

MAY AND JUNE 2010

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MAY AND JUNE 2010

Review was granted in the following cases during the months of May and June 2010:

Secretary of Labor, MSHA v. Ames Construction, Inc., WEST 2009-693-M. (Judge Miller, March 23, 2010.)

Secretary of Labor, MSHA v. Black Beauty Coal Company, LAKE 2008-477. (Judge Miller, March 25, 2010.)

Secretary of Labor, MSHA v. C & W Drilling Inc., SE 2009-794-M. (Judge Lesnick, unpublished settlement decision, April 5, 2010.)

Prairie State Generating Company, LLC. v. Secretary of Labor, MSHA, LAKE 2009-711-R. (Judge Miller, May 21, 2010.)

Secretary of Labor, MSHA v. Bill Simola, employed by United Taconite, LLC., LAKE 2010-128-M. (Judge Feldman, interlocutory review of April 6, 2010 order.)

Secretary of Labor, MSHA v. Black Beauty Coal Company, LAKE 2008-327. (Judge Miller, interlocutory review on May 18, 2010 order.)

Secretary of Labor, MSHA v. Performance Coal Company, WEVA 2007-460, et al. (Judge Miller, June 2, 2010 scheduling order.)

Review was denied in the following case during the months of May and June 2010:

Secretary of Labor, MSHA v. Orchard Coal Company, et al., PENN 2010-339-E, etc. Review of a non-jurisdictional issue.

Eastern Associated Coal LLC. filed a withdrawal of a Petition for Review in., WEVA 2008-1309, which was granted on May 12, 2010.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 5, 2010

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

v.

IMERY'S CLAY, INC.

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Docket No. SE 2009-717-M
A.C. No. 09-00111-181267

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) ("Mine Act"). On July 17, 2009, the Commission received from Imerys Clay, Inc. ("Imerys") a letter from the company's safety and health manager seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

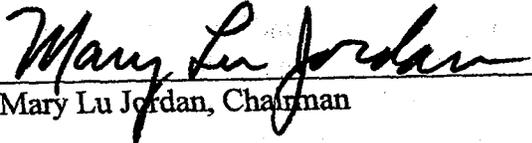
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

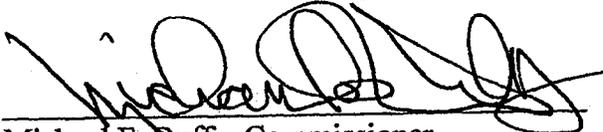
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

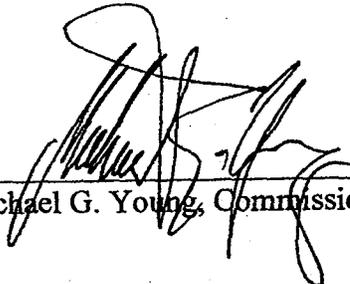
On April 7, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000181267 to Imerys. Imerys states that its accounts payable department sent a check to MSHA for the penalties that it did not wish to contest, but that the assessment form indicating the proposed assessments it did wish to contest was not included with the payment. Imerys' health and safety manager states that he did not know about this failure until the company received a delinquency notice from MSHA. In its letter, Imerys identifies the ten proposed assessments that it seeks to reopen.

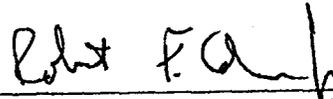
The Secretary does not oppose Imerys' request to reopen. She notes that MSHA timely received payment in the amount of \$1,918 from Imerys, but has no record of receiving the assessment contest form. She urges the operator to take all steps necessary to ensure that future penalty assessments are properly contested.

Having reviewed Imerys' request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 6, 2010

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

v.

SWINSON MATERIALS, INC.

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Docket No. LAKE 2010-355-M
A.C. No. 11-03120-200607

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) (“Mine Act”). On January 19, 2010, the Commission received from Swinson Materials, Inc. (“Swinson”) a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

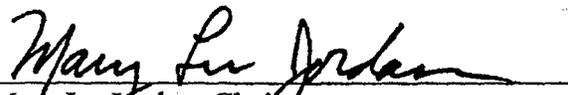
On October 15, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000200607 to Swinson, proposing civil penalties for four citations and one order. The operator's counsel states that Swinson did not receive a copy of the "final order" and was not aware of it until receipt of a fax on December 18, 2009.

The Secretary states that the proposed penalty assessment was received and signed for by the operator on October 21, 2009, and provides a Federal Express document to support this statement. She opposes the request to reopen on the ground that the operator does not explain why it failed to contest the proposed assessment that it received and makes no showing of any circumstances that warrant reopening.

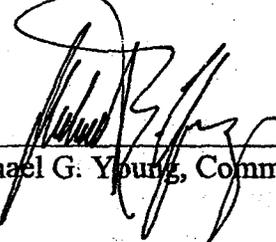
Having reviewed Swinson's request to reopen and the Secretary's response, we agree with the Secretary that Swinson has failed to provide a sufficient explanation for its failure to timely contest the proposed penalty assessment. Swinson's conclusory statement that it did not receive a copy of the final order and was not made aware of the final order until December 18, 2009, does not explain why it failed to contest the proposed assessment that it received on October 21, 2009, in a timely manner. Thus, the operator has failed to provide the Commission with an adequate basis to reopen. Accordingly, we deny without prejudice Swinson's request. *See, e.g., BRS Inc.*, 30 FMSHRC 626, 628 (July 2008); *Eastern Associated Coal, LLC*, 30 FMSHRC 392, 394 (May 2008).¹

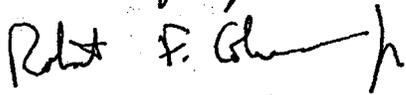
¹ If Swinson submits another request to reopen the case, it must establish good cause for not contesting the proposed assessment within 30 days from the date it received the proposed penalty assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Swinson should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Swinson from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. Swinson should submit copies of supporting documents with its request to reopen the case. Finally, Swinson should clarify which citations and proposed penalties it intends to contest.

Any amended or renewed request by Swinson to reopen Assessment No. 000200607 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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May 6, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. PENN 2008-51-R
	:	PENN 2008-52-R
v.	:	PENN 2008-53-R
	:	PENN 2008-54-R
CUMBERLAND COAL RESOURCES, LP	:	

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

DECISION

BY: Jordan, Chairman; Young and Cohen, Commissioners

In these contest proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"), Judge Michael Zielinski upheld a violation of 30 C.F.R. § 75.363(a)¹ alleged in an order issued to Cumberland Coal Resources, LP ("Cumberland"). 31 FMSHRC 137, 157-58 (Jan. 2009) (ALJ). Cumberland filed a petition for discretionary review challenging the Judge's finding of violation, which the Commission granted. The Secretary of Labor subsequently filed a response acknowledging that the violation of section 75.363(a) should not be affirmed and requesting that the Commission amend the order

¹ 30 C.F.R. § 75.363(a) provides in part:

Any hazardous condition found by the mine foreman . . . , assistant mine foreman . . . , or other certified persons designated by the operator for the purpose of conducting examinations . . . , shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. . . .

to allege a violation of 30 C.F.R. § 75.360(b).² For the reasons that follow, we deny the Secretary's request, reverse the Judge's finding that Cumberland violated section 75.363(a), and vacate the order.

I.

Factual and Procedural Background

Cumberland operates the Cumberland Mine, a large underground coal mine in Greene County, Pennsylvania. *Id.* at 137. On October 4, 2007, Barry Radolec, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted a regular inspection of the mine. *Id.* at 138. A few days prior to October 4, a belt move had occurred on the 8 Butt section of the mine. Tr. 242. Typically during a belt move, the area where the belt will be installed will be "fling dusted," that is, rock dust will be distributed by a fling duster placed on a scoop bucket. 31 FMSHRC at 155; Tr. 243. After the belt move, the area will be bulk dusted.³ 31 FMSHRC at 155; Tr. 241.

When Inspector Radolec arrived at the mine, he reviewed the preshift and onshift report books for the 8 Butt section of the mine. 31 FMSHRC at 138. He noticed several entries indicating that areas of the belt entry from crosscuts 25 to 30 and 11 to 15 needed to be rock dusted. *Id.*; Gov't Ex. 5. The inspector traveled to the 8 Butt section. 31 FMSHRC at 138. At the No. 17.5 crosscut, he observed that the belt had gone out of alignment and that a portion of the belt was rubbing the belt stand.⁴ *Id.* The belt was immediately taken out of service so that the alignment could be corrected. *Id.*

Between crosscuts 25 and 30.5, Inspector Radolec observed accumulations of dry black float coal dust, coal fines, and loose coal. *Id.* The loose coal and coal fines were underneath the belt and between the crosscuts. *Id.* There was a thin layer of float coal dust on the belt structures, electric cables, and switches. *Id.* The float coal dust was deposited on rock dust, which Radolec considered to be token in amount. *Id.* Radolec determined that the condition was highly likely to result in a fire that would cause fatalities because the belt presented a potential ignition source, and there were electrical cables, boxes, and switches present. *Id.* Accordingly, the inspector issued Citation No. 7025468, alleging a violation of 30 C.F.R. § 75.400, for failure

² 30 C.F.R. § 75.360(b) provides in part that "The person conducting the preshift examination shall examine for hazardous conditions"

³ To perform bulk dusting, miners use tanks which blow rock dust through the air. 31 FMSHRC at 141 n.4; Tr. 235.

⁴ Radolec issued Citation No. 7025467, alleging a violation of 30 C.F.R. § 75.1725(a), for failure to maintain machinery in a safe condition. *Id.* at 138 n.1. That citation is not at issue on review.

to clean up combustible materials. *Id.* at 139. The inspector indicated that the violation was significant and substantial (“S&S”)⁵ and caused by the operator’s unwarrantable failure to comply with the standard.⁶ *Id.* at 139. The inspector specified that the violation was to be abated later that day. Gov’t Ex. 4, at 1.

Inspector Radolec also issued Order No. 7025469, alleging an S&S and unwarrantable violation of section 75.363(a). 31 FMSHRC at 139. The order alleged that Cumberland had “failed to correct immediately a hazardous condition reported in the pre-shift examination book,” and identified that condition as that the 8 Butt conveyor belt needed to be rock dusted between crosscuts 25 and 30. Gov’t Ex. 6, at 1.

The operator challenged Citation No. 7025468, which alleged a violation of section 75.400, and Order No. 7025469, which alleged a violation of section 75.363(a), in addition to other orders not relevant on review. *See* Tr. 12-18. The matter proceeded to hearing before Judge Zielinski.

The Judge vacated the special findings and affirmed the violations of section 75.400 and 75.363(a) alleged in Citation No. 7025468 and Order No. 7025469, respectively.⁷ 31 FMSHRC at 140-58. With respect to Citation No. 7025468, the Judge concluded that Cumberland had violated section 75.400 based on his findings that loose coal and coal fines were present across nearly the entire width of the belt entry in several locations from the No. 25 to the 30.5 crosscuts, and that float coal dust existed on some horizontal surfaces. *Id.* at 142. The Judge also concluded that the area had not been fling dusted after the belt move, and that bulk rock dusting had not progressed to the area. *Id.* He determined that the violation was not S&S, however. *Id.* at 143. The Judge reasoned that although the accumulations presented a hazardous condition by contributing to, or exacerbating, the occurrence of a fire or explosion, the Secretary had failed to prove a reasonable likelihood that the hazard contributed to would result in an injury. *Id.* He also concluded that the violation was not unwarrantable based in part on his finding that preshift

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

⁶ 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.”

⁷ Because the Judge vacated the special findings, he modified Order No. 7025469 to a citation issued under section 104(a) of the Act. 31 FMSHRC at 157-58, 166. We refer to the enforcement action as an order rather than as a citation only as a matter of convenience to better distinguish Order No. 7025469 from Citation No. 7025468.

reports indicating that the area in question needed to be rock dusted did not demonstrate that the examiners considered the area to be hazardous. *Id.* at 156-57.

With respect to Order No. 7025469, the Judge determined that the notations in the preshift reports that areas of the belt entry needed to be rock dusted did not report a hazardous condition that required immediate correction. *Id.* at 157. Nonetheless, the Judge held that Cumberland violated section 75.363(a) because the accumulations underlying Citation No. 7025468 were hazardous, and Cumberland should have identified and reported the accumulations in the preshift reports. *Id.* at 157-58. The Judge also concluded that Cumberland's violation of section 75.363(a) was not S&S and was not caused by an unwarrantable failure to comply for the same reasons that he found that the accumulations violation was not S&S or unwarrantable. *Id.* at 158.

Cumberland filed a petition for discretionary review with the Commission, challenging the Judge's determination that it had violated section 75.363(a), and filed a motion requesting oral argument. The Commission granted Cumberland's petition and motion and heard oral argument.

In its petition, Cumberland argues that the Judge erred in finding a violation of section 75.363(a). It asserts that the basis for the Judge's finding of violation, that is, that Cumberland had failed to identify and report accumulations, was flawed since section 75.363(a) does not require the identification and reporting of hazardous conditions. C. Br. at 9-11. The operator also asserts that it was deprived of due process because the Judge determined that there was a violation on a basis other than what the Secretary alleged, and the parties did not address the issue of whether the accumulations were a condition that had to be reported as hazardous. *Id.* at 14-15, 19. Cumberland states that it would have offered other evidence concerning how certified officials interpret "hazard" if the issue had been presented during the hearing. *Id.* at 19-20. It maintains that, in any event, the accumulations were not hazardous. *Id.* at 20-23.

The Secretary concedes on appeal that the violation of section 75.363(a) should not be affirmed, but maintains that the order should now be amended to allege a violation of section 75.360(b). S. Br. at 2, 9. She states that under Fed. R. Civ. P. 15(b), absent prejudice to the non-moving party, pleadings may be conformed to the evidence if the nonpleaded issue was litigated by express or implied consent of the parties. *Id.* at 17-18. The Secretary contends that the factual issues underlying a section 75.360(b) violation were actually litigated in the S&S and unwarrantable failure determinations in connection with the accumulations violation. *Id.* at 11, 18. The Secretary dismisses Cumberland's argument that it would have offered different evidence and arguments if it had known that the adequacy of the preshift examinations was at issue, maintaining that a party asserting prejudice must do so with specificity. *Id.* at 18.

Cumberland replies that the Commission should deny the Secretary's request to amend the order to allege a violation of section 75.360(b). C. Reply Br. at 7. It submits that Rule 15(b) of the Federal Rules should not be applied to citations and orders because they differ from civil

pleadings in that they must describe conditions with particularity and they require abatement. *Id.* at 3-4. It also asserts that the parties have not litigated the issue of whether Cumberland violated section 75.360(b), and that granting the Secretary's request would result in significant prejudice to Cumberland. *Id.* at 7. Cumberland explains that if it had defended allegations that it violated section 75.360(b), it would have presented evidence regarding whether a reasonable mine examiner would have considered the accumulations to be hazardous such that they required reporting in a preshift book. *Id.* at 7-21. Accordingly, Cumberland requests that the Commission reverse the Judge's finding of violation with respect to Order No. 7024569. *Id.* at 21.

II.

Disposition

The central question on review is whether we should grant the Secretary's request to amend Order No. 7025469 to allege a violation of section 75.360(b). We conclude that, even if the evidence adduced at trial supports a violation of section 75.360(b) as the Secretary asserts, that was not the violation charged or defended against, and there is no basis to justify amendment at this stage in the proceedings.

The Secretary is seeking to amend the order after the Judge has issued his decision to allege that Cumberland had not recorded accumulations in the preshift examination book in violation of section 75.360(b). However, section 75.360(b) sets forth requirements that are different than those set forth in section 75.363(a). While section 75.363(a) requires that a hazardous condition be immediately corrected or posted, section 75.360(b) essentially requires a preshift examiner to find and record a hazardous condition in a preshift examination book. *See RAG Cumberland Res., LP*, 26 FMSHRC 639, 651, 653 (Aug. 2004); *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997). If Order No. 7025469 were amended to allege a violation of section 75.360(b), Cumberland would necessarily rely upon different evidence to defend the violation. In addition, the operator would be required to take different measures to abate such an order. Thus, the Secretary is seeking to amend the order to allege a violation of a different standard based on different underlying facts which would require different abatement action after Cumberland has defended a violation of section 75.363(a) at hearing.

The Secretary relies on Federal Rule of Civil Procedure 15(b)(2) to justify an amendment to the citation. Fed. R. Civ. P. 15(b)(2).⁸ The Commission's procedural rules provide that "[t]he

⁸ Rule 15(b)(2) provides:

When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move – at any time, even after judgment – to amend the pleadings to conform them to 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 The Commission has previously recognized that although the Commission’s procedural rules do not address amendment of pleadings, the Commission may properly look for guidance to Fed. R. Civ. P. 15 when the Secretary requests leave to amend a citation or order. *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). Accordingly, in our jurisprudence we have considered Rule 15(b) in several contexts. *Compare Consolidation Coal Co.*, 20 FMSHRC 227, 235-37 (Mar. 1998) (concluding that the Secretary could not amend a citation post-hearing to include a new theory of violation regarding the cited standard because the trial record did not reflect that the operator understood, or should have understood, that the new theory was being litigated) *with Faith Coal Co.*, 19 FMSHRC 1357, 1362 (Aug. 1997) (permitting a citation to be amended after hearing to correct a numbering error by the Secretary because the operator fully understood the gravamen of the correct standard, knowingly litigated the citation on that basis, and suffered no prejudice). In this case, we conclude that to the extent that Rule 15(b) permits post-hearing amendment in some cases, it does not apply to the circumstances here.⁹

Under Rule 15(b), amendments are permitted so that pleadings mirror the actual issues that were tried. 3 James Wm. Moore et al., *Moore’s Federal Practice* ¶ 15.18[1], at 15-73 (3d ed. 2002) (“*Moore’s*”). In permitting a complaint to be amended post-hearing to include an issue that had not been raised, courts require a showing that the issue was tried with the express or implied consent of the parties. *Id.* Implied consent may be found if the opposing party recognized that a new matter was at issue during the trial and that evidence was introduced to prove that issue. *Id.* at 15-75. Courts may not find implied consent “when evidence supporting an issue allegedly tried by implied consent is also relevant to other issues actually pleaded and

evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

⁹ We respectfully disagree with the suggestion of our colleague, Commissioner Duffy, that after abatement and termination, a citation or order may only be modified “in cases involving purely technical errors” such as *Faith Coal Co.*, which involved a numbering error. Slip op. at 11. Our precedent has clearly established that the fact of an operator’s abatement of a violation does not prevent it from being modified pursuant to Fed. R. Civ. P. 15 for more than purely technical purposes, in appropriate circumstances. *See Cyprus Empire*, 12 FMSHRC at 916 (affirming judge’s action permitting the Secretary to modify a citation and holding that “[a]mong the permissible purposes of such amendments are changes in the nature of the plaintiff’s claims or legal theories”); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1288-90 (Aug. 1992) (reversing judge’s conclusion that a citation may not be modified to allege a violation under a different standard after abatement and termination of original citation, holding that modification is permissible under Fed. R. Civ. P. 15(a), absent legal prejudice to the operator, because “a citation or order, even though terminated, remains in effect for purposes of subsequent contest and civil penalty proceedings”), *on remand* 15 FMSHRC 1107 (June 1993) (ALJ) (granting modification since operator failed to show legally recognizable prejudice).

tried.” *Id.*; *Acequia, Inc. v. Clinton*, 34 F.3d 800, 814 (9th Cir. 1994). In determining implied consent, courts also consider whether the opposing party had a fair opportunity to defend against the issue and would be prejudiced in presenting its case. *Moore’s* ¶ 15.18[1] at 15-76.

The record cannot reasonably be read to support the conclusion that Cumberland implicitly consented to litigating a violation of section 75.360(b).¹⁰ Similar to the operator in *Consolidation Coal*, the trial record does not reflect that Cumberland understood that the Secretary was litigating a violation of section 75.360(b).¹¹

Rather, it is clear from the record that Cumberland defended Order No. 7025469 on the basis that it did not violate section 75.363(a). Specifically, Cumberland presented evidence that the failure to rock-dust was recorded in the preshift examination book as a condition, rather than as a hazard,¹² and that Cumberland employees were addressing the condition described in the preshift examination book in a systematic, regular fashion in accordance with the priority they accorded such a non-hazardous condition. Tr. 21-22, 228-30, 233-34, 241, 248, 251-52, 254-55, 434; C. Ex. 3; Gov’t Ex. 5 at 49, 58, 78.

Cumberland’s counsel did not elicit testimony regarding whether the preshift examinations had been adequate. Indeed, Cumberland’s counsel clarified that the operator was not defending a preshift examination violation by asking Inspector Radolec, “Did you cite Cumberland for putting inadequate entries in the book?” Tr. 164. Inspector Radolec testified, “No, I didn’t.” Tr. 164.

The Secretary seeks to support her unpleaded claim that Cumberland violated section 75.360(b) by relying on evidence that was proffered to prove a pleaded issue, that is, the S&S and unwarrantable violation of section 75.400 alleged in Citation No. 7025468. The Secretary specifies that the violation of section 75.360(b) rests on three factual findings that the Judge made with respect to the special findings associated with the accumulations violation. S. Br. at 11 (stating that the Judge made “three key factual findings . . . during the course of his S&S and unwarrantable failure analyses in connection with the accumulations violation” that are supported

¹⁰ It is undisputed that Cumberland did not expressly consent to litigating a violation of section 75.360(b).

¹¹ In her post-hearing brief, the Secretary argued that the operator had violated section 75.363(a) and made no mention of section 75.360(b). S. Post-Hr’g Br. at 21-23. In fact, the Secretary noted that the notations, “needs dust[ing],” set forth in the preshift examination books “arguably implicates the adequate preshift provisions of 30 C.F.R. § 75.360(a),” not section 75.360(b). *Id.* at 22 n.3.

¹² The preshift books used by Cumberland contain two separate sections. One is entitled “Violations Observed and Reported/Violation or Condition,” and one is for “Dangers and Hazardous Conditions Observed and Reported.” Tr. 100; Gov’t Ex. 5.

by substantial evidence and establish a violation of section 75.360(b)); *see also* S. Br. at 3. As noted above, when evidence is relevant to a pleaded issue, it may not be used to support implied consent to litigate an unpleaded issue. *See Pinkley, Inc. v. City of Frederick*, 191 F.3d 394, 401 (4th Cir. 1999), *cert. denied*, 528 U.S. 1155 (2000) (“A court will not imply consent to try a claim merely because evidence relevant to a properly pleaded issue incidentally tends to establish an unpleaded claim.”) (citations omitted).

Basically, Cumberland has had no fair opportunity to defend against an allegation that it violated section 75.360(b). The Secretary had ample opportunity to move to amend the order prior to the hearing, during the hearing, or in her post-hearing brief. However, the Secretary did not move to amend the order until the Secretary filed her response brief on review. S. Br. at 2. The first time that the Secretary specifically referred to evidence to support her claim that Cumberland impliedly consented to litigating a violation of section 75.360(b) was during oral argument before the Commission, after all briefs with the Commission had been filed. Oral Arg. Tr. at 27-37, 42-50. Amending the order at this stage of the proceedings would be contrary to concepts of fundamental fairness that require that every litigant receive adequate notice of charges made against it.

Moreover, Cumberland has adequately demonstrated that it would be prejudiced if the order were amended to allege a violation of section 75.360(b). Cumberland argues that if the Secretary had alleged a violation of section 75.360(b), it would have presented different evidence in its defense. C. Reply Br. at 19. It contends that it would have presented evidence regarding whether a reasonable mine examiner would have considered the accumulations to be hazardous such that they required reporting in the preshift book. *Id.* No preshift examiners gave testimony at the hearing. In fact, Inspector Radolec acknowledged that he had not questioned a single preshift examiner about what was intended by the notation “needs dusted.” Tr. 164.

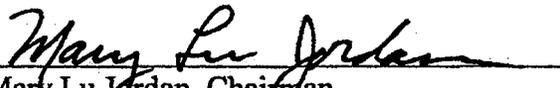
As noted, the Secretary agreed with Cumberland that the Judge had, in fact, erred in finding a violation of section 75.363(a). *See* S. Br. at 9 (“The Secretary acknowledges that the ALJ’s finding of a violation under section 75.363(a) should not be affirmed.”). We suggest that after making this determination, the Secretary should not have opposed Cumberland’s petition challenging the violation.¹³ Accordingly, given the Secretary’s concession and our conclusion that the order should not be amended to allege a violation of section 75.360(b), we reverse the Judge’s determination that Cumberland violated section 75.363(a) and vacate Order No. 7025469.

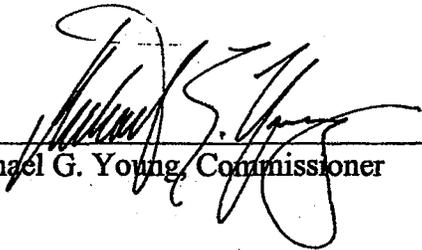
¹³ We are reminded that, “A government lawyer ‘is the representative not of an ordinary party to a controversy, . . . but of a sovereignty whose obligation . . . is not that it shall win a case, but that justice shall be done.’” *Freeport-McMoran Oil & Gas Co. v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992) (citing *Berger v. United States*, 295 U.S. 78 (1935)).

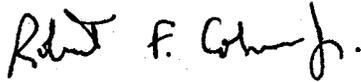
III.

Conclusion

For the foregoing reasons, we deny the Secretary's request to amend Order No. 7025469 to allege a violation of section 75.360(b), reverse the Judge's determination that Cumberland violated section 75.363(a), and vacate Order No. 7025469.


Mary Lu Jordan, Chairman


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

Commissioner Duffy, concurring:

I, too, would deny the Secretary's request to amend Order No. 7025469, reverse the Judge's finding of a violation of section 75.363(a), and vacate the order, but I would do so on more fundamental grounds. The explicit language of section 104(a) of the Mine Act precludes amendment of the order in these circumstances, so recourse to Federal Rule of Civil Procedure 15(b) would be foreclosed in this instance.

As Cumberland asserts, citations and orders issued pursuant to section 104 of the Mine Act differ in form and function from pleadings filed in civil cases. Section 104(a) requires that a citation "describe with particularity the nature of the violation, including a reference to the . . . standard . . . alleged to have been violated." 30 U.S.C. § 814(a). The purpose of the particularity requirement in section 104(a) is not only to permit the cited operator to "adequately prepare for a hearing on the matter," but also to allow it "to discern what conditions require abatement." *Empire Iron Mining Partnership*, 29 FMSHRC 999, 1003 (Dec. 2007) (citations omitted).

In contrast, in accordance with the notice pleading standards applicable to civil cases, complaints need only allege a claim for relief in "a short and plain statement." *See* Fed. R. Civ. P. 8(a). Thus, while a citation or order requires an operator to abate the alleged violative condition prior to resolution of the enforcement action, a federal civil complaint does not.

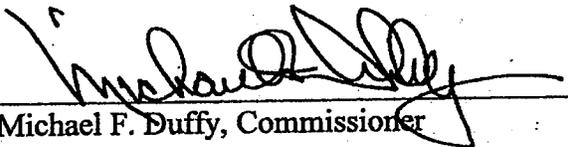
Termination of a citation or order signals that the operator has abated the violative condition, and that the operator is not subject to a section 104(b) withdrawal order for failure to abate that citation. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1288 (Aug. 1992). Consequently, notwithstanding that the Commission has held that the Secretary may modify a terminated citation or order in some circumstances, the Secretary may not modify a terminated citation or order to direct further abatement. *Id.* at 1289.

Order No. 7025469 alleges a violation of section 75.363(a), and provides in part that the "operator failed to correct immediately a hazardous condition reported in the preshift examination book," and that the hazardous condition reported was that the area from crosscut Nos. 25 to 30 needed to be rock dusted. Gov't Ex. 6. In order to abate the order, Cumberland's mine foreman received instruction about immediately correcting or posting off the allegedly hazardous condition. *Id.* The order was then terminated on October 4, 2007. *Id.* Cumberland defended against the order by presenting evidence to show that the condition reported in the preshift book (the need for rock-dusting) was not hazardous and did not require immediate corrective action or posting under section 75.363(a). C. Reply Br. at 20.¹

¹ As my colleagues correctly conclude, the record cannot support the Secretary's assertion that Cumberland impliedly consented to litigating a violation of section 75.360(b). *See Consolidation Coal Co.*, 20 FMSHRC 227, 235-37 (Mar. 1998) (concluding that the Secretary could not amend a citation post-hearing to include a new theory of violation regarding the cited

Given the Commission's decision in *Empire Iron, supra*, I am not convinced that the Secretary or the Commission has much latitude to amend a citation or order once abatement has been completed and the citation or order has been terminated, much less in the instant case, where the alleged violation has also already been defended at hearing. The only exception would be in cases involving purely technical errors. *See, e.g., Faith Coal Co.*, 19 FMSHRC 1357, 1362 (Aug. 1997) (permitting a citation to be amended post-hearing to correct a numbering error by the Secretary because the operator fully understood the gravamen of the correct standard, knowingly litigated the citation on that basis, and suffered no prejudice). It may well be that the requirement of specificity in section 104(a), including citing "with particularity" the standard alleged to have been violated, may trump any further leeway to be afforded the Secretary under the aegis of Rule 15(b).²

Consequently, in this case the Mine Act provision certainly forecloses the relief the Secretary seeks under Rule 15(b), and I join with my colleagues in expressing some consternation with her decision to oppose the petition for review and attempt to have the order amended so late in the proceeding.



Michael F. Duffy, Commissioner

standard because the trial record did not reflect that the operator understood, or should have understood, that the new theory was being litigated).

² While my colleagues cite cases in which the Commission has permitted more than a technical amendment to a citation or order (*see slip op. at 6 n.9*), in doing so the Commission was not directly confronted with an operator's claim that amendment meant it had been required to unnecessarily abate an alleged violation. That claim has been made here (*see C. Reply Br. at 20*), and, given the importance of abatement under the Mine Act, goes to the heart of the concept of "prejudice" that courts examine when deciding to permit amendment under Rule 15(b).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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May 11, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2010-339-E
v.	:	Docket No. PENN 2010-340-E
	:	Docket No. PENN 2010-342-E
ORCHARD COAL COMPANY,	:	Docket No. PENN 2010-343-E
S & M COAL COMPANY,	:	
ALFRED BROWN COAL COMPANY,	:	
and B & B COAL COMPANY	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER DENYING PETITION FOR DISCRETIONARY REVIEW

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). The petition for discretionary review filed in this matter by Orchard Coal Company, S&M Coal Company, Alfred Brown Coal Company, and B&B Coal Company (hereinafter “Anthracite Operators”),¹ states that the Mine Safety and Health Administration is enforcing Mine Act requirements in a way that has denied the Anthracite Operators the opportunity to seek modification of the requirements under section 101(c) of the Act, 30 U.S.C. § 811(c). The Anthracite Operators thus include within their petition for review a petition for relief under section 101(c).

¹ The petition also was filed on behalf of RS&W Coal Company, Inc., and purports to seek review in Docket No. PENN 2010-103-E of *RS&W Coal Co.*, 31 FMSHRC 1440 (Dec. 2009) (ALJ). Under section 113(d)(2) of the Mine Act, review of that decision could only be ordered by the Commission, pursuant to petition by RS&W or sua sponte, within 30 days of the decision’s issuance. See 30 U.S.C. § 823(d)(2). Because RS&W did not seek review, and the Commission did not order review sua sponte, the decision became a final decision of the Commission 40 days later. See 30 U.S.C. § 823(d)(1). Accordingly, this order only addresses the timely petition for review filed by the Anthracite Operators in the remaining cases.

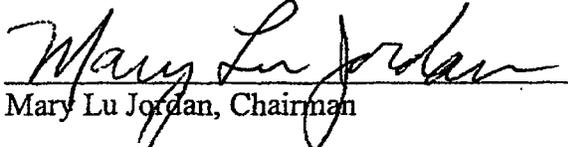
The Commission is without jurisdiction to entertain a petition for relief under section 101(c). The statute clearly states that such petitions are to be directed to the Secretary of Labor, and the modification process is the sole province of the Secretary or her designee.² Consequently, the relief the Anthracite Operators seek under section 101(c) can only be granted by the Secretary.

² Section 101(c) provides:

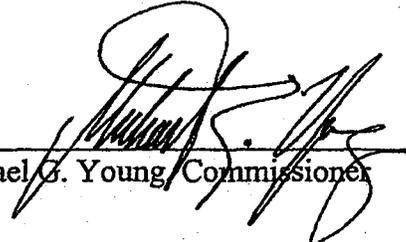
Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. Upon receipt of such petition the Secretary shall publish notice thereof and give notice to the operator or the representative of miners in the affected mine, as appropriate, and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of such operator or representative or other interested party, to enable the operator or the representative of miners in such mine, or other interested party to present information relating to the modification of such standard. Before granting any exception to a mandatory safety standard, the findings of the Secretary or his authorized representative shall be made public and shall be available to the representative of the miners at the affected mine. The Secretary shall issue a decision incorporating his findings of fact therein, and send a copy thereof to the operator or the representative of the miners, as appropriate. Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code.

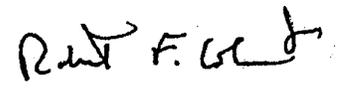
30 U.S.C. § 811(c).

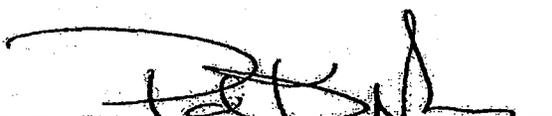
No two Commissioners having voted to grant the petition for review on the issues over which the Commission does have jurisdiction, it is denied.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 3, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. SE 2010-426-M
ADMINISTRATION (MSHA)	:	A.C. No. 40-00840-201713
	:	
v.	:	Docket No. SE 2010-427-M
	:	A.C. No. 40-00840-202198
CEMEX, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On February 18, 2010, the Commission received from Cemex, Inc. ("Cemex") motions made by counsel seeking to reopen two penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect.

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2010-426-M and SE 2010-427-M, both captioned *Cemex, Inc.*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

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).

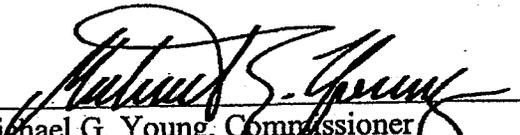
The record indicates that the two assessments were issued by MSHA within a week of each other, and received at the Cemex plant in Knoxville, Tennessee, after that plant’s health and safety manager had left Cemex and before a successor had been hired. Consequently, the health and safety manager of another Cemex plant, after reviewing both assessments, tried to instruct Cemex staff in Knoxville that certain of the penalties on one of the assessments should be paid, while other penalties on both assessments should be contested. Cemex staff paid the penalties as instructed, but neglected to contest the remaining penalties on the two assessments. This error was discovered by the new Knoxville health and safety manager once delinquency notices from MSHA were received regarding the assessments, and the motions to reopen were filed soon thereafter.

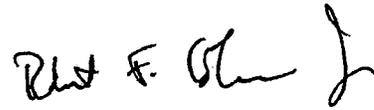
The Secretary states that she does not oppose the reopening of the proposed penalty assessments so that Cemex can contest the unpaid penalties.

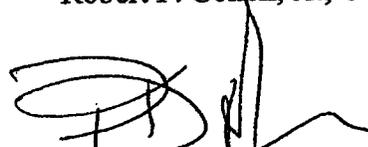
Having reviewed Cemex's requests and the Secretary's responses, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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June 3, 2010

SECRETARY OF LABOR,	:	Docket No. WEVA 2010-648
MINE SAFETY AND HEALTH	:	A.C. No. 46-08636-206152
ADMINISTRATION (MSHA)	:	
	:	Docket No. WEVA 2010-649
	:	A.C. No. 46-08778-206154
v.	:	
	:	Docket No. WEVA 2010-650
ROCKHOUSE CREEK	:	A.C. No. 46-09018-206158
DEVELOPMENT, LLC	:	
	:	Docket No. WEVA 2010-651
	:	A.C. No. 46-09279-206161

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On February 22, 2010, the Commission received from Rockhouse Creek Development, LLC (“Rockhouse”) four motions made by counsel to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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).

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2010-648, WEVA 2010-649, WEVA 2010-650, and WEVA 2010-651, all captioned *Rockhouse Creek Development, LLC*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

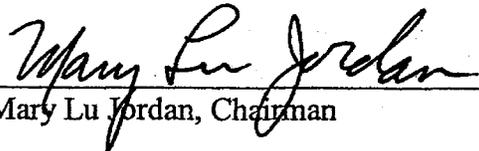
We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, 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 mistake, inadvertence, or excusable neglect. *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).

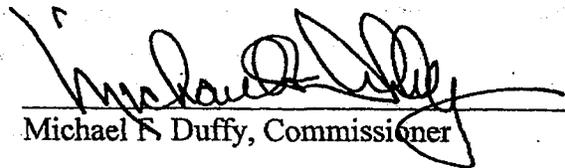
According to the record, this matter is before the Commission only because the four contest forms were mailed by Rockhouse on January 22, 2010, to the Department of Labor’s Mine Safety and Health Administration (“MSHA”), when the 30th day was January 21, 2010. Rockhouse’s counsel states that he only received the assessments from his client on January 20, 2010, and was out of the office until two days later.²

The Secretary of Labor does not oppose reopening.

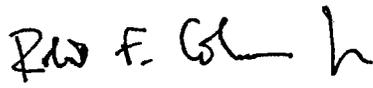
² In a footnote in its motion, Rockhouse states that because MSHA mailed the assessment, Commission Procedural Rule 8(b), 29 C.F.R. § 2700.8(b), should apply and the operator should have been accorded an additional five days in which to file the notices of contest. Rockhouse is mistaken regarding the applicability of Rule 8(b) to penalty assessments. *See The Banner Co.*, 31 FMSHRC 1046, 1047 n.1 (Sept. 2009).

Having reviewed Rockhouse's requests and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 4, 2010

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

v.

PERFORMANCE COAL COMPANY

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Docket No. WEVA 2010-195
A.C. No. 46-08436-188167

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On November 6, 2009, the Commission received from Performance Coal Company ("Performance") a motion to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

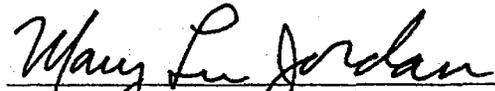
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

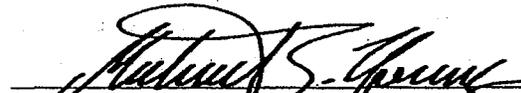
On June 16, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000188167 to Performance, proposing penalties for 62 violations totaling \$95,627. According to its motion, after Performance received the assessment, its safety director stamped the date on which he personally received the proposed assessment on the form and forwarded it to Performance's corporate counsel, who mailed the form to MSHA's Civil Penalty Compliance Office within 30 days of the stamp date. Performance was notified of the delinquency when it received a notice from MSHA on or about September 17, 2009, which caused Performance to file its motion to reopen.

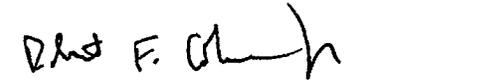
The Secretary of Labor, who does not oppose Performance's request, states that MSHA has no record of receiving the notice of contest. She notes that the 30-day period for filing a contest begins to run from the date of the operator's actual receipt of the proposed assessment, not the date on which the operator stamps the form. She also notes that the operator paid the penalties for this case in full by check dated November 6, 2009. The operator did not respond to the Secretary's statement that the penalties in this case have been paid.

Having reviewed Performance's motion and the Secretary's response, we find the request to reopen to be moot. The operator has paid the penalties in full. Accordingly, this case is dismissed. *See Riverton Investment Corp.*, 31 FMSHRC 1067 (Oct. 2009).


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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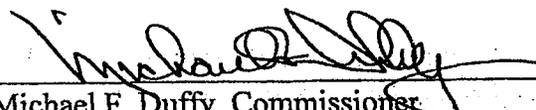
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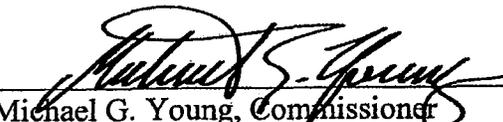
Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

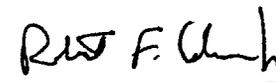
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

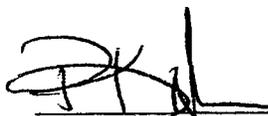
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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June 10, 2010

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

v.

LEHIGH CEMENT COMPANY

Docket No. PENN 2010-256-M
A.C. No. 36-00185-203701

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On January 15, 2010, the Commission received from Lehigh Cement Company ("Lehigh") a motion seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

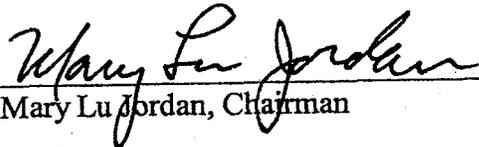
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

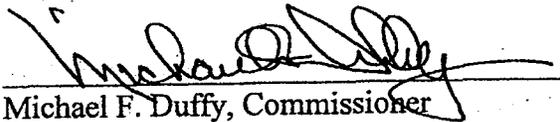
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. 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).

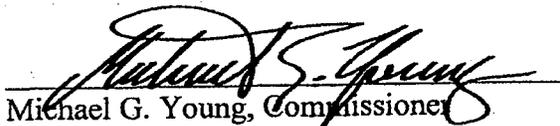
Counsel for the operator states that Lehigh intended to contest the penalties for Citation Nos. 6538295, 6538296, 6538299, 6538300 set forth on Proposed Assessment No. 000203701, but that counsel was unaware that Lehigh had included the proposed assessment among other materials forwarded to counsel because the assessment was mis-filed by a temporary clerical assistant. Counsel inadvertently failed to timely contest the penalties on the operator's behalf, and the proposed assessment became a final Commission order. When the operator's counsel realized the mistake by reviewing information on the website of the Department of Labor's Mine Safety and Health Administration ("MSHA"), Lehigh promptly sought re-opening.

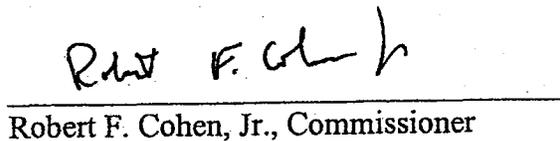
Although the Secretary does not oppose the reopening of the proposed penalty, she strongly urges counsel to take steps to ensure that all penalty contests are timely and properly filed.

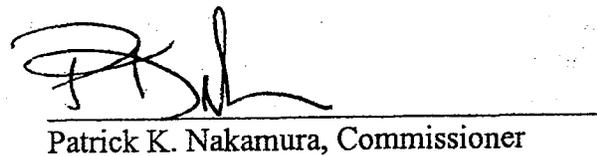
Having reviewed Lehigh's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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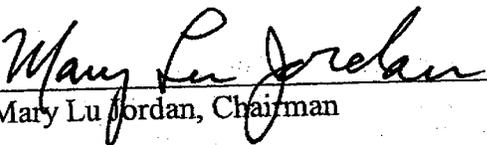
**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
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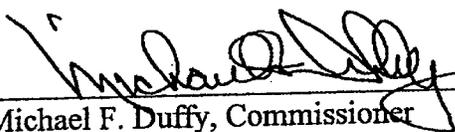
The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000196479 to Rocky Point on September 9, 2009, for various citations. Rocky Point states that although MSHA's records reflect that it received the proposed assessment on September 14, 2009, the operator did not, in fact, receive Proposed Assessment No. 000196479 until October 13, when it was included in an envelope with Assessment No. 000199808. Rocky Point states that it returned both assessment forms to MSHA on October 19, 2009. The operator states that it subsequently received a delinquency notice from MSHA as to Proposed Assessment No. 000196479, informing it that the proposed assessment had become a final Commission order.

The Secretary does not oppose reopening the proposed penalty assessment. However, she acknowledges that MSHA's records reflect that the operator received Proposed Assessment No. 000196479 on September 14, 2009.¹

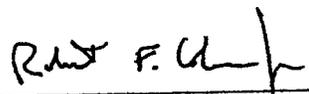
¹ It is not entirely clear from the record which proposed penalties Rocky Point wishes to contest. The citations listed on the cover of the operator's request to reopen do not correspond with all of the citations checked for contest on the proposed assessment form. In addition, the operator contends that it wishes to challenge penalties in the amount of \$3,088, but the penalties checked for contest total a sum of \$4,003.

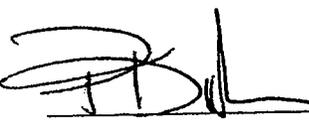
Having reviewed Rocky Point's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Rocky Point's failure to timely contest the penalties and whether relief from the final order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


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, 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 10, 2010

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. WEST 2010-465-M
 : A.C. No. 45-03281-196170
 :
MILES SAND & GRAVEL COMPANY :

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

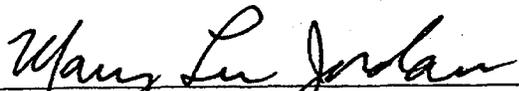
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 29, 2009, the Commission received from Miles Sand & Gravel Company ("Miles") a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On January 20, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

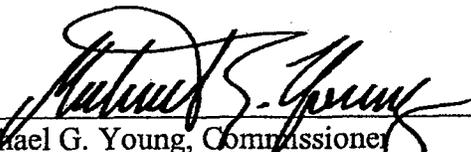
Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 10, 2010

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

v.

HANSON AGGREGATES ARIZONA, INC.

:
:
:
:
Docket No. WEST 2010-573-M
A.C. No. 02-01222-202231

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

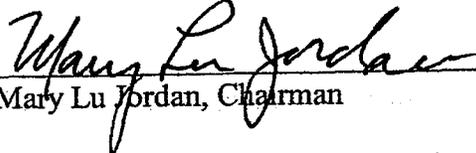
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 22, 2010, the Commission received from Hanson Aggregates Arizona, Inc. ("Hanson") a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On February 18, 2010, the Commission received a response from the Secretary of Labor stating that she does not oppose the request to reopen the assessment.

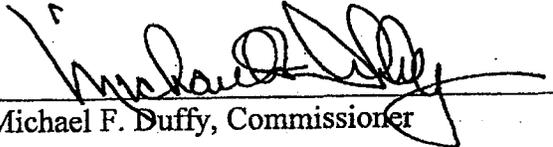
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

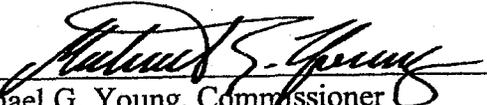
We have held, however, that in appropriate circumstances we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. 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

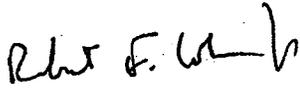
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Having reviewed the facts and circumstances of this case, the operator's request, and the Secretary's response, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

Distribution

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**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
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On November 12, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000168603 to Pritchard Mining. MSHA asserts that the proposed assessment was delivered by U.S. Postal Service on November 24, 2008. On February 9, 2009, MSHA sent a delinquency notice to Pritchard Mining. In its motion, Pritchard Mining states that it timely contested the underlying citations that are the subject of the proposed assessment it now seeks to reopen. Pritchard Mining explains that due to an unspecified "inadvertent error," it did not receive the proposed assessment.

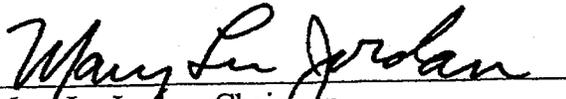
The Secretary opposes the request to reopen and states that the operator has failed to explain why it did not contest the proposed assessment in a timely manner. She also maintains that the operator failed to explain the long delay in filing its request to reopen after it had been notified of the delinquency.

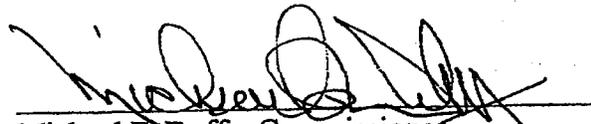
Having reviewed Pritchard Mining's request to reopen and the Secretary's response, we agree with the Secretary that Pritchard Mining has failed to provide an explanation for its failure to timely contest the proposed penalty assessment. Pritchard Mining has submitted no justifications for its failure to contest the proposed penalty within 30 days of receiving it and therefore has not provided the Commission with an adequate basis to reopen. Accordingly, we deny without prejudice Pritchard Mining's request. *See, e.g., BRS Inc.*, 30 FMSHRC 626, 628 (July 2008); *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394 (May 2008).¹ Any amended or

¹ The words "without prejudice" mean Pritchard Mining may submit another request to reopen the case so that it can contest the citation and penalty assessment. If Pritchard Mining submits another request to reopen the case, it must establish good cause for not contesting the proposed assessment within 30 days from the date it received the assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. Pritchard Mining should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Pritchard Mining from responding within the time limits provided in the Mine Act, as part of its request to reopen. Pritchard Mining should also include copies of all documents supporting its request to reopen.

In any such request Pritchard Mining must also address why it did not file its request to reopen until more than five months after the MSHA notice should have alerted it to its delinquency. In the context of penalty assessments, in considering whether an operator has unreasonably delayed in filing a motion to reopen, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice or other notification from MSHA and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). Since the time Pritchard Mining filed its request, the Commission has held that any request to reopen filed more than 30 days after the receipt of such a notice is grounds for

renewed request by Pritchard Mining to reopen Assessment No. 000168603 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

denial of that request. *Highland Mining Co.*, 31 FMSHRC 1313, 1316-17 (Nov. 2009).

In the contest proceedings related to the proposed assessment Pritchard Mining seeks to reopen, Docket Nos. WEVA 2009-49-R thru WEVA 2009-65-R, on January 25, 2010, the Chief Administrative Law Judge issued an Order to Submit Information, ordering the contestant to submit in writing the status of the citations within 20 days of the Judge's order or the cases would be dismissed. To date, Pritchard Mining has submitted no response. In addition to addressing its failure to timely contest the proposed assessment and timely act in response to the delinquency notice, Pritchard Mining must also explain why it failed to respond to the Judge's order in the related contest proceedings.

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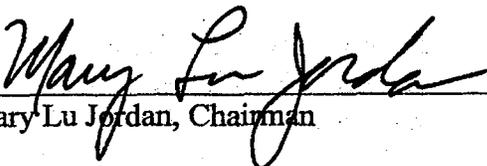
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**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
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On September 2, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 6154862 to Knife River, which subsequently filed a notice of contest challenging the citation (Docket No. CENT 2009-800-RM). MSHA issued the proposed assessment covering that citation on November 10, 2009. Knife River claims that it mistakenly paid the penalty. It further asserts that its counsel discovered that the penalty had been erroneously paid on the day the assessment became a final order. Within a week of discovery, Knife River filed a motion to reopen.

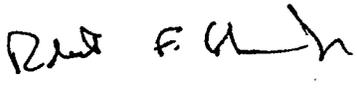
Although the Secretary does not oppose the motion to reopen, she urges the operator to take all steps necessary to ensure that future penalty assessments are contested in a timely manner.

Having reviewed Knife River's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 23, 2010

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

v.

JOHN S. OLYNICK, INC.

Docket No. LAKE 2010-242-M
A.C. No. 47-00865-196519

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On December 24, 2009, the Commission received from John S. Olynick, Inc. (“Olynick”) a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

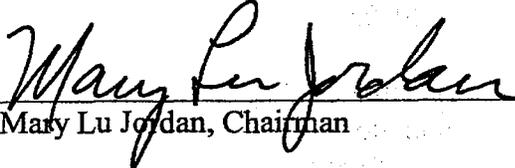
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

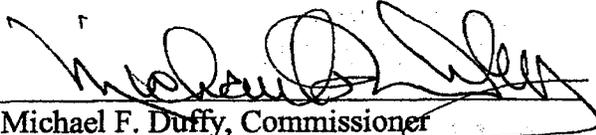
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

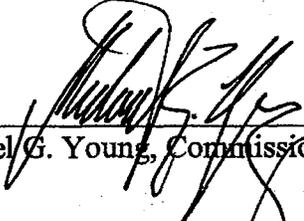
On September 9, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000196519 to Olynick. Olynick paid the penalty in a timely fashion. MSHA subsequently informed Olynick that it had initiated a special investigation against the owner of the company under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), based on allegations contained in the penalty assessment. Olynick seeks to reopen the penalty assessment and to consolidate it with any section 110(c) proceeding. It asserts that it was not aware that payment of the penalty could be construed as an admission of a violation and used as evidence against its agent in subsequent proceedings.

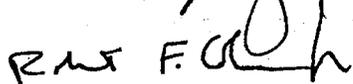
The Secretary opposes reopening and submits that under the doctrine of collateral estoppel, an operator's failure to contest a proposed penalty does not estop agents of the operator from litigating any aspect of the underlying violation. The Secretary states that she "traditionally has not argued that an operator's payment of or failure to contest a proposed assessment estops agents of the operator from litigating any aspect of the underlying violation in a subsequent section 110(c) proceeding, and the Secretary will not so argue if a subsequent section 110(c) proceeding is initiated here."

Based on the Secretary's representation that, if a section 110(c) proceeding is initiated, she will not argue that Olynick's payment of or failure to contest a proposed assessment estops the owner of the operator from litigating any aspect of the underlying violation, the grounds for the operator's contentions are unfounded. Accordingly, we hereby deny Olynick's request to reopen.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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On August 6, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000193672 to City Stone, proposing penalties for various citations. City Stone states that it "did not realize that the necessary paperwork to contest the citations had not been filed with MSHA" until it received a delinquency notice from MSHA dated October 28, 2009.¹

The Secretary opposes reopening on the ground that City Stone has failed to make a showing of the exceptional circumstances that warrant reopening. The Secretary argues that specific instructions on how to contest the proposed assessment appeared on the proposed assessment form, and that there is no explanation as to why the operator did not contest the proposed assessment within 30 days after receipt.

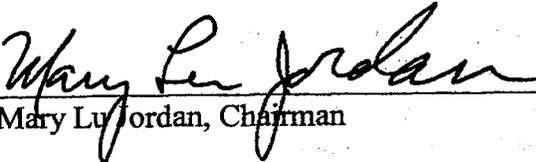
Having reviewed City Stone's request to reopen and the Secretary's response, we conclude that the operator has not provided a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. The statement that the operator did not realize that the necessary paperwork had not been filed does not provide the Commission with an adequate basis to reopen without further elaboration. Furthermore, City Stone has failed to explain why it delayed approximately two months in responding to the delinquency notice sent by MSHA.² Accordingly, we hereby deny without prejudice City Stone's request. *See Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009); *Eastern Assoc. Coal, LLC*, 30 FMSHRC 392, 394

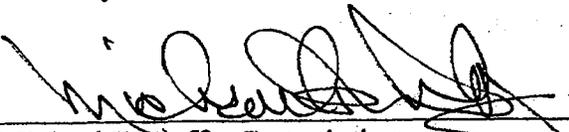
¹ The request to reopen was filed by James Young, of Catamount Consulting, who identifies himself as a representative for City Stone. Commission Procedural Rule 3 provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which includes parties, representatives of miners, an "owner, partner, officer or employee" of certain parties, or "[a]ny other person with the permission of the presiding judge or the Commission." 29 C.F.R. § 2700.3(b). It is unclear whether Mr. Young satisfied the requirements of Rule 3 when he filed the request on behalf of City Stone. We have determined that, despite this, we will consider the merits of the request in this instance. However, in any future proceeding before the Commission, including further proceedings in this case, Mr. Young may represent City Stone only if he demonstrates to the Commission or the presiding judge that he fits within one of the categories set forth in Rule 3(b)(1)-(3) or seeks permission to practice before the Commission or the judge pursuant to Rule 3(b)(4). Otherwise, City Stone must be represented by an attorney or by an owner, partner, officer, or employee.

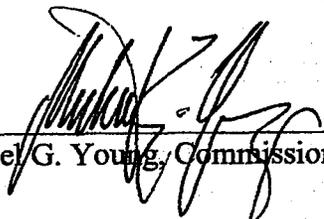
² In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 10-11 (Jan. 2009).

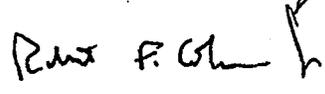
(May 2008). The words "without prejudice" mean City Stone may submit another request to reopen the case so that it can contest the citations and penalty assessment.³

Any amended or renewed request by City Stone to reopen Assessment No. 000193672 must be filed within 30 days of the date of this order. Any such request filed after that time will be denied with prejudice.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

³ If City Stone submits another request to reopen the case, it must establish good cause for not contesting the citations and proposed assessment within 30 days from the date it received the proposed penalty assessment from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. City Stone should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented City Stone from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. City Stone should also include copies of all documents supporting its request to reopen the case.

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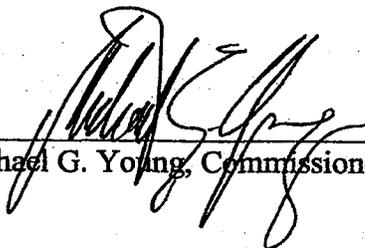
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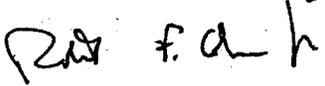
Phillips states that it requested a conference regarding one of the five citations covered by the proposed assessment; that it never received the proposed assessment; and that, upon being informed that it was delinquent, it paid the assessment in full. Phillips requests reopening as to the penalty for Citation No. 6500213. The Secretary does not oppose reopening, but notes that the Federal Express delivery of the assessment was signed for by "W. Heathcock" and reminds the operator that, even though a conference was requested, the operator was also required to contest the penalty once the assessment issued.

Having reviewed Phillips' request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, 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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June 23, 2010

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

:
:
:
:
:
:
:
:

v.

Docket No. SE 2010-258-M
A.C. No. 09-00038-199644

AGGREGATES USA LLC

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On December 9, 2009, the Commission received from Aggregates USA LLC ("Aggregates") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

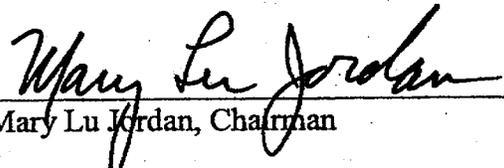
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

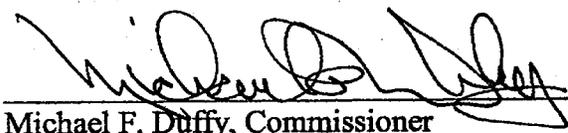
On August 31, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 6595211 to Aggregates, which timely contested it on September 2, 2009. Docket No. SE 2009-864-RM. On October 7, 2009, MSHA issued Proposed Assessment No. 000199644 to Aggregates, proposing civil penalties for several citations, including Citation 6595211. Aggregates maintains that it filled out the proposed assessment form indicating that it intended to challenge this citation and its associated penalty in the sum of \$100. Aggregates states that it sent its payment in the amount of \$1,409 for the remaining citations to MSHA's Payment Processing Center in St. Louis, Missouri, however its accounting office apparently failed to send the contest form to MSHA's Civil Penalty Compliance Office. The operator learned from MSHA's website that the citation had become a final order as of November 12, 2009.

The Secretary does not oppose Aggregates' request to reopen the proposed penalty assessment. She notes that a payment dated October 25, 2009, in the amount of \$1,409 was timely received at MSHA's Payment Processing Center. She also states that MSHA has no record of receiving the penalty contest form at its Civil Penalty Compliance Office in Arlington, Virginia.

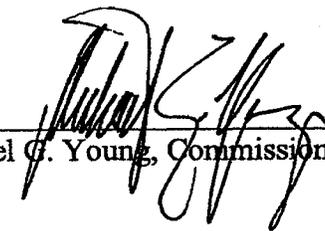
Having reviewed Aggregates' request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



Mary Lu Jordan, Chairman



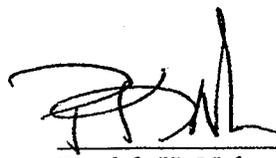
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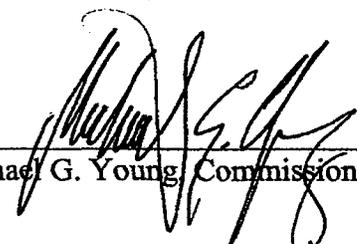
Asarco states that it returned the assessment form to the Department of Labor's Mine Safety and Health Administration ("MSHA") with the citations that it desired to contest noted on the form, although Asarco does not provide the date on which it returned the form. On July 9, 2009, Asarco received a delinquency notice from MSHA. On July 15, 2009, the operator submitted its request to reopen to the Commission.

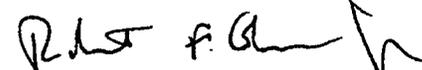
The Secretary does not oppose reopening the proposed penalty assessment but states that there is no record of the penalty contest form having been received by MSHA's Civil Penalty Compliance Office. The Secretary acknowledges that MSHA received a late payment with a check dated July 15, 2009, in the amount of \$28,197, to be applied to penalties in this case.

Having reviewed Asarco's request and the Secretary's response, 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 and whether relief from the final order should be granted. As part of this determination, the Judge should ascertain when Asarco returned the proposed assessment form. If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. § 2700.¹


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

¹ It is not clear which citations were paid and which citations Asarco seeks to reopen. Thus, if the Chief Administrative Law Judge determines that the case should be reopened, he should also determine which citations are to be included in the reopening.

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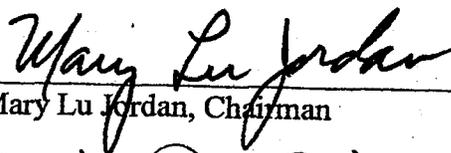
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Arlington, VA 22209-3939**

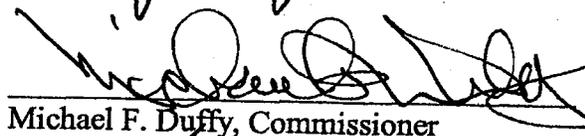
**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

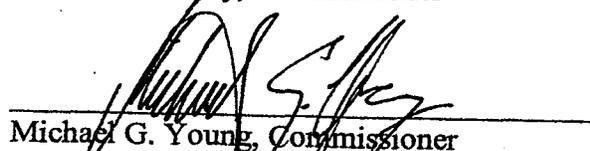
On January 7, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000173779 to Bowie, proposing civil penalties for several citations. Bowie maintains that it filled out the proposed assessment form indicating that it intended to challenge seven of the citations and orders and their associated penalties and sent the contest to MSHA's Civil Penalty Compliance Office. Bowie states that it sent its payment in the amount of \$3,974 for the remaining citations to MSHA's Payment Processing Center in St. Louis, Missouri. The operator further states it subsequently learned from MSHA that its contest of the seven citations/orders at issue was never received.

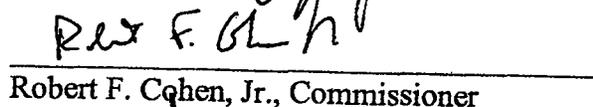
The Secretary does not oppose Bowie's request to reopen the proposed penalty assessment. She notes that a payment dated March 13, 2009, in the amount of \$3,974 was received at MSHA's Payment Processing Center. However, the Secretary states that MSHA has no record of receiving the penalty contest form at its Civil Penalty Compliance Office in Arlington, Virginia.

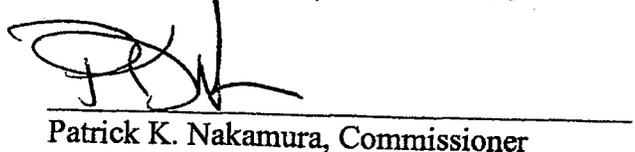
Having reviewed Bowie's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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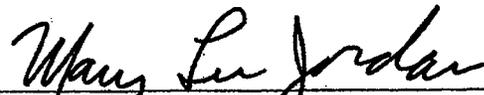
**Myra James, Chief
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U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939**

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

On July 1, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000189717 to the Hiatt Ready Mix Mine. In its request, 7/11 Materials alleges that it took ownership of the mine on August 1, 2009, and that it had not received copies of the pertinent citations or the proposed penalty assessment. The operator asserts that it received a notice of delinquency on September 30, 2009, and contacted MSHA on numerous occasions to contest the penalty assessments.

The Secretary states that she does not oppose 7/11 Materials' request to reopen the assessment and attaches copies of the proposed assessment and citations.

Having reviewed 7/11 Materials' request and the Secretary's response, in the interests of justice, we hereby reopen this matter. 7/11 Materials shall have 30 days from the date of this order to submit its contest to MSHA at the address contained on the proposed penalty assessment. If the penalty assessment is contested, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



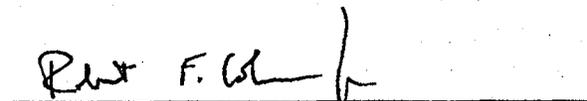
Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 2010

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

v.

RAY COUNTY STONE
PRODUCERS, LLC

Docket No. CENT 2010-88-M
A.C. No. 23-02274-192621

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On December 30, 2009, Ray County Stone Producers, LLC ("Ray County Stone") renewed its request that the Commission reopen a penalty assessment issued to the operator 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).

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

On July 29, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000192621 to Ray County Stone for three citations MSHA had issued to the operator on June 2, 2009. In ruling upon the original request to reopen, filed by Ray County Stone on October 28, 2009, the Commission concluded that the operator had failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Accordingly, the Commission denied the request without prejudice to Ray County Stone's right to refile another request which specified which penalties it would contest upon reopening and that included "more specific information regarding why it did not file a notice of contest on a timely basis, and when it learned of the delinquency." *Ray County Stone Producers, LLC*, 31 FMSHRC 1339, 1340-41 & n.1 (Dec. 2009).

In renewing its request, Ray County Stone's safety consultant, Earl Wilson, wrote the Commission a letter in which he identified the two citations the operator seeks to reopen. As for the reason it did not timely contest those penalties, Ray County Stone states that it was due to "issues with office staff" and because the operator was not told by the staff of the proposed assessment. It says it learned of the delinquency when it checked the MSHA web site.

While she did not oppose Ray County Stone's original request to reopen, the Secretary of Labor now opposes reopening the assessment, on the ground that reason given for the failure to timely contest the citations is no more than a conclusory assertion, and that Ray County Stone has failed to state the date on which it checked the MSHA web site.

Mr. Wilson cannot further represent Ray County Stone in this proceeding until he complies with Commission Procedural Rule 3(b). As explained in our original order, that rule provides that, in order to practice before the Commission, a person must either be an attorney or fall into one of the categories in Rule 3(b), which include parties, representatives of miners, an "owner, partner, officer or employee" of certain parties, or "[a]ny other person with the permission of the presiding judge or the Commission." 29 C.F.R. § 2700.3(b). In submitting the original request on the letterhead "Wilson and Associates," Mr. Wilson stated that he was a "Safety Consultant." In the renewed request, Mr. Wilson, on identical letterhead, takes the position that he is an "employee" of Ray County Stone because he has been "hired" to look into this matter. Given these conflicting accounts of Mr. Wilson's status, he must seek permission to practice before the Commission or judge pursuant to Rule 3(b)(4) before he can appear again before the Commission in this or any other case in which Wilson and Associates is not a party. Ray County Stone can instead be represented by an individual who fits within one of the categories set forth in Rule 3(b)(1)-(3). Because Mr. Wilson has not established compliance with Rule 3(b), we deny the operator's request without prejudice.

Having reviewed Ray County Stone's renewed request and the Secretary's response, we further conclude that the operator has again failed to provide a sufficiently detailed explanation

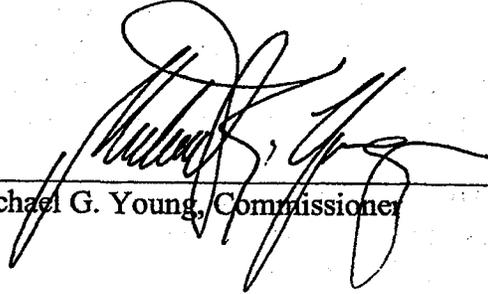
for its failure to timely contest the proposed penalty assessment. Because its renewed request states little more than its original request, we deny without prejudice Ray County Stone's request for this reason as well. If the operator files a third request to reopen, it must (1) explain in detail how the assessment, which was delivered to it and signed for by a "J. Dugan," was not timely contested, (2) identify the date it learned of the delinquency, and (3) describe what it did upon learning of the delinquency. If the defects identified herein are not cured within 30 days, the denial of the operator's request to reopen the penalty assessment shall become final and unappealable to the Commission



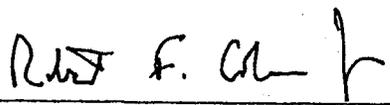
Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 2010

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

v.

ENTERPRISE MINING COMPANY LLC.

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Docket No. KENT 2009-1409
A.C. No. 15-19116-183877

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) (“Mine Act”). On August 6, 2009, the Commission received a motion by counsel to reopen a penalty assessment issued to Enterprise Mining Company LLC (“Enterprise”) that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

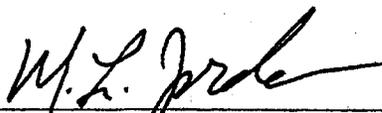
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

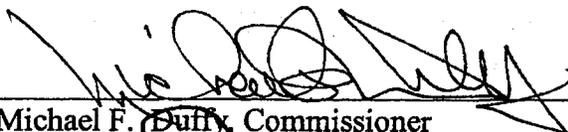
On April 29, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000183877 to Enterprise, which covered Citation No. 8315960. Enterprise asserts that its failure to timely file its contest was the result of confusion as to whether outside counsel or the safety director was going to send the form. According to Enterprise, its safety director also believed that no contest should be sent until a conference covering the citation, scheduled for May 6, 2009, was held. Enterprise also points out that it had already filed a pre-penalty contest of the citation.

The Secretary states that she does not oppose the reopening of the assessment, but notes that a pre-penalty contest does not alter the deadline or procedure for contesting a proposed penalty. The Secretary also urges that the operator take all steps to ensure that future penalty assessments be contested in a timely manner.

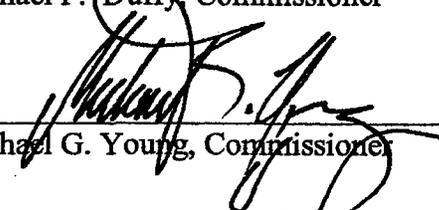
Having reviewed Enterprise's motion and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



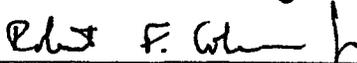
Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 2010

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

v.

L & S CONSTRUCTION CORPORATION

Docket No. LAKE 2010-332-M
A.C. No. 21-03095-198625

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

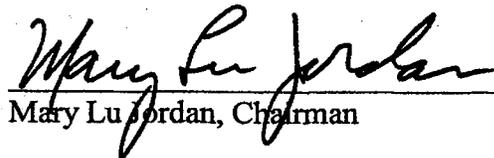
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On January 12, 2010, the Commission received from L & S Construction Corporation ("L&S") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

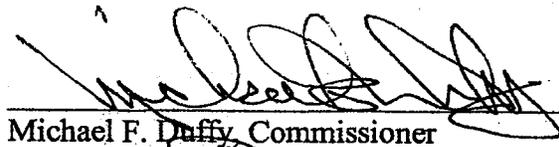
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

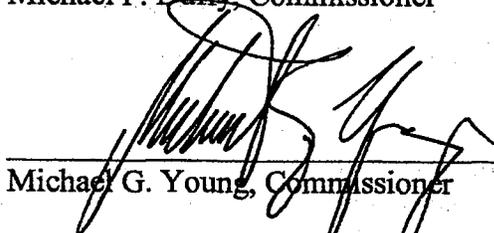
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. *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).

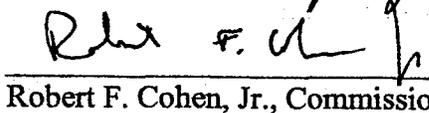
The Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000198625 to L&S on September 29, 2009, proposing penalties for nine citations and an order that had been issued to L&S on August 25, 2009. L&S states that on October 12, 2009, it sent a letter to the MSHA District Office to contest two of the citations. The operator further explains that on October 26, 2009, it received correspondence from MSHA indicating that a conference would be scheduled after L&S sent its contest, which the operator states that it thought it had done by its October 12 letter. The operator promptly filed its request to reopen when it discovered its error. The Secretary of Labor does not oppose reopening.

Having reviewed L&S's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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601 New Jersey Avenue, N.W., Suite 9500
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

June 30, 2010

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

v.

DJ DRILLING AND BLASTING, INC.

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Docket No. SE 2009-807-M
A.C. No. 40-03315-183194 W720

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

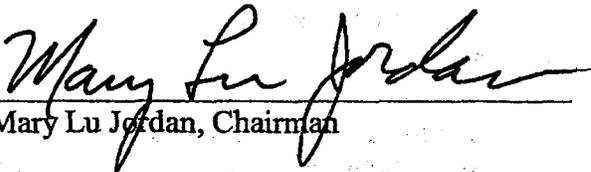
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On August 11, 2009, the Commission received from DJ Drilling and Blasting, Inc. ("DJ Drilling") a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

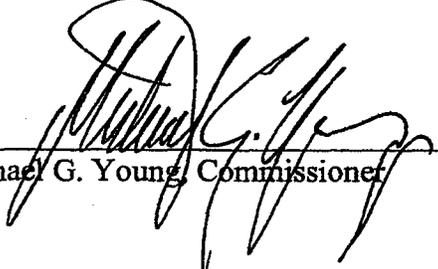
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) 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 mistake, inadvertence, or excusable neglect. 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).

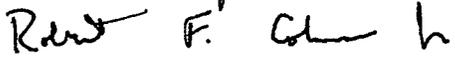
The Department of Labor's Mine Safety and Health Administration ("MSHA") issued the proposed assessment on April 22, 2009. DJ Drilling claims that it sent to MSHA a letter and proposed assessment form contesting the assessment on May 12, 2009. It states that it received a delinquency notice on July 24, 2009, indicating that the assessment was past due. DJ Drilling further asserts that it then called MSHA and learned that there was no record of its contest. According to DJ Drilling, it learned on August 5, 2009, that it needed to contact the Commission to reopen the penalties. On that same day, DJ Drilling sent a letter seeking reopening. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

Having reviewed DJ Drilling's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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U.S. Dept. of Labor
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Arlington, VA 22209-3939**

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 2010

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

v.

GENERAL CHEMICAL (SODA ASH)
PARTNERS

Docket No. WEST 2009-1201-M
A.C. No. 48-00155-183788

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, 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. (2006) ("Mine Act"). On August 4, 2009, the Commission received from General Chemical (Soda Ash) Partners ("General Chemical") a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

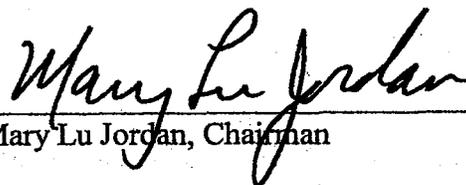
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

We have held, however, 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 mistake, inadvertence, or excusable neglect. *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).

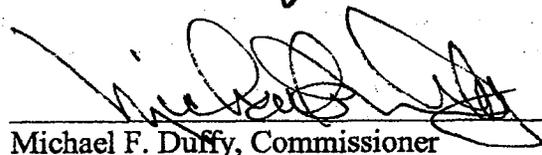
The Department of Labor's Mine Safety and Health Administration ("MSHA") issued the proposed assessment on April 28, 2009. General Chemical claims that it requested a conference for several citations, including Citation No. 6420307 at issue here, and that it sent the contest form to MSHA covering the citation at issue. It states that it received a delinquency notice on July 21, 2009, indicating that the assessments were past due. Within two weeks of the notice, General Chemical sought reopening before the Commission.

The Secretary states that she does not oppose the reopening of the proposed penalty assessment, although she has no record of receiving the contest in this case. She also notes that a request for a conference does not alter the deadline or procedure for contesting a proposed penalty.

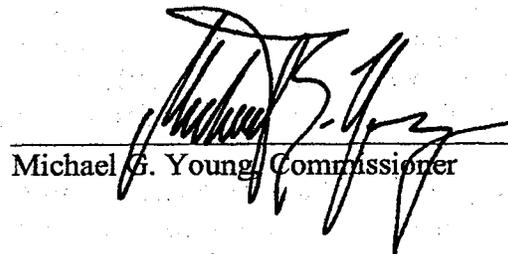
Having reviewed General Chemical's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. § 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



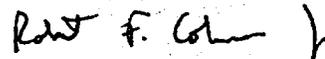
Mary Lu Jordan, Chairman



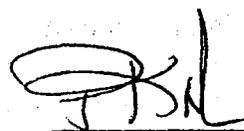
Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner



Patrick K. Nakamura, Commissioner

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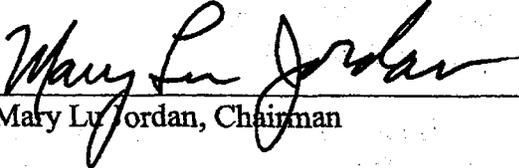
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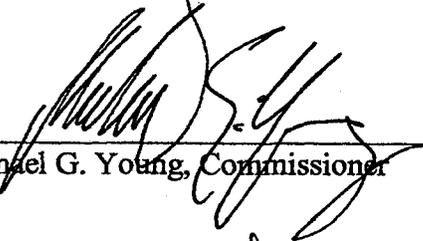
Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

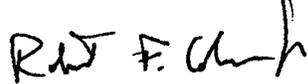
On October 23, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued the proposed assessment at issue. Elcon claims that it timely mailed the contest form on November 20, 2008, and did not receive any further correspondence relating to the assessment until it received a collection notice from the Department of Treasury dated May 16, 2009. The Secretary asserts that she has no record of receiving the contest and notes that a delinquency notice was sent to the operator on January 15, 2009, before the case was referred to the Treasury Department for collection. She does not oppose reopening but urges the operator to take all steps necessary to ensure that future penalty assessments are contested in a timely manner and mailed to the appropriate MSHA address.

Having reviewed Elcon's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 2010

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

v.

BRODY MINING, LLC

:
:
:
:
:
:
:
:
:
:

Docket No. WEVA 2009-1445
A.C. No. 46-09086-184529

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

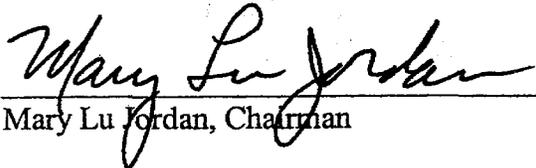
BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On May 12, 2010, the Commission received a petition for discretionary review from Brody Mining, LLC (“Brody”) challenging an order issued by Chief Administrative Law Judge Robert J. Lesnick on April 9, 2010. In his order, Judge Lesnick denied a motion to dismiss filed by Brody and accepted an untimely petition for assessment of penalty filed by the Secretary of Labor.

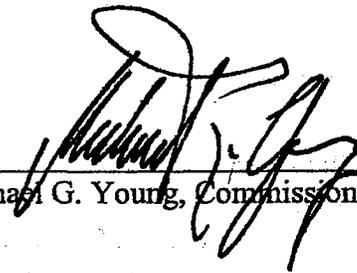
Under the Mine Act and the Commission’s procedural rules, relief from a Judge’s final decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. §§ 2700.69(a), 2700.70(a). Under the Commission’s Procedural Rules, the filing of a petition for discretionary review is effective upon receipt. 29 C.F.R. §§ 2700.5(e)(2), 2700.70(a).

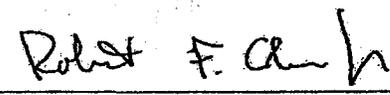
Brody’s petition was received by the Commission on May 12, 2010, more than 30 days after issuance of the Judge’s April 9, 2010 order. Accordingly, the petition should be dismissed as untimely filed. *Duval Corp. v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981); *Sunbeam Coal Corp.*, 2 FMSHRC 775 n.1 (Apr. 1980).

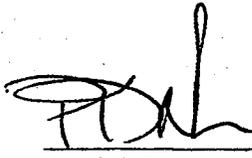
For the foregoing reasons, Brody's petition for discretionary review is dismissed as untimely.¹


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner

¹ We note that even if Brody had timely filed the petition, an independent grounds for denial exists since the petition seeks review of a Judge's order that is interlocutory, rather than final, in nature. *See* 29 C.F.R. § 2700.76.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500

WASHINGTON, D.C. 20001

May 4, 2010

ABUNDANCE COAL, INC.,	:	EQUAL ACCESS TO JUSTICE
Applicant	:	PROCEEDING
	:	
v.	:	DOCKET NO. EAJ 2010-01
	:	Formerly KENT 2010-5-R
SECRETARY OF LABOR,	:	KENT 2010-6-R
MINE SAFETY & HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 15-18711
Respondent	:	No. 1 Mine

DECISION

This case is before me upon an application for fees and expenses filed by Abundance Coal, Inc., (Abundance) pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, the “Act”, and the Commission’s implementing regulations at 29 C.F.R. § 2704. Abundance was the prevailing party in an expedited contest proceeding, *Abundance Coal, Inc.*, 31 FMSHRC 1241 (October 2009)(ALJ). On March 10, 2010, a decision was issued in these proceedings finding that Abundance was qualified to receive fees and expenses under the Act and that the Secretary was liable for those fees and expenses for failing to sustain her burden of proving that her position at trial was substantially justified. 5 U.S.C. § 504(a)(1); 29 C.F.R. § 2704.105(a).

Abundance failed to support its application for fees and expenses, however, by failing to provide “a written verification under oath or penalty of perjury that the information provided in the application is true and correct”. 29 C.F.R. § 2704.201(d). Abundance also failed to provide an itemized statement of professional services in connection with the underlying proceeding. 29 C.F.R. § 2704.205. Accordingly Abundance was granted 30 days to comply with the noted regulatory provisions.¹

In response, on April 12, 2010, Abundance filed an affidavit by its president, Ray Slone, to the effect that the “motion” for attorneys fees and costs was true and correct. The Commission’s regulation is perfectly clear however that the verification must be specifically directed to the “information” in the application and not merely to the motion itself. This is not a trivial technicality but is a critical distinction to enable a credibility assessment to be made. The affiant should, of course, also have firsthand knowledge of the facts affirmed. Abundance also failed in its response to provide the detailed information required by 29 C.F.R. § 2704.205. It is particularly noted that Abundance failed to distinguish between time spent on the underlying cases and time spent on the consolidated but separate cases involving two imminent danger withdrawal orders (Docket Nos. KENT 2010-28-R and KENT 2010-29-R). The latter cases are not a part of these equal access of

¹ The Secretary was also directed to comply with the provisions of 29 C.F.R. § 2704.302(c) but failed to respond.

justice proceedings and the fees and expenses related to those cases are not compensable in these proceedings.

The failure of Abundance to have complied with the Commission's regulations could be grounds for denial of the entire application. However, to the extent that parts of the application are unopposed or can be reasonably ascertained, a partial award will be granted. Consideration is also given to a presumption of truthfulness accorded representations by members of the bar.

The Secretary first argues that attorney's fees for Abundance should be limited to a rate of \$125.00 per hour as set forth in 29 C.F.R. § 2704.201. Abundance seeks an award at a rate of \$175.00 per hour and cites an increase in the cost of living since the enactment of the 1996 Act and other special circumstances to justify that rate. See 29 C.F.R. § 2704.201(b). Abundance cites the fact that its attorney has a mining engineering degree and has been practicing all aspects of coal mine law for over 20 years, asserts that it would have been unable to obtain a qualified attorney to handle the matter for \$125.00 an hour and maintains that there are only a very few attorneys in eastern Kentucky who would represent coal mine operators in MSHA proceedings. Finally, Abundance notes that the only place eastern Kentucky coal operators can obtain qualified attorneys to defend MSHA administrative proceedings is in Lexington, Kentucky where most charge more than \$175.00 per hour. Under the circumstances, I find that a rate of \$175.00 is appropriate to be awarded in these proceedings.

The Secretary objects to attorney fees for conversations with the attorney representing mine operator Consol of Kentucky in the consolidated but separate contest of an "imminent danger" order. It is essential to note in this regard that initially four expedited contest proceedings were consolidated for trial to commence on October 14, 2009. Two challenged "Section 107(a)" imminent danger withdrawal orders - - one issued against Abundance at its No. 1 Mine and one against Consol of Kentucky at its adjacent Jones Fork mine. These two cases involved an alleged common hazard originating in the adjacent Jones Fork mine and were resolved by settlement on October 14, 2009. They are not in themselves within the scope of any claims for fees and expenses under the Act. The other contests (of Citation No. 8227636 and "Section 104(b)" Order No. 8227637) involved Abundance's seals separating its No. 1 mine from the Jones Fork mine and involved the same alleged common hazard originating in the Jones Fork mine. The latter two cases are those underlying the instant application for fees and expenses. While there was, of necessity, some need for coordination between counsel this rationale provides only a partial explanation for the charges. Accordingly an appropriate reduction in fees of 25% or \$175.00 is warranted..

The Secretary next takes issue with fees and expenses for attendance at the proceedings on October 14, 2009. All four consolidated cases were scheduled for trial on October 14, 2009, but at the suggestion of the undersigned the parties engaged in settlement negotiations. As a result, the "Section 107(a)" imminent danger orders issued to both Consol of Kentucky and Abundance were resolved. As previously noted, since the specific cases (Docket Nos. KENT 2010-5-R and 2010-6-R) on which Abundance prevailed (regarding Citation No. 8227636 and Order No. 8227637) were separate and distinct from the "Section 107(a)" orders which were the primary subject of the settlement conference on October 14, 2009, (Docket Nos. KENT 2010-28-R and 2010-29-R) the

time spent on those orders at that conference is not compensable in these proceedings. An appropriate reduction in fees of 50% or \$1,050.00 is therefore taken from the October 14, 2009 billing.

The Secretary also takes issue with the time charged for conferring with MSHA's district manager following the completion of the hearing on October 15, 2009. While this meeting was at the suggestion of the undersigned judge it was not directly related to the underlying cases but rather for the purpose of avoiding future litigation regarding the mine ventilation plan. It was therefore not an appropriate charge in these proceedings and a fee reduction of \$350.00 from the October 15th billing is warranted.

The Secretary further takes issue with costs associated with obtaining an expedited transcript of the hearing. Expedited hearings were held in the underlying cases because the Secretary had ordered the closure of the Abundance mine and miners were out of work. An expedited transcript was therefore necessary for the parties to prepare expedited briefs. Accordingly the cost for an expedited transcript was appropriate.

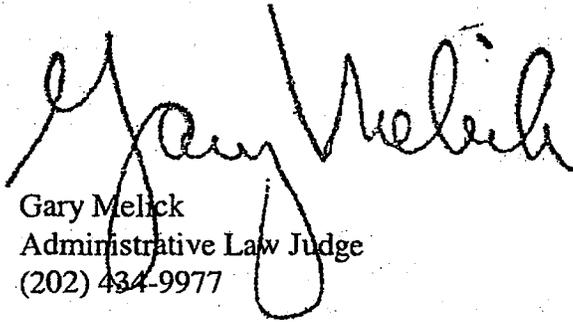
Finally, the Secretary takes issue with bills for services from Abundance's experts and consultants. In particular, the Secretary asserts that neither the bill for Alpha Engineering Services, Inc., in the amount of \$900.00 nor the bill to Sure Tech Systems, Inc., in the amount of \$600.00 meet the specificity required by the Commission's regulations. See 29 C.F.R. § 2704.205. I find the Secretary correct in this regard and in spite of the opportunity given to Abundance to supplement the record, it has nevertheless failed to fully comport with the requirements of 29 C.F.R. § 2704.205. It is particularly noted that although some work was devoted by the experts to the "Section 107(a)" orders not compensable in these proceedings it was included in the fees charged herein. Accordingly, Abundance's claim for fees for these consultants is accordingly reduced by 50% to \$750.00.

The Secretary also claims that the Commission's regulations do not permit attorney's fees for preparing and filing an application for fees and expenses under the Act. I find no such authority for the Secretary's position and indeed since the preparation of the fee application is an integral part of these proceedings I find that it is entirely appropriate to include that in the application for attorney's fees herein. Indeed such fees have been approved in other cases under the Act. See *Schuenemeyer v. U.S.*, 776 F.2d 329 (Fed. Cir. 1985); *Fritz v. Principi*, 264 F.3d 1372 (Fed. Cir. 2001); *Black Diamond Construction, Inc.*, 20 FMSHRC 1169 (October 1998) (ALJ).

Under all the circumstances, I find that Abundance is entitled to fees and expenses of \$11,586.59.

ORDER

In accordance with 29 C.F.R. § 2704.108 the Secretary of Labor is directed to pay Abundance Coal Inc., the amount of \$11,586.59 within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution:(Certified Mail)

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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 13, 2010

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2007-151
Petitioner	:	A.C. No. 36-07416-109800
	:	
v.	:	
	:	
CONSOL PENNSYLVANIA COAL	:	
COMPANY,	:	Mine: Enlow Fork
Respondent	:	

DECISION

Appearances: Andrea J. Appel, Esq., U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Rodger L. Puz, Esq., Dickie, McCamey & Chilcote, P.C., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Bulluck

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, on behalf of her Mine Safety and Health Administration (“MSHA”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Act”), 30 U.S.C. § 815(d), against Consol Pennsylvania Coal Company (“Consol”). The Secretary seeks civil penalties in the amount of \$19,300.00 for three alleged violations of the Act and her mandatory safety standards.

A hearing was held in Pittsburgh, Pennsylvania. The issues to be resolved are: 1) whether Respondent violated 30 C.F.R. § 75.360(f), as alleged in Order No. 7073382, and 30 C.F.R. § 75.400, as alleged in Citation No. 7071787 and Order No. 7073658; 2) whether the violations were “significant and substantial” (“S&S”); and 3) whether the violations were attributable to Consol’s unwarrantable failure to comply with the standards.¹ The parties’ post-

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

hearing briefs are of record. For the reasons set forth below, I **AFFIRM** the citation and orders, as **AMENDED**, and assess penalties against Respondent.

I. Stipulations

The parties stipulated as follows:

1. Respondent was an “operator” as defined in section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 803(d), of the Enlow Fork Mine at the time Citation/Order Nos. 7071787, 7073382 and 7073658 were issued.

2. The operations of Respondent at the aforementioned mine at the time Citation/Order Nos. 7071787, 7073382 and 7073658 were issued are subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges, pursuant to Sections 104 and 113 of the Mine Act.

4. Inspector Barry Radolec was acting in his official capacity and as an authorized representative of the Secretary of Labor when Citation No. 7071787 was issued.

5. Inspector James Kaczmark was acting in his official capacity and as an authorized representative of the Secretary of Labor when Order No. 7073382 was issued.

6. Inspector Ronald Rihaley was acting in his official capacity and as an authorized representative of the Secretary of Labor when Order No. 7073658 was issued.

7. True copies of Citation/Order Nos. 7071787, 7073382, and 7073658 were served on Respondent and/or its agents, as is required by the Mine Act.

8. Payment of the total proposed penalty for Citation/Order Nos. 7071787, 7073382, and 7073658 will not affect Respondent’s ability to continue in business.

9. The citations contained in Exhibit A attached to the Secretary’s petition in the case docketed as PENN 2007-151, are authentic copies of Citation/Order Nos. 7071787, 7073382, and 7073658 with all the appropriate modifications or abatements, if any.

10. At the time that Citation No. 7071787 was issued, material existed at certain points on the 3 North Number 1 Main Conveyor Belt, starting at the end of the conveyor belt take-up and continuing inby to the number 5 ½ crosscut.

mandatory health or safety standards.” *Id.*

11. At the time that Citation No. 7071787 was issued, the accumulations described in Request for Admission No. 10 measured from 6 feet wide by 25 feet long and from 1 inch to 12 inches in depth under the bottom conveyor belt and belt rollers, behind the conveyor belt take-up.

12. At the time that Citation No. 7071787 was issued, material existed at certain points on the inby side of the E-1 belt overcast to the number 5 ½ crosscut.

13. At the time that Citation No. 7071787 was issued, accumulations were in contact with 3 bottom rollers.

14. At the time that Citation No. 7071787 was issued, some of the accumulations described in the Citation were damp to wet.

15. At the time that Citation No. 7071787 was issued, accumulations existed under certain bottom rollers between the number 5 ½ crosscut and the E-1 belt overcast.

16. At the time that Citation No. 7071787 was issued, some of the accumulations described in the Citation required shoveling.

17. Coal is combustible under certain circumstances.

18. Coal fines are combustible under certain circumstances.

19. Coal dust is combustible under certain circumstances.

20. At the time that Order No. 7073382 was issued, there were 14 rib rolls on the E-14 belt, which obstructed the 24-inches required for the tight side walkway.

21. At the time that Order No. 7073382 was issued, there were two stoppings along the E-14 belt which contained combustible material.

22. At the time that Order No. 7073382 was issued, the condition described by MSHA as a roof violation on the wide side of the E-14 belt travelway was not recorded by Respondent in its pre-shift examination of the E-14 longwall belt.

23. At the time that Order No. 7073382 was issued, there were rollers turning in black coal fines.

24. At the time that Order No. 7073382 was issued, the condition described in Stipulation No. 23 was not recorded in Respondent's pre-shift examination of the E-14 longwall belt.

25. At the time that Order No. 7073382 was issued, the take-up pulley at the head of the

E-14 longwall belt was not fully guarded.

26. At the time that Order No. 7073382 was issued, the condition described in Stipulation No. 25 was not recorded in Respondent's pre-shift examination of the E-14 longwall belt.

27. At the time that Order No. 7073382 was issued, the E-14 longwall belt was pre-shifted three times per day by a certified person.

28. At the time that Order No. 7073658 was issued, accumulations of coal and/or coal fines at certain locations along the No. 1 main belt conveyor were in contact with rollers or the conveyor belt itself.

29. At the time that Order No. 7073658 was issued, in those areas along the No.1 main belt conveyor where rollers or the belt itself were in contact with coal and/or coal fines, some of those accumulations were wet and some were dry.

30. At the time that Order No. 7073658 was issued, there was coal spillage at certain locations along the E-14 longwall belt.

31. At the time that Order No. 7073658 was issued, coal dust and/or float coal dust was deposited onto previously rockdusted surfaces at certain locations along the E-14 longwall belt.

32. At the time that Citation/Order Nos. 7071787, 7073382, and 7073658 were issued, energized equipment was operating in certain discrete locations within each of the cited areas of the Enlow Fork Mine.

II. Factual Background

Consol operates the Enlow Fork mine in Washington County, Pennsylvania, which produced over 11 million tons of coal in 2007 and 2008. It is the largest bituminous coal producing deep mine in the country. Tr. 187. On August 9, 2006, MSHA sent multiple inspectors to Enlow Fork to conduct a regular quarterly safety and health inspection. Tr. 30, 192. This was a saturation type inspection, in that 10 to 12 inspectors were on-site to carry it out.

MSHA Coal Mine Inspector James Kaczmark was assigned to inspect the 1.7 mile long E-14 longwall belt. Tr. 290, 580-81. During his inspection, Kaczmark was accompanied by Enlow Fork safety inspector, Joshua Huth. Tr. 570-71. While traveling the belt, Kaczmark found nine hazardous conditions that had not been logged in Respondent's pre-shift examination book. Tr. 291-92. Specifically, Kaczmark found two stoppings with open holes, and three stoppings that had not been sealed and contained combustible materials, as well as 13 rib rolls obstructing the 24 inches required for the tight side walkway. Stip. 20, 21; Sec'y. Br. at 20 n.2. There was a crack in the roof on the wide side of the belt, which is also the travelway, three rollers were turning in loose, black coal fines, and there was damage to the guarding on the take-

up pulley at the head of the E-14 longwall belt. Stip. 22, 23, 25. There was also energized equipment operating in the cited area. Stip. 32. As a result of the conditions Kazmarck found, he issued section 104(d)(1) Order No. 7073382 for a violation of 30 C.F.R. § 75.360(f), for failure to conduct an adequate pre-shift examination. Ex. P-5. This belt was subject to three pre-shift examinations per day by a certified person. Stip. 27. Kaczmark did not interview the miner who conducted the pre-shift examination. Tr. 434-36.

During the same inspection, MSHA Inspector Barry Radolec, who was not regularly assigned to Enlow Fork, inspected the 3 North Main's number 1 conveyor belt. Tr. 30-31. Radolec was accompanied by Enlow Fork's safety supervisor, Don Overfield, and MSHA Supervisory Inspector Robert Newhouse, whose purpose was to evaluate Radolec's inspection. Tr. 32, 121. During the inspection, Radolec observed coal dust accumulations under the metal bottom rollers at the number 5 ½ crosscut, which measured 150 feet long by 12 to 18 inches wide, and up to 10 inches deep. Tr. 40. The accumulations were dry, powdery, somewhat compacted, and floated when thrown in the air. Tr. 40. The accumulated dust was also being rubbed by the bottom moving conveyor belt for a distance of about 150 feet. Tr. 41. One of the metal belt stands had been cut in half by the rubbing belt, and belt shavings were found in the immediate area. Tr. 41. There were identical coal dust accumulations under the bottom rollers at various locations between the number 5 ½ crosscut and the 1 East belt crossover. Tr. 40. In one area of the number 5 ½ crosscut, Radolec observed float coal dust being deposited on the mine roof ribs, on top of the overcast, on the metal conveyor belt structures, aluminum pipes, electrical cables along the belt, roof, roof controls, and roof support materials. Tr. 38. The consistency of these accumulations was dry to damp. Tr. 38. Overall, Radolec inspected somewhere between 550 to 600 feet of beltline over a two hour period. Tr. 80-81. Along that belt span, Radolec noted three moving rollers in contact with dust accumulations. Tr. 119. Overfield, using a heat gun, took the temperature of the three rollers and got a reading between 72 and 74 degrees.² Tr. 122. Radolec also noted that the belt was rubbing over three inches of the belt structure in two separate places, for a distance of about 30 feet. Tr. 122-23. Radolec took the belt out of service and issued section 104(d)(1) Order No. 7071787 for a violation of 30 C.F.R. § 75.400. Tr. 41; Ex. P-4. Consol uses fire resistant belts at Enlow Fork. Tr. 118.

MSHA Coal Mine Inspector Ronald Rihaley issued Order No. 7073658, also for violation of section 75.400, after observing coal dust accumulations at numerous locations along the No. 1 Main belt conveyor over a span of 1,500 feet. Stip. 28; Tr. 217-19. At approximately 1,500 feet long, this is the shortest main belt in the mine. Tr. 218-19. The accumulations were in contact with both the rollers and the conveyor belt; some were wet, and some were dry. Stip. 28, 29. There was also coal spillage along the E-14 longwall belt and coal dust and/or float coal dust deposited onto previously rockdusted surfaces in the same areas, and energized equipment was operating within the cited area. Stip. 30, 31, 32. At the number 4 ½ crosscut, Rihaley observed packed coal fines around the rotating bottom roller and the belt rubbing the coal fines. Tr. 219. He also saw 3 ½ feet of dry float coal dust. Tr. 220. At the number 5 crosscut, there was a stuck

² All references to temperature herein are according to the Fahrenheit scale.

bottom roller in contact with the belt, and dry coal fines built up around the roller. Tr. 221. There were dry coal fines on the tight side of the take-up pulley, approximately three feet long, two feet wide, and two feet high, being compressed by the large, rotating pulley. Tr. 222.

At the number 8 crosscut, Rihaley observed a bottom roller missing and the belt, which was out of alignment, rubbing the belt structure. Tr. 222-23. There were coal fines built up where the belt was rubbing and, inby, a bottom roller turning in coal fines on a two-foot section of belt that was producing dry, visible dust being suspended in air. Tr. 223. At the number 9 crosscut, there was a stuck bottom roller and three inby rollers turning in coal fines, as well as the belt rubbing these fines for at least one foot. Tr. 224. At the number 10 ½ crosscut, there were packed coal fines in contact with a bottom roller and four feet of accumulations that were dry to the touch and producing visible dust. Tr. 226. Rihaley observed a stuck roller, a broken roller, and another roller turning in packed coal at the number 13 ½ crosscut, and more bottom rollers turning in coal at the number 14 and 14 ½ crosscuts. Tr. 228. On the tight side at the number 14 crosscut, there were accumulations measuring 40 feet long, two to three feet wide, and six to sixteen inches deep. Tr. 231. Rihaley also observed a bottom roller and eight to ten feet of belt in contact with dry coal fines producing visible dust at the number 15 crosscut. Tr. 228-29. During his inspection, he did not see any Consol employees attempting to clean up the cited accumulations. Tr. 232, 269.

Supervisory Inspector Newhouse testified that MSHA has had numerous discussions with Enlow Fork management regarding preventative measures for combustible coal accumulations, including discussions during pre-inspection conferences at the beginning of every quarter, and close-out conferences at the end of each quarter. Tr. 173. In addition, Newhouse stated that he, personally, has had discussions about coal accumulations with mine management. Tr. 173.

III. Findings of Fact and Conclusions of Law

Order No. 7073382

A. Fact of Violation

Inspector Kazmark issued 104(d)(1) Order No. 7073382 for a violation of section 75.360(f). He determined that it was highly likely that the violation would result in an injury or illness involving lost work days or restricted duty, that the violation was significant and substantial, that one employee was affected, and that Consol's negligence was high and the result of its unwarrantable failure to comply with the standard. Ex. P-5, R-1B. Section 75.360, which governs pre-shift examinations, provides, in pertinent part:

(a)(1) Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a pre-shift examination within 3 hours preceding the beginning of any 8-hour

interval during which any person is scheduled to work or travel underground.

(f) A record of the results of each pre-shift examination, including a record of hazardous conditions and their locations found by the examiner during each examination . . . shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine.

30 C.F.R. § 75.360(a)(1), (f). The citation describes the “Condition or Practice” as follows:

The operator failed to conduct a[n] adequate pre-shift examination of the E-14 longwall belt. The hazards and violations regarding combustible material in stopping, holes in stopping, guards of storage rollers, roof conditions where persons work and travel, rollers turning in combustible material, and locations of tight side rib rolls. [There] were 14 rib rolls not recorded in the mine examiner pre-shift book which obstructed the 24 inches required for the tight side walkway, two holes in 2 different stopping, 2 stopping with very visible combustible [material] present. [There] was one roof violation on the wide side of the belt travel way. Rollers turning in black coal fines. The take up pulleys [sic] at the head of the E-14 longwall belt was not fully guarded. This belt is pre-shifted 3 times a day by certified persons. [There] were 9 citations issued on this belt line.

Ex. R-5.

The pre-shift examination requirement “is of fundamental importance in assuring a safe working environment underground.” *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995). The purpose of the pre-shift examination is to “prevent loss of life and injury,” resulting from hazards at the mines. S. Rep. No. 91-411, at 71 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 183 (1975). The examination is intended to prevent hazardous conditions from developing. *Enlow Fork Mine Co.*, 19 FMSHRC 5, 15 (Jan. 1997).

In the instant case, the pre-shift examination of the E-14 longwall belt occurred from 5:00 a.m. to 6:15 a.m. on August 9, 2006, and was conducted by Michael Despot, a certified pre-shift examiner. Ex. P-7. Approximately six hours after Despot pre-shifted the belt, Kaczmark issued the Order. Ex. P-5. Although there were hazards noted in the pre-shift report, Kaczmark

identified nine hazards during his inspection that were not.³ Tr. 293. The parties have stipulated to many of the conditions, and that several were not included in the pre-shift examination report for the E-14 longwall belt. Tr. 15-17; Stip. 20-26. The issue is whether the conditions existed at the time of Despot's pre-shift examination and, if so, whether they were obvious.

Consol did not present any witnesses to testify to the conditions in the affected areas at the time of the pre-shift examination. Notably absent was Despot, who had performed the pre-shift examination, and could have testified regarding what conditions he had encountered and whether, in his opinion, they were hazardous. On the other hand, Kaczmark testified regarding each of the conditions listed, and explained why he believed that they had existed at the time of the pre-shift examination and why they were hazardous.

The first five cited conditions involve two open holes in stoppings along the E-14 longwall belt, and combustible materials in holes in three stoppings. Stoppings are designed to run dust-filled air out of escapeways to the face, in order to decrease the amount of gas and dust contaminating the mine atmosphere. Tr. 299-300. Holes in stoppings are hazardous because they divert the direction of unclean air and compromise the efficiency of the ventilation system. Tr. 299-300. Kaczmark testified that the holes were visible and could be seen just by walking along the belt. Tr. 307. He believed that the holes could not have developed in the time between the pre-shift examination and the MSHA inspection because there was one hole, five inches high and three inches wide, with a hose going through it, and there "might" have been a wench cable going through the second. Tr. 302-06. In his opinion, the amount of dirt and dust that had accumulated around the hose indicated that it had been in the hole for "quite awhile." Tr. 306. This assessment is supported by the fact that mining had ceased between the number 20 and 25 crosscuts where the holes were discovered, and had progressed to the number 31 crosscut, which would have taken a long period of time. Tr. 301. Former MSHA Conference and Litigation Representative, Lynn Workley, testifying for Consol, opined that the holes would not have exposed miners to gas or dust, since the air was vented to the return, and that they "[do not] significantly reduce the strength or ability of the stopping to resist fire or to prevent the air from mixing between the belt and the next entry over." Tr. 658. In light of Workley's extensive background as a mine inspector and ventilation specialist, I credit his testimony, which was un rebutted by the Secretary.

³ Kazmark issued nine citations: (1) 104(a) Citation No. 7073373 for a stopping with combustible material at the number 23 crosscut; (2) 104(a) Citation No. 7073374 for a crack in the roof at the number 23 ½ crosscut; (3) 104(a) Citation No. 7073375 for combustible coal accumulations under three rollers at the number 27 ½ crosscut; (4) 104(a) Citation No. 7073376 for stopping with combustible material at the number 25 crosscut; (5) 104(a) Citation No. 7073377 for a hole in the stopping at the number 28 crosscut; (6) 104(a) Citation No. 7073378 for stopping with combustible material at the number 29 crosscut; (7) 104(a) Citation No. 7073379 for a hole in the stopping at the number 30 crosscut; (8) 104(a) Citation No. 7073380 for rib rolls on the tight side of the belt at 13 locations; and (9) 104(a) Citation No. 7073381 for rips in the guarding at the take-up pulley at the head of the E-14 belt. Ex. P-8.

The unsealed combustible materials in three locations in the stoppings included exposed paper and wood, and a lump of coal. Tr. 308. According to Kaczmark, when combustible material is in a stopping without a sealant, it compromises the integrity of the stopping and will be the first thing to catch fire, should heat make contact with it. Tr. 308. Sealant retards the fire and will prevent it from spreading rapidly for at least an hour. Tr. 308. The combustible materials appeared to have been present for over a week, because of the amount of dirt that had accumulated on them and because of the compressed indentations on the wooden wedges, which would have been installed for stability when the stoppings were put in place. Tr. 310-13. Kaczmark stated that the scoops are sometimes parked in the crosscuts, and a possible ignition source could be a battery on a scoop. Tr. 366-67. There was no scoop present in the area during Kaczmark's inspection. Tr. 367.

Consol contends that the language of section 75.360 only requires that "hazardous conditions" be recorded in the pre-shift examination report, not safety or health violations, even though an operator may choose to record them. It argues that conditions that are unlikely to cause injury or illness are not hazardous and, because Kaczmark deemed these five underlying citations as "injury or illness unlikely," the citations cannot support a violation of the standard. Resp. Br. at 21. Consol proffers Kaczmark's own testimony, in which he states that when an injury is unlikely to result, the condition is not hazardous. Resp. Br. at 21; Tr. 451-52.

I reject Consol's argument that, because a violation is unlikely to cause an injury or illness, it is not a hazard. In essence, Consol is arguing that a violation must be at least reasonably likely to result in an injury or illness in order to constitute a hazardous condition. The Commission has previously rejected this argument. While examining subpart (b) of this standard, the Commission has stated that "the plain language . . . of section 75.360(b) does not specify that hazardous conditions are only those reasonably likely to result in serious injury." *Enlow Fork Mining Co.*, 19 FMSHRC 5, 14 (Jan. 1997). Section 75.360(f) also makes no such qualification. Furthermore, although the standard does not define the term "hazardous condition," the Commission, in discussing section 75.360(b), has held:

[B]ased on its dictionary definition, a "hazard" denotes a measure of danger to safety or health. The Commission has approved the definition of "hazard" as "a possible source of peril, danger, duress, or difficulty," or "a condition that tends to create or increase the possibility of loss."

Id. (citations omitted). Therefore, while it may not have been reasonably likely that the combustible materials in the stoppings would ignite, since there was no identifiable ignition source in the vicinity, nor that the holes in the stoppings would expose miners to gas or dust, since the air was vented to the return without significant compromise to the stoppings, there was a possibility that these incidents could occur, albeit low. Additionally, because mining had substantially advanced past the cited areas, and there had been an appreciable build-up of dust and dirt in the areas, as well as the tightness of the wedges used to secure the stoppings, I am persuaded that the holes and the unsealed combustible materials in the stoppings existed prior to

the pre-shift examination. I also find that the conditions were obvious, and that Consol has not proffered any evidence proving otherwise. Consequently, I conclude that the conditions were hazardous, obvious, and should have been recorded in the pre-shift examination report. Respecting the remaining four conditions, Consol argues that they do not support Order No. 7073382 because they, too, were not hazards. Kaczmark testified that the rib rolls obstructing the clearance on the tight side of the belt had probably existed for more than a week since lateral pressure from continued mining puts pressure on the ribs, which, over time, weakens and crushes the coal, creating a rib roll. Tr. 298. According to Kaczmark, this is not a process that could occur within a matter of hours, because it takes time for the ribs to crush the coal and roll in. He further stated that the rolls were actually "higher than the belt itself," making them very visible from the walkway side of the belt. Tr. 298-99. He described the obstructed walkway as slippery and sitting between a solid block of coal on the one side, and a fast moving belt on the other side. Tr. 295-98. This was a hazard, in his opinion, because miners have to walk on the tight side of the belt daily to install monorail and replace rollers. Tr. 294-95, 417.

Consol asserts, to the contrary, that this violation was based on a safeguard issued to the mine, and was not a hazardous condition, in and of itself. As previously stated, the tight side of the belt is only traveled when maintenance is needed, and is not a travelway. Additionally, Huth, testifying to the state of conditions at the time of Kaczmark's inspection, stated that the rib rolls were not in any areas where monorail was being installed or would be in the near future. Tr. 576. Monorail is installed a few blocks from the face, which was situated at the last crosscut, number 31 ½. Tr. 577-78. Although Kaczmark deemed this a hazardous condition, Consol points out that he gave the company one week to clean it up. Tr. 424-26. The fact that the violation may have been based on a safeguard does not make the condition any less hazardous. Consol has offered no evidence indicating that the rib rolls may have occurred after Despot's examination, nor has it argued that the rolls were somehow concealed or difficult to spot by the pre-shift examiner. In fact, Kaczmark credibly testified that the rib rolls were very visible from the wide side of the belt. I find that the condition existed at the time of the pre-shift examination, that it was obvious, and that the pre-shift examiner should have identified and recorded it.

Kaczmark also concluded that the three rollers turning in loose, black coal had not occurred after the pre-shift examination, because the belt had been running during the entire shift and there were piles of coal fines in various locations along the belt. Tr. 323, 327. The accumulation under the rollers was 12 inches long and 6-8 inches deep. Resp. Ex. R-2. Additionally, Kaczmark testified that the belt was rubbing the stand with such friction that it emitted a smell, which was a sign of heat. Tr. 323-24. In his opinion, continued heat would have led to a belt fire. Tr. 324. As a result of Kaczmark's observation, Consol took the belt out of operation. Tr. 324-25. After the belt was shut down, Kaczmark did not touch the rollers to feel if they were hot. Tr. 387-88.

Consol argues that this condition could have been missed by any pre-shift examiner. There are 528 rollers over the 1.5 mile stretch at issue. Out of the 528, there were only three rollers touching accumulations. Tr. 598. Moreover, the condition was present on the tight side

of the belt where workers only go to perform maintenance, and not the wide side, the travel side. Tr. 379-380. Huth testified that it is company policy that the men, including the pre-shift examiners, are not permitted to walk the tight side of the belt. Tr. 620. To see rollers on the tight side, Huth stated, one has "to get down on a knee and get low to see across," because the "belt runs pretty close to the ground." Tr. 592; see also Tr. 381-82. When miners are conducting pre-shift examinations, they periodically get down on bended knee to look at the tight side of the belt. Tr. 592-93. Kaczmark admitted that the condition was not visibly apparent and stated that he smelled the belt rubbing, which is what caused him to look down at the rollers on the tight side. Tr. 389, 391-92. He went on to opine that it is possible that the pre-shift examiner could have missed the condition because there may have been no smell several hours earlier and, thus, it would not have caught his attention. Tr. 391-93. On the other hand, Huth testified that during the inspection, he did not smell anything, nor did Kaczmark mention the smell. Tr. 590-91. As support, Consol points to Kaczmark's and Huth's notes, neither of which make mention of any smell. Tr. 388-390, 590-91. Kaczmark also acknowledged that he did not see any smoke. Tr. 388-89.

Although, it is likely that the condition existed at the time of Despot's pre-shift examination, the record does not establish that the condition was obvious. The condition was on the side of the belt that is not routinely traveled, and was positioned such that one would have to kneel down to see it. Kaczmark admitted that it was the smell that prompted his attention. Although it can be challenging for a pre-shift examiner to identify all hazards, particularly in a case such as this where the run is long and contains a high number of rollers, and where the affected ones are operating on the less visible side of the belt, this condition has such potential for harm that heightened attention must be paid to the examinations. Huth testified that, in general, pre-shift examiners usually take one to two hours of the three hours allotted to complete their examinations. Tr. 620-22. Especially in situations such as this, however, where the condition of rollers on the travel side of the belt suggest that similar conditions may exist on the tight side, examiners should be more thorough. Therefore, I find that a more thorough examination was required and, that the condition should have been identified and recorded in the pre-shift report.

Kaczmark also observed two rips in the guarding at the take-up pulley. He believed that the condition had existed for more than one shift because of the blackened rips in the plastic guard, which color would have been pure white when the ripping initially occurred. Tr. 317, 320-21. Because the miners travel over uneven, slippery bottom along the belt line, they are at risk for trips and falls into the belt, which is moving at 300-400 feet per minute. Tr. 318, 322. Consol counters that Kaczmark's contention, that discoloration of the rips is an indicator of how long the condition existed, is unfounded. The company points out that, in Kaczmark's notes on this citation, there is no notation of discoloration. Tr. 431-44. Kaczmark also failed to mention discoloration in his deposition, when discussing how long the hazard had existed. Tr. 431-44. Huth offered an alternative explanation, stating that the rips could just as well have been discolored by a detached belt flapper coated with coal, as it flapped along as the belt ran. Tr. 599-603. This could occur very quickly and could have happened at any time, including after

the pre-shift examination. Tr. 601-02. I find Huth's explanation just as plausible as Kaczmark's and, therefore, conclude that, from the evidence as a whole, there is no sure way of determining when the rips occurred. Because they could have occurred subsequent to the pre-shift examination, I conclude that this condition does not support the inadequate shift violation.

The final hazardous condition concerns a visible crack in the roof along a travelway. Tr. 314. The crack was separated from the solid coal by nine inches, and ran 14 feet back into the stopping in the number 23 ½ crosscut, a portion of which extended along the walkway. Ex. R-2; Tr. 376-77. Kaczmark testified that the supporting straps were starting to show signs of stress from the weight of the weakening roof. Tr. 373-74. He believed that the crack existed for more than one shift, because rockdust had already settled into the crack and covered rock that would have been shiny if the crack had been new. Tr. 314; Ex. R-2. This condition was hazardous, the Secretary asserts, because it could have led to a roof fall over a travelway used by mine examiners and belt shovelers. Tr. 315. Consol counters that a roof fall was not reasonably likely to occur because the support straps were still in place and the roof bolts were securely implanted. Tr. 588-89; Resp. Br. at 21. The company also argues that the existence of rockdust, alone, is not sufficient to demonstrate that the condition existed prior to the shift in question. I find that the condition was a hazard, that it was obvious, and that the presence of rockdust, coupled with visible stress on the roof straps, make it more likely than not that the condition existed at the time of the pre-shift examination.

I conclude that at the time of the pre-shift examination, there were open holes in stoppings, holes containing combustible materials in stoppings, and rib rolls on the tight side of the belt that should have been identified as hazardous conditions and recorded in the pre-shift report. Likewise, although the rollers turning in coal accumulations on the tight side of the belt may not have been obvious, and the roof supports may have been holding steady, Consol should have identified the conditions as hazards and recorded them in the pre-shift report. Therefore, I find that the Secretary has proven that Consol violated section 75.360(f).

B. Significant and Substantial

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission set forth four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'd* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

The fact of the violation has been established. The focus of the S&S analysis here is whether the violation was reasonably likely to result in an injury producing event. In *U. S. Steel Mining Company*, the Commission provided further guidance:

We have explained that the third element of the *Mathies* formula “requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.” We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial.

U. S. Steel Mining Co., 7 FMSHRC 1125, 1129 (Aug. 1985) (citations omitted). Openings and combustible materials in stoppings, rib rolls, combustible coal accumulations, and inadequate roof support over travelways are serious conditions that could result in injuries ranging from cuts, bruises, sprains, broken bones and contusions to fatalities. All conditions presented discrete safety hazards, e.g., slip and fall, the possibility of fire or explosion, and roof fall. If any of these events were to occur, it is reasonably likely that injuries resulting to miners would be of a reasonably serious nature.

An evaluation of the reasonable likelihood of injury should be made in the context of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co.*, 6 FMSHRC 1573 (July 1984). Moreover, resolution of whether a violation is S&S must be based “on the particular facts surrounding the violation.” *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

It has been established that injury was unlikely to result from the open holes in the two stoppings and the three stoppings filled with combustible materials. Furthermore, the three stoppings with combustible materials were also unlikely to result in injury since there was no scoop present, nor any other identifiable ignition source. With regard to the rib rolls, I credit Huth’s testimony and find that a slip and fall hazard was not reasonably likely to occur because the tight side of the belt is not regularly traveled, and the rib rolls were not in any areas where monorail was being installed.

Respecting the rollers turning in coal accumulations, the Commission has established that a coal accumulation violation is S&S where potential ignition sources are posed by, among other things, frictional contact between belt rollers and accumulations, and the belt rubbing against the frame. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994). Understanding that there are a vast number of rollers along the E-14 longwall belt, some on the less obvious, tight side, and the challenge this presents to pre-shift examiners, I, nevertheless, cannot overlook the fact of the rollers that were turning in coal accumulations, and that this frictional contact was a possible source of ignition.⁴ If this condition had been allowed to persist, it is reasonably likely

⁴ On cross-examination, Kaczmark stated that there was no possibility that the coal accumulations under the rollers were wet. However, at his deposition, he admitted that he did

that it would have led to a fire or explosion. In addition, the belt rubbing the structure could also have generated a spark, thus, presenting another ignition source.

With regard to the crack in the roof, the “adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard.” *Cannon Coal Co.*, 9 FMSHRC 667, 668 (April 1987). As previously indicated, the straps supporting the roof were showing signs of stress from the weight of the weakening roof. Huth conceded that the straps “were bent down some from that piece falling,” but stated that “that is relatively common for the side of the strap,” and that the straps were still in place, working as intended. Tr. 588-89. The bolts were also securely implanted in the roof and, according to Huth, if the supports were not working, more of the bolts would have been visible. Tr. 589. Consequently, Consol asserts that there was no reasonable likelihood of a roof fall. I am not persuaded. The extensive crack, along with the signs of stress on the straps from the weakening roof, were indicative of adverse roof conditions or, at the least, that the roof was changing, such that adjustments to the roof supports were warranted. If normal mining operations had continued, uninterrupted, I find that the condition would have been reasonably likely to result in a roof fall in an area where miners worked and traveled.

I conclude that the coal accumulations and the crack in the roof were reasonably likely to result in injury causing events, and that the resulting injuries would be serious. I find that these hazards, which Consol failed to adequately identify in its pre-shift examination, support the Secretary’s allegation that Consol’s violation was S&S. Accordingly, I affirm the Secretary’s S&S finding.

C. Unwarrantable Failure

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d at 136 (approving the Commission’s unwarrantable failure test). The Commission has recognized the relevance of

not note the moisture level of the accumulations in his notes, and that it was indeed possible that the accumulations were damp to wet. Tr. 384-85. At hearing, Kaczmark conceded that making notations of everything he observes is important, because these factors are used in determining the likelihood of a fire. Tr. 387. I do not find Kaczmark’s testimony that the coal fines were dry credible, because of his conflicting statements and his admission that he did not examine them for moisture content. In any event, even if the coal had been wet, the Commission has recognized that wet coal can dry out and ignite. *See Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985).

several factors in determining whether conduct is “aggravated” in the context of unwarrantable failure, such as the extensiveness of the violation, the length of time that the violation has existed, the operator’s efforts in eliminating the violative condition and, whether the operator has been put on notice that greater efforts are necessary for compliance. *See Consolidation Coal Co.*, 22 FMSHRC 328, 331 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994). The Commission has also considered whether the violative condition is obvious, or poses a high degree of danger. *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999) (citing *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984)). Each case must be examined on its own facts to determine whether an actor’s conduct is aggravated, or whether mitigating circumstances exist. *Eagle Energy, Inc.*, 23 FMSHRC 829, 834 (Aug. 2001) (citing *Consol*, 22 FMSHRC at 353). Negligence is the failure to meet the standard of care required by the circumstances.

The Secretary argues that the inadequate pre-shift examination was the result of Consol’s unwarrantable failure because the hazards missing from the report were extensive, obvious, posed a high degree of danger, and existed long enough for miners to begin working in the hazardous areas. Resp. Br. at 10. The pre-shift examination report was signed by the foreman and mine manager, putting Consol on notice of the conditions. I find, however, that there are mitigating factors. The weight of the evidence shows that the coal accumulations on the tight side of the belt were not obvious. There was no visible smoke to speak of, and Inspector Kaczmark conceded that there may have been no smell at the time of the pre-shift examination. It is also clear that, but for the smell of the rollers, Kaczmark, too, would have missed the cited accumulations. Regarding the roof condition, although the straps were not in optimal condition, they, and the roof bolts, were securely in place.

Consequently, I find that the Secretary has not met her burden of establishing aggravated conduct, and that the violation was a result of Consol’s moderate negligence, not its unwarrantable failure to comply with the standard. Accordingly, the Order shall be modified to a section 104(a) citation.

Citation No. 7071787

Order No. 7071787 was issued by MSHA Inspector Radolec for a violation of 30 C.F.R. § 75.400 for combustible coal accumulations along the 3 North Number 1 main conveyor belt. Ex. G-4; Stip.10. Section 75.400 provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

30 C.F.R. § 75.400. Rodolec determined that the violation was highly likely to result in injury or illness that would be permanently disabling, that the violation was S&S, that one person was affected, and that the operator's negligence was high. Ex. P-4. The Order was issued under section 104(d)(1) of the Act, alleging Consol's unwarrantable failure; subsequently, it was modified to a 104(d)(1) citation. Rodolec described the "Condition or Practice" as follows:

An accumulation of combustible materials consisting of coal, coal fines and coal dust exist[s] on the 3 North No. 1 Main Conveyor Belt, starting at the end of the conveyor belt take-up and continuing inby to number 5 ½ crosscut. These combustible accumulations measured from 6 feet wide by 25 feet long and from 1 inch to 12 inches in depth under the bottom conveyor belt and belt rollers, behind the conveyor belt take-up. Additional accumulations of combustible material also existed in the inby side of the E-1 belt overcast to number 5 ½ crosscut. Where the combustible accumulations contacted the bottom of moving convey[or] belt and rollers. These combustible accumulations at number 5 ½ crosscut measured 150 feet long by 12 to 18 inches wide and up to 10 inches deep.. These combustible accumulation[s] were dry powdery and somewhat compacted coal dust. Additional combustible accumulations of coal existed under bottom rollers that [sic] numerous locations between number 5 ½ crosscut to the E-1 belt overcast. These combustible accumulations under the bottom belt and conveyor belt rollers consisted of a shovel full to needing extensive shoveling to completely remove the combustible accumulations under numerous conveyor belt roller[s] and bottom conveyor belt.

Ex. P-4. Respondent challenges the S&S designation of the citation, as well as the unwarrantable failure allegation. Resp. Br. at 2-7.

A. Significant and Substantial

The fact of the violation has been established. Stip 10-16. The combustible coal accumulations presented the possibility of a fire or explosion in the cited area. If either event were to occur, it is reasonably likely that injuries resulting to miners, e.g., burns or smoke inhalation, would be of a reasonably serious nature. The focus of the S&S analysis here turns on the third element of the *Mathies* criteria, i.e., whether the violation was reasonably likely to result in an injury producing event.

The Secretary argues that several factors support a conclusion that a fire or explosion was reasonably likely to occur: that the accumulations consisted of loose, dry coal dust along a belt line with the belt running on packed and in loose coal; that the belt and rollers were in contact

with the coal; that the belt was rubbing against the conveyor framework which had been cut in two; that some of the accumulations were dry; that there were damp to wet accumulations being dried by the rubbing of the belt and; that there was a friction source present. In support of her position, the Secretary points to *Amax*, a case in which the Commission upheld the ALJ's finding that an extensive accumulation of loose, dry coal and float coal dust along a belt line, with the belt running on packed, dry coal and in loose coal, was a potential source of ignition and showed a reasonable likelihood of an injury causing event. *Amax Coal Co.*, 19 FMSHRC 846 (May 1997). As further support, the Secretary cites *Mid-Continent*, 16 FMSHRC 1218, in which the Commission vacated the ALJ's finding that 12-inch high, mostly dry coal accumulations, that were in contact with the belt and the belt rollers, as well as the conveyor framework that was being rubbed by the belt, were not reasonably likely to result in a fire because the coal was of low combustibility.

Consol argues that there was no likelihood of a fire or explosion, and if there were, it was only slight. The accumulations were identified in August, which, because of seasonal warm weather, is when moisture is prevalent in mines in that region. Resp. Br. at 13-14. The moisture in the air is absorbed by the coal and accumulations, which makes them less likely to ignite than dry coal. Resp. Br. 14. Radolec's notes, contrary to his testimony at hearing, confirmed that the first accumulation consisted of "damp, wet coal fines," and "damp coal dust." Ex. 9, p. 12; Tr. 106. Consol asserts that this accumulation was 6 ½ to 7 feet below the belt, so there was no friction to speak of or potential ignition source. Tr. 103. Additionally, with respect to the second accumulation, the company argues that only three rollers were making contact with accumulations over the entire 600 feet of inspected belt. Resp. Br. at 15; Tr. 112-13. Although bearings in rollers can wear over time and produce heat caused by friction, Radolec admitted that the rollers were not hot. Resp. Br. at 15; Tr. 112-13. The heat gun used by Overfield to gauge the temperature of the affected rollers indicated that the rollers were only 74 degrees, whereas Radolec testified that the temperature of the coal would have to be over 500 degrees to ignite; according to Workley, 300 degrees is the threshold temperature. Tr. 121-22, 650. Radolec also conceded that the area where the belt was rubbing the belt structure was not hot from friction. Tr. 123-24. There was also no possibility of ignition near the third accumulation because neither the belt nor the rollers were rubbing the accumulations and the rollers were not generating heat. Tr. 128; Resp. Br. at 16.

When examining the reasonable likelihood of a fire or explosion, the Commission considers whether a "confluence of factors" was present based on the particular facts surrounding the violation, including the extent of the accumulations and the presence of possible ignition sources. *Amax*, 19 FMSHRC at 848 (quoting *Texasgulf, Inc.*, 10 FMSHRC 498, 500-03 (Apr. 1988)). The Commission also considers whether methane was present, and what type of equipment was in the area. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 9 (Jan. 1997) (quoting *Utah Power & Light Co.*, 12 FMSHRC 965, 970-71 (May 1990)); *Texasgulf*, 10 FMSHRC at 500-03.

In a factually similar case, the Commission determined that a violation was S&S where there were "potential ignition sources such as frictional contact between the belt rollers and the

accumulations, the belt rubbing against the frame, electrical cables for the shark pump, the electrical devices for the longwall and one area in the longwall that was not being maintained.” *Mid-Continent Resources, Inc.*, 16 FMSHRC at 1222. The Commission further found that it was immaterial that there was no identifiable hot spot in the accumulations because continued normal mining operations must be taken into account when evaluating the circumstances. *Id.*

I reject Consol’s argument that the violation was not S&S because coal is less combustible during summer months when its moisture content is high. At best, damp to wet coal may delay combustion but, as the Commission has previously concluded, “even absent a fire, accumulations of damp or wet coal, if not cleaned up, can eventually dry out and ignite.” *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 5, 1985). “A construction of the standard that excludes loose coal that is wet or that allows accumulations of loose coal mixed with noncombustible materials, defeats Congress’ intent to remove fuel sources from mines and permits potentially dangerous conditions to exist.” *Id.* Further, as Consol has done little more than simply state that fire resistant belts were in use at the mine on August 9, without a more detailed explanation of their retardant capabilities, I am unable to give this argument significant weight. Consol has simply failed to support its assertion that the belts were unlikely to catch fire.

I do not believe, however, that there was an ignition source near the first accumulation, which was situated 6 ½ to 7 feet below the belt. Tr. 103. Radolec conceded that there “was a slim chance” of these accumulations igniting. Tr. 103-04. The only ignition source would have been from the belt, itself, catching fire and flames falling onto the accumulations seven feet below. Tr. 103. With regard to the third accumulation, neither the belt nor the rollers were rubbing the accumulations, and the Secretary did not allude to any other source of friction that might have led to an ignition. Radolec, acknowledged that if a fire started, it was “not likely that it would start there.” Tr. 129. Furthermore, the Secretary asserts that there was energized equipment in the area. However, the fact that electrical equipment could somehow result in an ignition is insufficient to establish that the violation was S&S. *See Amax Coal Co.*, 18 FMSHRC 1355, 1358-59 (Aug. 1996). Radolec failed to specifically identify any particular piece of equipment that may have been a potential source of ignition, or any identifiable defects in any equipment that may have produced a spark that would ignite these particular accumulations.

The second group of accumulations was extensive. Radolec testified that these accumulations at the number 5 ½ crosscut measured 150 feet long, between 12 and 18 inches wide, and up to 10 inches deep. Tr. 40, 111. In other locations, there were accumulations of float coal dust on the mine roof and ribs, and on top of the overcast, metal conveyor belt structures, and electrical cables along the belt. Tr. 38. There were also three rollers turning in the accumulations which were dry, powdery, and compacted, the bottom conveyor belt was rubbing the coal dust for a distance of 150 feet, and the belt had cut in half one of the metal belt stands. Tr. 40-41.

I find that the three rollers turning in the second group of accumulations, which were dry, powdery, and compacted, were a potential source of ignition. I further find that the bottom

conveyor belt rubbing the coal and the conveyor belt structure was also a potential ignition source. Consol's arguments that the rollers were not hot and only measured 72 to 74 degrees, and that the belt and rollers were not rubbing the accumulations at the time of Radolec's inspection, do not take into account the likelihood of these conditions worsening, if not corrected, as normal mining operations continued. The likelihood is further enhanced by virtue of the float coal dust at the number 5 ½ crosscut, which could propagate a mine fire or explosion. I find that the accumulations in question were reasonably likely to result in an ignition of a fire, explosion or propagation thereof. Accordingly, I find that the violation was S&S.

B. Unwarrantable Failure

The Secretary argues that the violation was the result of Consol's unwarrantable failure because the accumulations were extensive, obvious, and posed a high degree of danger. Resp. Br. at 10. Additionally, the accumulations had been recorded in the pre-shift examination report for the shift during which the MSHA inspection was conducted, as well as the report for the day before, showing that the hazardous condition had existed for sufficient time to support an unwarrantable failure finding. The pre-shift examinations were signed by the foreman and mine manager, thereby putting Consol on notice of the condition.

It has already been established that the accumulations were extensive, and that is further evidenced by the fact that it took six miners four hours to clean up the accumulations before the conveyor belt could be restarted. Tr. 62. The accumulations were obvious because Radolec spotted them on both the wide and tight sides of the belt while he was walking the belt line. Tr. 38. Even if the pre-shift examiner had only spotted the accumulations on the wide side of the belt, they were so extensive and obvious that he should have anticipated that there could be accumulations on the tight side as well, even if not readily visible to him. With regard to the length of time that the condition existed, the 7th Circuit has concluded that extensive accumulations that were present at least one shift, and not removed after one pre-shift examination, provided an adequate basis to establish an unwarrantable failure finding. *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133,136 (7th Cir. 1995); *see also Windsor Coal Co.*, 21 FMSHRC 997 (Sept. 1999) (extensive accumulations existing for more than one shift supported unwarrantable failure finding); *Mid Continent Res., Inc.*, 16 FMSHRC 1226, 1232 (June 1994) (failure to correct coal accumulations recorded in pre-shift examination reports over two days constituted unwarrantable failure). In this case, pre-shift examination reports indicate that accumulations existed for at least two shifts.

Additionally, in examining an unwarrantable failure finding related to section 75.400, the Commission has recognized that:

[P]ast discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan. 1997). Likewise, a high number of past

violations of section 75.400 serve to put an operator on notice that it has a recurring safety problem in need of correction and the violation history may be relevant in determining the operator's degree of negligence. *Peabody*, 14 FMSHRC at 1263-64.

Consolidation Coal Co., 23 FMSHRC 588, 595 (June 2001).

Consol was on notice that greater corrective measures were required to prevent coal dust accumulations by virtue of the fact that it had engaged in numerous, regular discussions with MSHA representatives about the issue in the past, several of which Inspector Newhouse testified to having personally participated in. Furthermore, Consol had been cited for violating section 75.400 seventy-two times during the previous year. Tr. 172; *see Consolidation Coal Co.*, 23 FMSHRC at 595 (ALJ's finding of no unwarrantable failure reversed where operator received previous warning from MSHA regarding "borderline to substandard" clean-up efforts, and had received 88 citations during the previous two years for violations of section 75.400); *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997) (ALJ's finding of unwarrantable failure affirmed where MSHA had repeated discussions with mine management regarding section 75.400 compliance, and operator received 98 citations over 10 months for violating section 75.400).

The record also supports a finding that Consol was on notice of the violative condition by virtue of the mine manager's signature on the pre-shift examination reports for August 8 and 9, in which the conditions had been recorded. Consol admitted that its efforts consisted of only attempting to clean the wide side of the belt, and not the tight side. Tr. 539, 553. It has also been established that the violation posed a significant degree of danger, in that accumulations were reasonably likely to lead to, or propagate a mine fire or explosion. Therefore, I find that sufficient evidence exists to support a conclusion that the cited conditions were the result of Consol's unwarrantable failure.

Order No. 7073658

Order No. 7073658 is factually similar to Citation No. 7071787. The Order was issued by MSHA Inspector Rihaley for a violation of section 75.400 for combustible coal accumulations and/or coal fines along the Number 1 main belt conveyor. Stip. 28. Rihaley determined that it was highly likely that the violation would result in an injury or illness involving lost work days or restricted duty, that the violation was S&S, that five employees were affected, and that the operator's negligence was high. The Order also alleges that the violation was the result of Consol's unwarrantable failure to comply with the standard. Ex. P-6. The "Condition or Practice" is described as follows:

There was an accumulation of packed coal fines under and in contact with a bottom roller at 4 ½ crosscut on the # 1 Main belt conveyor. Also at this location the bottom of this belt was rubbing this accumulation for a distance of approximately 3 ½ feet and was

dry and dusty where it was rubbing.

5 x-cut — stuck bottom roller with dry coal fines built up around the roller and in contact with the belt.

Take-up pulley — turning in coal tight side, dry, 3 feet in length, 2 feet width and height.

8 x-cut — half of bottom roller missing with belt rubbing the structure and coal fines, also the next inby bottom roller was turning in coal fines and a 2 foot section of belt. The fines were dry and producing visible dust.

9 x-cut — 1 stuck bottom roller and 3 inby rollers turning in coal fines, also the belt was rubbing these fines at each location for a distance of at least 1 foot.

10 ½ x-cut — packed coal fines in contact with a bottom roller and 4 feet of belt, dry and producing visible dust.

13 ½ x-cut — 1 stuck and broken roller and another turning in packed coal.

14 x-cut and 14 ½ crosscut — bottom rollers turning in coal.

15 x-cut — bottom roller and from 8 to 10 feet of belt in contact with dry coal fines, producing visible dust.

14 x-cut — coal spillage tight side, 40 feet in length, 2 to 3 feet width and 6 to 16 inches in depth. This condition also existed at intermittent locations to inby 16 x-cut.

There was coal dust and coal float dust intermittently deposited on the previously rockdusted surface of the #1 Main belt from the head roller to inby 16 x-cut, this was mostly under and on the tight side in the form of a film.

The operator may run this belt to remove the clean-up.

The fact of the violation has been established. Stip. 28-31. Respondent challenges the S&S designation of the Order, as well as the unwarrantable failure allegation. Resp. Br. at 2-7.

A. Significant and Substantial

The focus here is the third element of the *Mathies* test, i.e., whether the violation was reasonably likely to result in an injury producing event. Rihaley's testimony describes extensive accumulations along the Number 1 main belt conveyor and likely ignition sources. Tr. 217-31.

The rollers turning in coal accumulations at a minimum of five different locations along the belt, the belt rubbing the structure at the number 8 crosscut, and the belt rubbing coal fines at five different locations, all present potential ignition sources. There were also stuck and broken rollers which could generate sparks. I find that the accumulations were reasonably likely to result in an ignition of a fire, explosion, or propagation thereof. Accordingly, I find that the violation

was S&S.

B. Unwarrantable Failure

The accumulations were extensive, and existed at numerous locations along the Number 1 main belt conveyor. Although Rihaley failed to describe the dimensions of each accumulation in question, there were several instances where the accumulations were high enough to reach the bottom rollers. The accumulations were easily seen by Rihaley as he walked along the belt line and, therefore, were obvious. Tr. 226. Much like the previous citation, several conditions were recorded in prior pre-shift examination reports, going back two shifts. For the same reasons applied to Citation No. 7071787, I find that sufficient evidence exists to support a finding that the cited conditions occurred as a result of Consol's unwarrantable failure to comply with the standard.

IV. Penalty

While the Secretary has proposed total civil penalties in the amount of \$19,300.00 for these violations, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j). See *Sellersburg Stone Co.*, 5 FMSHRC 287, 291-92 (Mar. 1993), *aff'd*, 763 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, I find that Consol is a large operator with a one-year history of 72 violations of 30 C.F.R. § 75.400, which I find to be significant. As stipulated by the parties, the total proposed penalty will not affect Respondent's ability to continue in business. Stip. 8. I also find that Consol demonstrated good faith in achieving rapid compliance, after notice of the violations.

The remaining criteria involve consideration of the gravity of the violations and Consol's negligence in committing them. These factors have been discussed fully, respecting each citation. Therefore, having considered the six penalty criteria, the penalties are set forth below.

Order No. 7073382

The Secretary proposed a civil penalty of \$5,600.00 for this violation. It has been established that this S&S violation of 30 C.F.R. § 75.360(f) was reasonably likely to cause an injury that would result in lost workdays or restricted duty, that it was due to Consol's moderate negligence. The Order shall be modified to a citation issued pursuant to section 104(a) of the Act. Applying the civil penalty criteria, I find that a penalty of \$2,500.00 is appropriate.

Citation No. 7071787

The Secretary proposed a civil penalty of \$6,200.00 for this violation. It has been

established that this S&S violation of 30 C.F.R. § 70.400 was highly likely to cause an injury that would be permanently disabling, that it was due to Consol's high negligence and unwarrantable failure to comply with the standard, and that it was timely abated. Applying the civil penalty criteria, I find that a penalty of \$6,200.00 is appropriate.

Order No. 7073658

The Secretary proposed a civil penalty of \$7,500.00 for this violation. It has been established that this S&S violation of 30 C.F.R. § 70.400 was highly likely to cause an injury that would result in lost workdays or restricted duty, that it was due to Consol's high negligence and unwarrantable failure to comply with the standard, and that it was timely abated. Applying the six civil penalty criteria, I find that a penalty of \$7,500.00 is appropriate.

ORDER

WHEREFORE, Citation No. 7071787 and Order No. 7073658 are **AFFIRMED**, as issued, Order No. 7073382 is **AFFIRMED**, as modified, and it is **ORDERED** that the Secretary **MODIFY** Order No. 7073382 to a citation issued pursuant to section 104(a) of the Act, 30 U.S.C. § 14(a), and reduce the degree of negligence from "high" to "moderate," and that Respondent pay a civil penalty of \$16,200.00, within 30 days of this decision. Accordingly, this case is **DISMISSED**.


Jacqueline R. Bulluck
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 14, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2008-1585
Petitioner	:	A.C. No. 48-01694-162385
	:	
v.	:	
	:	
ARCH OF WYOMING, LLC,	:	Elk Mountain Mine
Respondent	:	

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Act"). The Secretary filed a motion for summary decision under Commission Procedural Rule 67, 29 C.F.R. § 2700.67. In response, Arch of Wyoming, LLC ("Arch") filed a cross-motion for summary decision. Both parties briefed the issues.

On January 10, 2008, Inspector Richard Dickson with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 7622039 under section 104(a) of the Act alleging a violation of 30 C.F.R. § 77.1605(k). The citation alleges:

The upper and lower drill benches, located in the North Elk Mtn. Pit area, and being approximately 300' and 200' respectively, were constructed without necessary berms on the outer edges. The vertical drop from the top bench to the lower bench was estimated to be 20'. The vertical drop from the lower bench to the natural ground was estimated to be 12' tapering to 0'. Drillers and blasters and their vehicles are required to travel these drill benches extensively and frequently, which exposes them to the hazard of overtravel and overturning from these benches. Very high wind conditions and lack of visibility also exist in this pit area.

Inspector Dickson determined that it was reasonably likely that the cited condition would injure a miner and that the violation was significant and substantial ("S&S"). He also determined that Arch's negligence was high. The safety standard provides that "[b]erms or guards shall be provided on the outer bank of elevated roadways." 30 C.F.R. § 77.1605(k). The Secretary proposed a penalty of \$2,106.00 for the citation.

Inspector Dickson also issued Citation No. 7622040 alleging a violation of section 77.1713(a) because he believed that the conditions cited in the previous citation “should have been noticed and corrected by a certified person during the pre-shift examination of the pit and surrounding areas.” He determined that it was unlikely that the cited condition would injure a miner and that the violation was not S&S. He determined that Arch’s negligence was high and the Secretary proposed a penalty of \$224. The standard provides that “[a]t least once during each working shift . . . each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions shall be reported to the operator and shall be corrected by the operator.” 30 C.F.R. § 77.1713(a).

The parties stipulated to key facts and also introduced other documents as attachments to their briefs. The stipulations are as follows:

1. Respondent Arch of Wyoming, LLC (“Arch”) owns the Elk Mountain Mine (Mine ID 48-01694) (the “Mine”).
2. Arch is engaged in mining operations in the United States, and its mining operations affect interstate commerce.
3. The ALJ has subject matter and personal jurisdiction over the dispute in this case.
4. Arch is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-965.
5. The Elk Mountain Mine is a surface coal mine.
6. Elk Mountain utilizes an open pit mining method and uses drill benches to create blast holes.
7. The drill benches are constructed using a Caterpillar D-10N bulldozer.
8. The benches are built to provide the drill with a safe and flat working surface on which to drill.
9. Once the drill benches are constructed, the shot pattern is then “staked” out in the field on a grid pattern with each blast hole at the desired “burden and spacing” (length and width); in this case, on a 25-foot x 25-foot grid.
10. The shot pattern is designed based on a desired pit width and anticipated length of shot which is determined by experience of drill pattern time.

11. The blast hole drill then begins drilling out the “gridded” pattern in a logical sequence that will enable the shooting crew to load each hole with explosives following the drill.
12. It is at this time that the shot pattern is barricaded and “signed” so that only authorized personnel can enter the shot pattern.
13. The signs read “DANGER – Blasting Area – Authorized Personnel Only.”
14. In order to load these holes, the ANFO truck needs to travel the line of blast holes to load the ANFO into the hole from an auger-fed tube.
15. The ANFO truck travels hole to hole at an obvious slow rate of speed since it only travels 25 feet, stops, loads the hole, and then travels to the next hole.
16. The shooters walk on the ground and load primers, delays, and shooting cord in each hole prior to the ANFO loading procedure.
17. Once a hole is loaded with primers, desired delays, shooting cord and ANFO they can be backfilled with “stemming” which is usually the drill hole cuttings.
18. This stemming will fill the remaining hole void once all explosives are in the hole so that it is filled to the ground surface and no “void” exists.
19. In most cases, a skidder is used to perform this backfill operation.
20. This is done in a sequence where there are a logical number of holes to be backfilled at the same time to allow for room for the skidder to work and not interfere with the drilling or loading operations.
21. This backfilling is performed so that no loaded blast hole is open at a shift’s end.
22. Once the entire shot pattern is completely loaded it is ready for detonation.
23. All equipment and personnel, with the exception of the shooting crew, are removed from the area.
24. The shooting crew then ties all of the loaded holes together with shooting cord and delays to blast the desired result.
25. The entire shot pattern is then detonated from a safe distance.

26. The foreman will enter the area at least once each shift during the entire process as outlined above to check on the drill, shooters, and inspect the area.
27. The shooters seldom, if ever, enter the area in their vehicle (pick-up truck) since everything they need is usually in the ANFO truck.
28. Traffic is kept to a minimum in an active drilling/blasting pattern.
29. The upper drill bench was approximately 300 feet long; and
30. The lower drill bench was approximately 200 feet long.
31. The vertical drop from the upper drill bench to the lower drill bench was approximately 20 feet tapering to 0 feet.
32. The vertical drop from the lower drill bench to the natural ground was approximately 12 feet, tapering down to where the lower drill bench sloped into the natural ground.
33. The benches varied in width from 35 feet to 45 feet.
34. Neither bench had berms at its outer edges.
35. Arch was responsible for building and maintaining the drill benches at this location.
36. Both the upper drill bench and the lower drill bench were divisions in the coal seam formed by the process of cutting coal from the earth.
37. [At] approximately 12:30 p.m. on January 10, 2008, the Mine Safety and Health Administration ("MSHA") inspected the Mine.
38. Richard Dickson inspected the Mine for MSHA.
39. On January 10, 2008, there were two drill benches above the North Elk Mountain mining pit at the Mine.
40. MSHA issued Citation No. 7622039 to Arch on January 10, 2008, alleging a violation of 30 C.F.R. § 77.1605(k).
41. Citation No. 7622039 terminated at 3:13 p.m. on January 10, 2008 after Arch constructed a berm, approximately 2.5 feet high, along the front edge of both the upper and lower drill benches.

42. MSHA also issued Citation No. 7622040 to Arch on January 20, 2008, alleging a violation of 30 C.F.R. § 77.1713(a) because the record showing the on-shift examination did not note the absence of berms on the drill benches.
43. Arch was responsible for conducting the daily on-shift examinations at the Mine's active working areas.
44. Arch was also responsible for maintaining the record of the daily on-shift examinations conducted at the Mine's active working areas.
45. Citation No. 7622040 terminated at 3:30 p.m.
46. The parties now dispute whether a drill bench at a surface mine is an "elevated roadway" under 30 C.F.R. § 77.1605(k).
47. Arch has never built berms on its drill benches.
48. MSHA has never previously issued Arch any citations for berms or failing to identify lack of berms at Elk Mountain.
49. There has never been a piece of equipment of any kind falling or driving off a drill bench at Elk Mountain.

II. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor.

The Secretary contends that the issue in this case is relatively simple: whether a drill bench at a surface coal mine is an "elevated roadway" under section 77.1605(k). She maintains that a drill bench is such an elevated roadway and that, as a consequence, Arch was required to install berms on the outer banks of the drill benches at the Elk Mountain Mine. The Secretary argues that the Commission has previously determined that a drill bench is an elevated roadway under the similar safety standard applicable to metal and nonmetal mines. *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35 (Jan. 1981). Several Commission administrative law judges have reached the same conclusion. The Secretary states that, when she promulgated that safety standard, she did not exempt drill benches from the scope of the standard. Finally, the Secretary maintains that her determination that a drill bench is an elevated roadway is reasonable and is entitled to deference by the Commission. The fact that Arch's drill benches had not been previously cited for the lack of berms should not affect the validity of the citation.

B. Arch of Wyoming.

Arch maintains that drill benches are not elevated roadways. The Secretary has not defined the term "elevated roadway" in her regulations. MSHA's "Haul Road Inspection Handbook" defines elevated roadways to include roads used "to transport coal, equipment, or personnel." At least one Commission administrative law judge has determined that a bench is not an elevated roadway provided that no vehicles transport coal, equipment, or personnel on the bench. *Peabody Coal Co.*, 6 FMSHRC 2530 (Nov. 1984) (ALJ). The drill benches at Arch are distinguishable from the benches discussed in *El Paso Rock Quarries*. Access to the benches at Arch is controlled and limited. Haulage vehicles and through traffic are prohibited. Only the drill, the explosives truck, and the skidder regularly travel on the drill benches. As a consequence, the drill benches are working places and not roadways. The Commission should not defer to the Secretary's interpretation of the safety standard because the plain language of the standard makes clear that it applies only to roadways and not to working places. Finally, it argues that the citations should be vacated because the Secretary did not provide adequate notice of her interpretation of the standard to Arch and other mine operators.

II. ANALYSIS WITH FINDINGS AND CONCLUSIONS

Section 2700.67 of the Commission's Procedural Rules sets forth the grounds for granting summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

I find that there is no genuine issue as to any material fact and that the Secretary is entitled to summary decision as a matter of law.

A. Citation No. 7622039.

1. Fact of Violation.

In *El Paso Rock Quarries, Inc.*, an MSHA inspector issued a citation because the operator had allowed haulage trucks to be driven on a bench before berms were installed. 3 FMSHRC 36. The judge affirmed the citation and the operator appealed on the basis that a bench is not an elevated roadway. The Commission affirmed the judge and held that a bench is an elevated roadway. In another contested citation at issue in the same case, the operator challenged a citation that was issued on a elevated roadway that provided access to the top of the quarry wall. The operator contested the citation because the roadway was not used to haul rock, but was used

to haul explosives and to provide access to areas which were to be drilled and blasted. The judge vacated the citation on the ground that the standard only applied to roads used for loading, hauling, and dumping and that the road was not used for any of those purposes.¹ The Commission reversed the judge and held that hauling explosive materials is the kind of haulage contemplated by the safety standard.

Several Commission judges have also determined that benches and the area above a highwall can be elevated roadways, as that term is used in section 77.1605(k). *S. & M. Construction, Inc.*, 19 FMSHRC 566, 576-77 (March 1997) (ALJ); *Peabody Coal Company*, 12 FMSHRC 109, 114-16 (Jan. 1990) (ALJ). More recently, Judge Miller reached the same conclusion. *Black Beauty Coal Company*, 32 FMSHRC ____, slip op. at 2-4, LAKE 2008-477 (March 25, 2010) (ALJ) (*Pet. for disc. rev. granted by Comm., May 4, 2010*).

Arch relies heavily on my decision in *Higman Sand & Gravel, Inc.*, 24 FMSHRC 87, 104-07 (Jan. 2002) (ALJ). The facts in that case, however, differ significantly from the present case. In *Higman*, the MSHA inspector cited the operator for not installing a berm along the edge of a pond in the sand pit. An excavator operated at the edge of the pond to scoop out sand from the pond, but the inspector determined that a berm was not required for this activity. The inspector cited the company because a loader was operated in the area. The loader operator loaded haulage trucks with the sand that had been excavated from the edge of the pond. The inspector also testified that he was not concerned with the haulage trucks because they did not travel near the edge of the pond. He said that berms were required because the loader was operated in the vicinity of the pond. I determined that the area in which the loader was operated was not an elevated roadway and that safety standard did not apply. *Id.* I held that the cited area was a "working place," as that term is defined in section 56.2, rather than an elevated roadway. The loader worked in the area loading material into dump trucks. This area was not a roadway but was the working place where material was being extracted from the pond.

Arch also relies on a decision by former Commission Judge John J. Morris in *Peabody Coal Company*, 6 FMSHRC 2530, 2540-45 (Nov. 1984) (ALJ). In that case, Judge Morris distinguished the facts in his case from the facts present in *El Paso Rock Quarries* and vacated a citation issued for the operator's failure to install berms on its benches. The facts revealed that trucks operated within 10 to 12 feet of the edge of the bench at the mine operated by El Paso Rock Quarries. At Peabody's Black Mesa Mine, on the other hand, the benches were 120 to 140 feet wide and trucks did not operate any closer than 60 feet from the edge of the bench. *Id.* at 2541. The judge determined that these differences were "crucial." *Id.* at 2542.

In the present case, the stipulations establish that the benches were used as roadways. The Elk Mountain Mine, a surface coal mine, uses drilling equipment to create blast holes. The

¹ The safety standard for metal and nonmetal mines provides that "[b]erms or guards shall be provided on the outer banks of elevated roadways." § 56.9300 (a). The heading for the standard is entitled "Loading, hauling, dumping."

benches are built using a bulldozer to provide the drill with a safe, flat surface on which to work. Once a drill bench is constructed, the shot pattern is staked out on a grid pattern with each blast hole at the desired location. The holes are on a 25-foot by 25-foot grid.

The holes are drilled in a logical sequence and the shooting crew loads the holes with explosives following the drill. The area is then barricaded and a warning sign is erected so that only authorized miners can enter the area. The explosive material used, an ammonium nitrate and fuel oil mixture known as ANFO, is brought onto the drill bench in a truck. The ANFO truck travels the line of blast holes to load the ANFO into the holes from an auger-fed tube. This truck travels at a slow rate of speed since it must stop every 25 feet to load the next hole. The shooting crew walks on the ground and install primers, delays, and shooting cord in each hole before the ANFO is added. Once the hole is loaded with primers, delays, shooting cord, and ANFO, the holes are filled with stemming using a track vehicle called a "skidder." Drill hole cuttings are typically used to fill each hole to ground level. Once the holes are loaded, all equipment and personnel, except the shooting crew, leave the area. The shooting crew ties all of the holes together and then the shot is detonated. Occasionally, the shooting crew uses a pickup truck to enter the drill bench, but they usually ride in the ANFO truck. The upper drill bench was about 300 feet long while the lower bench was about 200 feet long. The benches varied in width from 35 to 45 feet.

I find that Arch's reliance on *Higman Sand & Gravel* and *Peabody Coal* to be misplaced because they present significantly different factual situations from the present case. Arch points out that at the Elk Mountain Mine vehicles do not travel along the benches to get from one area of the mine to another nor do these vehicles transport material out of the area. In my decision in *Higman*, I relied on a number of factors when reaching the conclusion that the area cited was not an elevated roadway. The fact that vehicles did not use the area adjacent to the pond to travel from one area of the mine to another or that the loader did not transport material out of the area were two factors I considered. The key fact, however, that differentiates that case from the present case is that the cited area in *Higman* was clearly a working place, not a roadway. It was a loading area for dump trucks. It is instructive to note that the MSHA inspector who issued the citation at Higman did not believe that berms were necessary to protect the excavator or trucks operating in the same area. He only required berms for the loader operator.

I am not bound by Judge Morris's decision in *Peabody Coal* and the facts there are quite different as well. The judge credited evidence that vehicles did not travel anywhere near the edge of the benches in that case.

In the present case, a drill, the ANFO truck, and the skidder travel along on the bench. A pickup truck is driven on the bench in some instances. The fact that they do not transport material out of the area is not determinative. These vehicles travel along the bench to drill holes and load ANFO. The evidence establishes that the benches are 35 to 45 feet wide, are used as roadways, and are elevated. It is well established that the safety standard is not limited to roadways that are used by haulage vehicles that transport coal, equipment, or personnel. *El Paso*

Rock Quarries, at 36. The record in the present case establishes that all the vehicles described above enter the benches when drilling commences and that this same equipment is removed from the benches before detonation of the explosives. When on the benches, the vehicles travel along these benches as the holes are loaded. While it is true that the vehicles travel at a low rate of speed and access to the benches is limited, those factors do not affect the status of the benches as elevated roadways.

Arch also argues that the citation should be vacated because it was not provided with adequate notice of the Secretary's interpretation of the safety standard. I reject this argument. The Secretary's intent has been clear since 1981. The language of the berm standard applicable to metal and nonmetal mines is identical to that applied to coal mines. Commission judges have accepted the Secretary's interpretation that the standard applies to benches, except in very limited circumstances. The Secretary has provided the mining community with adequate notice of the requirements of the standard. MSHA's "Haul Road Inspection Handbook" provides that the cited safety standard "is applicable to all elevated roadways on mine property, including roads to transport coal, equipment, or personnel, and regardless of the size, location, or characterization of the roadways." (Sec'y Br. Ex. 5). Although this provision does not mention benches, it certainly does not support Arch's interpretation that only "haulage roads" are covered by the standard. Arch has never been cited for a violation of this standard on its drill benches at the Elk Mountain Mine. I have considered this fact when evaluating the negligence of Arch.

Based on the discussion above, I find that the Secretary established a violation of section 77.1605(k). The benches were elevated roadways and the outer banks of these roadways were not provided with berms.

2. Significant and Substantial Nature of the Violation; Gravity.

The Secretary argues that the violation was serious and S&S. She relies on the fact that the large vehicles that must operate on the benches are required to maneuver in tight spaces. She states that the types of vehicles operated on the bench were of special concern to Inspector Dickson. Visibility is restricted from the cab of the bulldozer used to build the benches. (Sec'y Br. Ex. 1, Declaration of Dickson ¶ 19). The ANFO truck is problematic because it is large and has less room to maneuver than the other trucks on the benches. (Dickson ¶ 22). Inspector Dickson believes that skidders are susceptible to tipping over on uneven terrain, and icy and muddy conditions make them difficult to control. (Dickson ¶ 25). The mine is in Wyoming and the ground can freeze and ice over in the winter. (Dickson ¶ 26).

An S&S violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel*, 6 FMSHRC at 1574. 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 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

I find that the Secretary established that the violation was S&S. The bench was rather narrow. Large vehicles traveled along the bench. Given the environmental hazards present and the types of vehicles that travel on the bench, it was reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. Although the vehicles do not travel at a high rate of speed, they must maneuver in tight spaces in all types of weather. Even a slight operator error could result in a vehicle tipping over the edge of a bench. The height of the benches varied, but they ranged up to 20 feet. A very serious or fatal injury would likely result if a vehicle went over the edge of a bench. Although no vehicle had ever slipped off the

edge of a bench at the Elk Mountain Mine, the conditions presented a serious risk that such an accident would occur assuming continuing mining operations. The violation was serious.

3. Negligence.

The inspector determined that Arch was highly negligent with respect to this violation. I find that the operator's negligence should be reduced. I base this finding on the fact that the mine has been in existence for several years and it has been inspected by MSHA many times. MSHA never previously issued a citation to Arch for a violation of this standard on its benches and MSHA never otherwise advised the company that berms were required. Although the Secretary is not required to advise mine operators what conditions violate her safety and health standards, Arch reasonably relied on the fact that citations had never been issued at this mine or at other surface coal mines owned by Arch Coal, Inc., for failing to have a berm on the outer bank of a drill bench. *See e.g. Dix River Stone, Inc.*, 29 FMSHRC 186, 203 (March 2007) (ALJ). In addition, the Secretary's written interpretations do not address the question whether benches are elevated roadways requiring berms. The failure of Arch to provide a berm was the result of its moderate to low negligence.

B. Citation No. 7622039.

In this citation, Inspector Dickson alleged that the lack of berms on the outer edges of the drill benches was "a safety hazard" and this hazard "should have been noticed and corrected by a certified person during the pre-shift examination of the pit and surrounding areas." The safety standard at section 77.1713(a) provides that "[a]t least once during each working shift . . . each active working area and each active surface installation shall be examined by a certified person designed by the operator to conduct such examinations for hazardous conditions and any hazardous conditions shall be reported to the operator and shall be corrected by the operator." 30 C.F.R. § 77.1713(a).

It is clear that the safety standard requires that "hazardous conditions" be reported and corrected. Such hazardous conditions are not limited to those conditions that violate MSHA's safety and health standards. In the present case, there is no allegation that an examination was not conducted or that the certified person who conducted the examination was not competent to conduct examinations for hazardous conditions. The only allegation is that the lack of berms on the outer edge of the drill benches created a safety hazard and the examiner did not report this condition to the mine operator and the condition was therefore never corrected.

The parties' arguments on this citation are rather superficial. The Secretary argues that Arch properly examined all other areas of the mine with the result that the rest of the mine was hazard-free at the time of the inspection, but that the examiner should have noted the lack of berms in the mine's examination records and steps should have been taken to install a berm. Arch argues that, because the drill benches are not elevated roadways, a berm was not required to

be installed at that location and no hazardous condition existed. It contends that the citation should be vacated.

The real issue here is whether a citation for failure to conduct a competent pre-shift examination should be affirmed in a situation in which the mine operator believed that the condition was not hazardous based, in part, on the Secretary's lack of enforcement of the underlying safety standard at the mine. I affirmed the berm citation and found that the failure to install berms on the edge of the drill benches created a serious safety hazard. Despite previous MSHA inspections, however, the condition had never been cited by MSHA. I have previously vacated citations issued under section 56.18002, a similar metal/nonmetal standard, when the Secretary simply relied on other citations issued during the same inspection to support the citation alleging a violation of the examination standard. In these cases, the Secretary is unable to establish that examinations were not being performed by a certified person, but she is trying to prove that the examinations were inadequate based in the fact that the MSHA inspector issued other citations at the mine. *See Dumbarton Quarry Associates*, 21 FMSHRC 1132, 1134-36 (Oct. 1999) (ALJ). Other judges have vacated examination citations in similar circumstances. *See Lopke Quarries, Inc.*, 22 FMSHRC 899, 911-12 (July 2000) (ALJ). In one case, I affirmed an examination citation where the hazards cited by the MSHA inspector were "so obvious that I [could] only conclude that the workplace examinations were rather cursory and superficial." *Clayton's Calcium Inc.*, 29 FMSHRC 230, 244 (March 2007) (ALJ).

In the present case, the lack of berms along the outer edge of the drill benches was obvious. This condition had never been recorded by certified persons during pre-shift exams at the mine because berms had never been present on benches. If an operator genuinely believes that berms are not required on benches and genuinely believes that the lack of berms in that location does not create a safety hazard, the qualified person cannot be expected to report this condition where, as in this case, the operator has never been cited by MSHA for the condition. Information at MSHA's website indicates that the mine has been operating since April 2006. Arch states that MSHA has never required berms on drill benches at any of the other surface coal mines owned and operated by Arch Coal, Inc. (Arch Br. 13).

Based on the above, I find that the citation should be vacated. The Secretary did not establish that the qualified person failed to perform a competent examination of the active working areas and each active surface installation at the mine, including an examination of the drill benches.

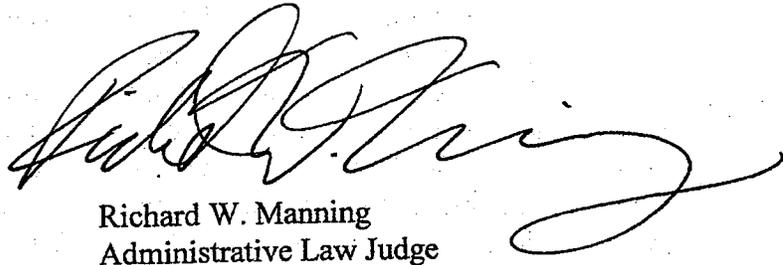
III. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. 30 U.S.C. § 110(i). The mine was not issued any citations in the 24 months preceding January 10, 2008. (S. Br. 16; Ex. 8). In 2007, 10,555 tons of coal was produced at the mine and Arch Coal, Inc., produced more than 10,000,000 tons of coal at all of its mines in 2007. Arch Coal, Inc. is a large operator. The penalty assessed in this decision will not affect the operator's ability to continue in business. The violation was abated in good faith.

My findings on gravity and negligence are set forth above. Based on the penalty criteria, I find that the Secretary's proposed penalty of \$1,600.00 for Citation No. 7622039 is appropriate.

IV. ORDER

The motion for summary decision filed by the Secretary is **GRANTED**, in part. The motion for summary decision filed by Arch of Wyoming, LLC, is **DENIED**, in part. Citation No. 7622039 is **AFFIRMED** in all respects except the negligence attributed to the operator is reduced. Citation No. 7622040 is **VACATED**. Arch of Wyoming, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,600.00 within 40 days of the date of this decision.²



Richard W. Manning
Administrative Law Judge

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RWM

² Payment should be sent to Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 14, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-14
Petitioner	:	A.C. No. 15-09636-125440
	:	
v.	:	
	:	
BLUE DIAMOND COAL COMPANY,	:	Mine No. 77
Respondent	:	

DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, on behalf of Blue Diamond Coal Company.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Petition alleges that Blue Diamond Coal Company is liable for two violations of the Secretary’s Mandatory Safety Standards for Underground Coal Mines, and proposes the imposition of civil penalties in the total amount of \$21,200.00. A hearing was held in Hazard, Kentucky, and the parties filed briefs after receipt of the transcript. At the hearing, the parties advised that they had reached a settlement agreement as to one of the alleged violations. A motion seeking approval of the settlement has been filed, and will be granted. For the reasons set forth below, I find that Blue Diamond committed the remaining violation, but that it was not significant and substantial or the result of an unwarrantable failure, and impose a civil penalty in the amount of \$4,000.00.

Findings of Fact - Conclusions of Law

Robert Ashworth, an MSHA inspector, began an inspection of Blue Diamond’s No. 77 mine, located in Perry County, Kentucky, on April 4, 2007. On April 5, he and fellow inspector, Patrick Stanfield, returned to the mine to abate citations previously issued, and to conduct an inspection in response to a phoned-in safety complaint raising a number of issues, including illicit drug use by miners, non-compliance with ventilation requirements, and roof control violations. They traveled into the mine with Charles Williams, the mine superintendent. They reached the 011 Mechanized Mining Unit during the second shift, and gathered the miners so that a search could be conducted for smoking materials and other contraband. None was found.

During their travel through the section, they observed conditions that they determined violated various safety standards. Citations and orders were issued for roof control violations, and failure to comply with the approved ventilation plan.

Stanfield and Ashworth left the section shortly after midnight, in the early morning hours of April 6. They walked inby along the belt entry, intending to terminate violations issued several days earlier. The 011 section had just moved to a new panel, which was adjacent to the previously mined panel. When Stanfield and Ashworth had traveled about five breaks, they were in the area of the previously mined panel, and observed that there was no permanent stopping separating the belt entry from the return in one of the old panel's entries. Stanfield issued Order No. 7521760, alleging a violation of the applicable standard. Blue Diamond timely contested the Order and the proposed penalty.

Order No. 7521760

Order No. 7521760 alleges a violation of 30 C.F.R. § 75.333(b)(2), which requires that permanent stoppings or other permanent ventilation control devices be built and maintained to "separate belt conveyor haulageways from return air courses."

The violation was described in the "Condition and Practice" section of the Order as follows:

The # 11 conveyor belt (alternate escapeway off the 011/MMU) is not being separated from the return. One crosscut inby SPAD #3699, a permanent stopping has not been installed to separate the #11 conveyor belt from the return. The next stopping inby, where the old #12 belt was located, has sealant applied on the non-pressure side. The next two stoppings inby marked crosscut #13 and #14 do not have sealant applied to either side or to cover the wood products used in the construction of the stoppings. The permanent return stopping marked as the 15th has the personnel door open.

Order #4220150 is issued for failure to comply with the approved ventilation plan on the 011/MMU (failure to maintain the required 9,000 cfm at the last open crosscut). The approved roof control plan requires only two open crosscuts to be maintained. This mine is currently on a 103(i) spot inspection for methane liberation. This condition has existed for a significant amount of time. The 011/MMU was moved on or about 04/02/2007.

Ex. G-1.

Stanfield determined that it was highly likely that the violation would result in a fatal injury, that the violation was significant and substantial ("S&S"), that eight persons were affected, and that the operator's negligence was high. The Order was issued pursuant to section 104(d)(2) of the Act, and alleged that the violation was the result of the operator's unwarrantable

failure to comply with the mandatory standard.¹ A specially assessed civil penalty, in the amount of \$19,000.00, was proposed for this violation.

The Violation

As noted in the Order, the 011 section had been moved about three days prior to the phone-complaint inspection. The old panel, consisted of seven entries, and was just outby the new panel. Both panels were mined at right angles to entries referred to as the "Daugherty Mains" (DM). As depicted on the mine map, when facing inby and counting from left to right, the first two entries of the DM were returns, entries #3 and #4 were neutrals, and entries #5, #6 and #7 were intakes.² The intake entries were designated as the primary escapeway, and the neutral entries were designated as the secondary escapeway. The belt was located in entry #4. Permanent stoppings were required to separate the intake entries from the neutral entries, and the neutral entries from the return entries.

The entries of the new panel, like the old one, were mined off the #1 DM return entry, at right angles to it. At the time of the inspection, six entries on the new panel had been started, and mining of the first crosscut had commenced with a right turn from entries #1 through #5. None of the crosscuts had been cut through. Therefore, the #1 DM entry was the last open crosscut (LOCC) for the new panel. When Stanfield and Ashworth arrived on the section it was not in production. A shuttle car had broken down on a cable at the feeder, and the second shuttle car had ben loaded and was awaiting access to the feeder. An electrician had traveled in with the inspection party in order to repair the shuttle car.

The continuous miner was in the #1 entry. As Ashworth approached that entry to gather miners for the search, he observed the continuous miner operator in the LOCC and a significant amount of what appeared to be dust suspended in the air in the intersection. When the miner operator saw Ashworth, he started back into the #1 entry, ostensibly to hang line curtain. Ashworth became concerned about inadequate ventilation, which was one of the allegations of the phoned-in complaint. He instructed the miner to get his jacket and lunch bucket and proceed to the area near the feeder, where the smoke/drug search and a safety meeting were to be conducted. The foreman searched the assembled miners, and Williams searched the foreman. No smoking articles or drugs were found.

Ashworth and Stanfield then conducted an imminent danger run. Stanfield went inby to the #6 entry and Ashworth started at the #4 entry and worked outby. Ashworth took an air

¹ The parties stipulated that the predicate section 104(d)(1) order, Order No. 7550843, issued on June 3, 2005, was in paid status, and that there had not been an intervening "clean" inspection of the mine. Tr. 8-9.

² Air in the neutral/belt entries flowed inby. However, it could not be used to ventilate the face, and was routed to the returns, in part, through a tied-open mandoor, which was being used temporarily as a regulator.

reading in the #1 DM entry. He testified that he took the measurement between the #1 and #2 entries of the new panel. Tr. 145-47. However, his field notes report that the reading was taken between the #2 and #3 entries. Ex. G-4 at 9. He calculated that 7,611 cubic-feet-per-minute (cfm) of air was moving through the entry, less than the 9,000 cfm required in the LOCC under Blue Diamond's approved ventilation plan. Tr. 148, 165-66; Ex. G-4 at 9. As his notes reflect, he repeated the measurement at 9:45 p.m. "at the same location," and it again was inadequate. Ex. G-4 at 9. Efforts were made to improve ventilation, and the third reading, taken at 10:00 p.m., was 9,648 cfm, which was satisfactory. Ex. G-4 at 15. However, mining could not proceed because the ventilation plan's required volume of 5,500 cfm on the return side of the curtain in the #1 entry could not be obtained. A measurement taken at 11:00 p.m. yielded an air flow of only 2,066 cfm at that location. Ex. G-4 at 15. Ashworth wrote an order based upon those violations of the ventilation plan. That order is not at issue in this proceeding.

In the early morning hours of April 6, Stanfield and Ashworth traveled out of the mine by walking the belt entry, the #4 DM entry. They intended to check on progress that had been made to abate violations that had been written several days earlier during an electrical inspection, including the presence of accumulations of coal near the #10 and #11 belts. Tr. 53-55. They were accompanied by mine foreman Burley Adams, who had replaced Williams. It was during this exit trip that Stanfield observed that there was no permanent stopping separating the #3 DM neutral entry from the #2 DM return entry in the crosscut that was the extension of entry #3 of the old panel. Stanfield issued Order No. 7521760, citing the missing stopping and two adjacent stoppings that were inadequately sealed. Adams confirmed that the stopping was missing and that other stoppings were improperly "plastered," as Stanfield noted in the order.

Blue Diamond concedes that there was no permanent stopping at the required location and that the standard was violated. It challenges the S&S and unwarrantable failure designations.

Significant and Substantial

An S&S violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The fact of the violation has been established. A measure of danger to safety was contributed to by the failure to install a permanent stopping.³ The Secretary contends that the missing stopping could have resulted in a methane explosion, failure to detect a fire, and exposure to respirable dust. There is little question that a fire, explosion or serious dust exposure could reasonably have been expected to result in fatalities or serious injuries. As is often the case, the primary issue in the S&S analysis is whether the violation was reasonably likely to result in an injury causing event, i.e., an explosion, failure to detect a fire, or significant exposure to respirable dust.

The Secretary advances two arguments on the gravity of the violation. She maintains that the missing stopping created a shortage of air at the working faces, creating a possibility of an

³ The effect of the conditions identified in the Order was to allow air to "short circuit" from the neutral entries to the return entries, which is the primary thrust of the Secretary's arguments on gravity and negligence. By far, the most significant contributor to that effect was the missing stopping. While the inadequate sealing of the two adjoining stoppings contributed some small component to that effect, the discussion herein is framed in terms of the missing stopping.

ignition or explosion and subjecting miners to respirable dust. Recognizing that there are questions about the accuracy of Ashworth's air flow measurements, she asserts that "it is clear that the air was cut off from the working section by this condition [the missing stopping]." Sec'y. Br. at 7. She also argues that, since belt air was allowed to short circuit to the return, the flow of air to the carbon monoxide ("CO") monitor at the tailpiece of the belt was reduced to an extent that detection of a fire in that entry would have been delayed, resulting in serious injuries. I find neither argument persuasive.

While a serious shortage of air flow at the working faces of the section could have led to accumulations of methane or other noxious gases and dust, the missing stopping did not have a significant adverse effect on face ventilation.⁴ Face ventilation for the 011 section was supplied by intake air coursing inby in the #5, #6 and #7 DM entries. Fresh air also flowed inby in the neutral entries, the #3 and #4 DM entries. However, it could not be used to ventilate the faces, and was channeled directly into the return air courses, partially through the open mandoor that was temporarily being used as a regulator. Although, the missing stopping allowed some of the neutral air to short circuit into the returns, it did not reduce the flow of intake air to the faces.⁵ Stanfield and Ashworth testified that the missing stopping would tend to lessen the pressure differential between the intake and the return entries, reducing air flow to the faces. Tr. 112-14, 160-61. However, they made no attempt to quantify the supposed impact and, because of the overall air flow pattern, it is highly unlikely that there was any significant reduction in face ventilation attributable to the missing stopping.

The lack of adverse impact is evident from face air flow measurements taken while the stopping was missing. When the old panel was being mined, several of its entries had to be open to allow for ventilation and belt haulage. When the old panel was abandoned, permanent

⁴ While the #77 mine was subject to 15-day spot inspections, pursuant to section 103(i) of the Act, because it had liberated over 250,000 cubic feet of methane in a 24-hour period, methane was not prevalent in the mine around the time of the inspection. The 103(i) designation had been made by the MSHA district manager on the basis of the results of testing that had been done months earlier. Tr. 225. Williams testified that the mine had not liberated that quantity of methane in the past 8-10 months, and that requests to remove the spot inspection designation had been denied. Bottle samples taken by Ashworth on April 4 had contained 0.06% methane in the #11 MMU and 0.0% in the #12 MMU. Tr. 162-64; Ex. R-5. The only methane found on April 5, was 0.5% in the #1 entry of the new panel. Tr. 175. Methane is explosive at concentrations between 5% and 15%. Other than that reading, preshift reports reflect that no methane was found in any of the headings for examinations conducted on April 4 and 5. Ex. R-8.

⁵ There was a relatively small leak in one of the stoppings separating the intake entries from the neutral entries. A block was missing from a stopping, and a plastic bag had been placed over the hole. Tr. 68-69, 112-14. A separate citation was written for that violation. The Secretary does not argue that that condition adversely affected face ventilation with respect to this violation.

stoppings had to be built in the old panel entries between the #2 and #3 DM entries in order to separate the neutral entries of the new panel from the return entries. Blue Diamond failed to construct a permanent stopping separating the neutral DM entries from the return DM entries in what had been the #3 entry of the old panel. Because the stopping was never built, all air measurements on the new panel on April 4 and 5, were taken while the stopping was missing. The preshift reports for that period show that air flow in the LOCC was measured at 14,375 cfm to 15,400 cfm, well above the required 9,000 cfm. Ex. R-8. It was not until the suspect measurements taken by Ashworth late on the second shift on April 5 that the flow dropped below 9,000 cfm. Tellingly, Ashworth, himself, had measured the air flow in the LOCC of the new panel on April 4, and found it to be 14,706 cfm. Tr. 139, 162-64. The stopping was missing at that time. Yet the ventilation volume substantially exceeded the required 9,000 cfm, as it had for several other measurements. If there was restricted ventilation at the face late on April 5, it was not due to the missing stopping.

Blue Diamond contends that Ashworth's air readings are unreliable because he took them in the wrong location, i.e., between the #2 and #3 entries on the new panel. They point out that placement of ventilation controls allowed return air to flow through both the #1 and #2 DM return entries at that point. Consequently, measurements of air flow in the #1 DM entry would reflect only a portion of the return air flow. It points to the fact that Ashworth's notes report that his measurements were taken between the #2 and #3 entries, and that a contrary indication was not placed on his notes until his deposition was taken in December of 2008. Tr. 170-71. Ashworth was adamant that he took the measurements between the #1 and #2 entries, and that his notes are erroneous. Tr. 166-69. There is also conflicting testimony on whether the error was called to his attention. Williams testified that he told Ashworth he was taking his measurement in the wrong location. Tr. 245-46. Ashworth testified that no one told him he was measuring in the wrong place. Tr. 152.

Ashworth is an experienced inspector and had 18 years of mining experience prior to joining MSHA. Tr. 132. He should have known the correct location to take the air reading, and it is unlikely that he would have taken it in the wrong location, although the fact that the section was in the initial stages of development created the potential for confusion. Tr. 148-49. However, his notes, made contemporaneously with the inspection some three years ago, clearly state that the measurements were taken between the #2 and #3 entries, which would have yielded inaccurately low measurements. The marked difference between Ashworth's April 5 readings and the numerous readings in the range of 14,000-15,000 cfm on April 4 and 5, including Ashworth's own reading of April 4, cannot be explained by the fact that the stopping was missing. On this record, the only explanation for the discrepancy is that the readings were not taken in the correct location.

The Secretary also makes more than can reasonably be made of the evidence regarding air flow at the CO monitor at the end of the belt. She argues that the missing stopping allowed belt air to short circuit and not pass by the CO monitor at the belt tailpiece, thereby significantly impairing the monitor's ability to detect a fire. Sec'y. Br. at 8. The missing stopping certainly allowed some amount of air from the neutral entries to short circuit into the return. However,

there is no evidence that it resulted in an inadequate flow of air at the CO monitor. Stanfield took no air readings at that location, and did not know if the required 50 feet-per-minute of flow was provided, or if air was short circuiting at the CO monitor. Tr. 102. Ashworth could not recall observing any problems with the CO monitoring system. Tr. 175-76. If there were a serious question about the volume of air flow at the CO monitor, it is reasonable to expect that measurements or some enforcement action would have been taken, as with other perceived violations. The Secretary also argues that the open mandoor, being used as a regulator, was "similar" to a condition that existed during a belt fire at the mine around 2006. Sec'y. Br. at 8. However, that is not the case. In the 2006 fire, which apparently did not result in any injuries, a mandoor had been left open near a head drive, allowing air to bypass a CO monitor. Tr. 74-77. Here, the mandoor/regulator was on the section at the tailpiece of the belt, in or near a location where a regulator was supposed to be located, to allow neutral air to flow into the return without going to the face. Tr. 102-03. While a mandoor is not supposed to be used as a regulator, there is no evidence that it did not effectively function as such.

The Secretary's CO monitor argument on gravity is predicated on a fire occurring in the belt entry. She points to the fact that the mine had experienced belt fires in 2001 and 2006, and that citations had been issued for accumulations along the belt and at the feeder, and for a defective cable near the feeder, creating the potential for a fire. However, she fails to address the fact that the inspectors determined that those violations were unlikely to result in injuries, and that there is no evidence that the potential ignition source was in proximity to the accumulations. Tr. 58-59, 92-94. In addition, Stanfield testified that, while an uninsulated cable may arc if it is grounded, it is not "real common." Tr. 58-59. Assuming the fact of a belt fire, itself an unlikely event, there is no evidence that the ability of the CO monitoring system to detect a fire was impaired to any appreciable degree, or that an injury was reasonably likely to result.

Upon consideration of all of the above, I find that the Secretary has not met her burden of proving that the violation was S&S. I find that the violation was unlikely to result in lost work days or restricted duty injuries.

Unwarrantable Failure - Negligence

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission reiterated the law applicable to determining whether a violation is the result of an unwarrantable failure:

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 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991)

("R&P"); see also *Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed; the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). 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. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

The Secretary argues that the violation was the result of Blue Diamond's unwarrantable failure because it was obvious, had existed for several shifts, should have been discovered by several mine examiners, and posed a high degree of danger. Blue Diamond counters that the condition was not obvious, it had no actual knowledge of it, it existed only for one full shift and portions of two others, and it did not pose a danger to miners.

Production commenced on the second shift on April 4, and the stopping was required to be in place at that time. Production also occurred on the first and second shifts on April 5. Blue Diamond argues that the violation existed only for one shift, and portions of two others. While correct, that is a significant period of time.

The move to the new panel started on April 2, and production resumed on the second shift on April 4. Mine foreman Adams supervised the second shift on April 3, during which some of the required stoppings were built, and material for other stoppings was distributed. He instructed the oncoming midnight shift that the remaining stoppings needed to be built. Adams substituted as section foreman on the second shift on April 4. He did not personally verify that the stoppings had been built, and no one told him that they had been built. Tr. 214-15. He believed that the required permanent stoppings had been constructed because he had advised the previous midnight shift to do so, and the first shift had run production. He measured air flow of approximately 15,000 cfm in the LOCC, and he did not observe any other problems. Tr. 206.

He later conducted the preshift examination for the oncoming third shift between the hours of 8:30 and 9:30 p.m., and measured 15,310 cfm of air flow in the #1 DM entry, just outby the #1 entry of the new panel. Tr. 201-04; Ex. R-8. He also found no methane in any of the new panel headings. Ex. R-8.

Stanfield believed that "numerous" examiners had failed to discover the condition. Tr. 81. The belt was required to be examined on every production shift, and an examination of the return was required weekly. Consequently, the condition was not discovered by the belt examiner on the second shift on April 4, or the belt examiners on the first and second shifts on April 5. Stanfield believed that the outby examiner, inspecting the return, should have made sure to check the stoppings because of the recent move. Tr. 81. He believed that he had seen a notation in the outby exam book that the exam had been conducted on April 5. Tr. 95. However, he could not recall when he had seen the book, and he had not listed the outby exam book among the records that he reviewed in conjunction with the inspection. Tr. 95-97. He conceded that he could not be sure that an outby examination had been conducted in the area of the violative condition while it existed. Tr. 96.

The belt line had to be examined on every production shift, i.e., on the first and second shifts. Examinations were performed on the second shift on April 4 and the first shift on April 5. It is unclear whether the belt exam for the second shift on April 5 had been conducted prior to the inspection. Charles Hensley was the belt foreman on the day shift. Hensley's first post-panel-move examination of the #11 belt occurred on April 5. The brattice line, the line of permanent stoppings, was between the #2 and #3 DM entries. The belt was in the #4 DM entry. Consequently, the location where the stopping was supposed to have been constructed was about 100 feet away from where Hensley traveled. Tr. 183-84. It was dark where the stoppings were supposed to be located, and there was gob piled up to within about one foot of the mine roof in some of the entries of the old panel, between the #4 and #3 DM entries. Tr. 184-86. Hensley could not see all of the stoppings and did not notice any missing stoppings or any of the other defects noted in the order. He believed that it was the section foremen's responsibility to make sure that the required stoppings were in place before starting to mine. Tr. 190.

George Abner, who no longer worked for Blue Diamond when he testified, was the mine examiner during the pertinent period, and performed weekly inspections of all outby areas. He typically would travel long distances in a "buggy" and, in the area of the violation, would have traveled in the #1 DM entry, next to the "wall," because he had to inspect seals at various points. He did not recall when he performed the weekly inspection in the area of the missing stopping. The outby book, where the inspections would have been recorded, was unavailable at the hearing.⁶ He believed that if he had failed to note a missing stopping during an examination and

⁶ The book was apparently destroyed in the normal course of business. Because the book was not maintained by Blue Diamond, the Secretary urges that an adverse inference be drawn on the issue of whether the outby examination was conducted while the section was in production and the stopping was missing. For the reasons advanced by Blue Diamond, I decline

a citation or order was issued, Williams would have reprimanded or disciplined him, and he did not recall any such incident. Tr. 122-23. Abner also believed that it was the section foreman's responsibility to install required stoppings and to assure that that was done. Tr. 126. Williams testified that, other than weekly examinations by the outby foreman, no one traveled the return. He recalled looking at the outby book with Abner shortly after the Order had been issued, and believed that Abner's examination had been conducted earlier in the week, before the move had been completed. He confirmed that he would have disciplined or "consulted" Abner, had he failed to notice that a required stopping was not in place, and he did not do so. Tr. 222-23.

The Secretary contends that the violation was obvious, which it would have been to anyone standing at that location. However, it was not obvious to the section foremen, who were not in a position to have seen it, and who did not suspect a problem because there was ample ventilation at the faces. The belt examiners, at least two of whom made examinations on production shifts while the violation existed, did not see the missing stopping. It was not obvious from the belt examiners' route of travel. The Secretary argues that the violation was obvious because Stanfield observed it while walking along the belt while his mind was on other things. Sec'y. Br. at 12-13. However, Stanfield testified that he may well have been specifically looking for the stoppings because he was aware of the recent panel move and the inadequate air flow readings, and questioned whether a missing stopping could have caused the problem. Tr. 61.

As evidenced by the S&S discussion, the violation did not pose a high degree of danger to miners. It did not significantly affect ventilation on the working section. Blue Diamond had no direct knowledge of the violation, and had not been put on notice that greater efforts were needed for compliance. The violation was promptly abated.

Considering all of these factors, I find that the violation was not the result of Blue Diamond's unwarrantable failure to comply with the mandatory safety standard. While Blue Diamond did not have direct knowledge of the violation, it should have known of it. Placement of critical ventilation controls in conjunction with a move of a section is an important task, the completion of which should have been verified. Because placement of such controls is required prior to commencing production, the section foreman initiating production on the new panel should have personally made sure that the stopping was in place, as several witnesses opined. It is not apparent that Blue Diamond had assigned that responsibility directly, or whether the assigned person failed to discharge the responsibility. In either case, Blue Diamond's negligence was high.

The Appropriate Civil Penalties

Blue Diamond is a medium-sized operator, with a large controlling entity. The assessment data reflects that it averaged 2.0-2.1 violations per inspection day during the relevant

to draw such an inference. Resp. Br. at 7 n.4; Resp. Rply. Br. at 2-3.

period, a relatively high incidence of violations. Blue Diamond does not contend that payment of the proposed penalty will affect its ability to continue in business. The violation was promptly abated.

Order No. 7521760 is affirmed. However, the gravity of the violation was found to be less serious than alleged, including that it was not S&S. In addition, the violation was not the result of Respondent's unwarrantable failure. Rather, its negligence was high. A specially assessed civil penalty of \$19,000.00 was proposed by the Secretary. The lowering of the levels of negligence and gravity justify a reduction in the proposed penalty. I impose a penalty in the amount of \$4,000.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

The Settlement

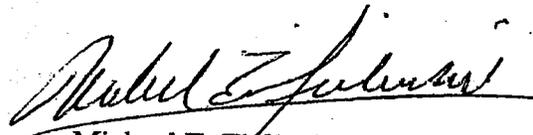
The parties have moved for approval of a settlement agreement as to Citation No. 7553882. It is proposed that the penalty be reduced from \$2,200.00 to \$1,540.00. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

ORDER

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of \$1,540.00 for Citation No. 7553882.

Order No. 7521760 is **modified to a citation issued pursuant to section 104(a) of the Act, and is AFFIRMED**, as so modified, and Respondent is **ORDERED** to pay a civil penalty in the amount of \$4,000.00 for that violation.

Respondent's payment of civil penalties in the total amount of \$5,540.00 for the settled and contested violations shall be made within 30 days.



Michael E. Zielinski
Senior Administrative Law Judge

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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 18, 2010

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on behalf	:	
of CHRISTOPHER L. ABEYTA,	:	Docket No. CENT 2010-584-D
Complainant	:	Denv-CD 2010-08
v.	:	
	:	
SAN JUAN COAL COMPANY,	:	MINE ID 29-02170
AND ITS SUCCESSORS	:	San Juan Mine 1
Respondent	:	

DECISION
AND
ORDER OF TEMPORARY REINSTATEMENT

Appearances: Michael D. Schoen, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Applicant;
Brian K. Nichols, Esq., Modrall Sperling Roehl Harris & Sisk, P.A., Albuquerque, New Mexico, for Respondent.

Before: Judge Hodgdon

This case is before me on an Application for Temporary Reinstatement brought by the Secretary of Labor, on behalf of Christopher L. Abeyta, under section 105(c) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c). The application seeks reinstatement of Mr. Abeyta as an employee of the Respondent, San Juan Coal Company, pending final disposition of the discrimination complaint he has filed with the Mine Safety and Health Administration (MSHA) against the company.¹ A hearing on the application was held on April 21, 2010, in Farmington, New Mexico. For the reasons set forth below, I grant the application and order Mr. Abeyta's temporary reinstatement.

Summary of the Evidence

On March 2, 2010, Abeyta filed a discrimination complaint with MSHA stating that he had been discharged from San Juan on February 23, 2010, and alleging that the discharge was

¹ It does not appear that the Secretary has completed investigation of Mr. Abeyta's complaint. Accordingly, there is no Complaint of Discrimination before the Commission.

“retaliation for issuing complaint to MSHA on Feb. 11, 2010” (Govt. Ex. 1.) At the hearing, he testified that he began working for San Juan as an Electrical Projects Engineer on September 8, 2009. (Tr. 43, 45.)

Abeyta further testified that at a February 8, 2010, meeting with Chuck Wilson, his immediate supervisor, Marilyn King, a Labor Relations Advisor from Human Resources, and Steve Pierro, the Belt Coordinator, he informed them of a problem with “arcing” at the power centers and the “inappropriate” use of capacitors on the long wall. (Tr. 60-61.) At the end of the meeting, it was determined that Abeyta would be “[h]eld out of service pending further investigation.” (Tr. 66, Govt. Ex. 8.) Abeyta was subsequently informed that he was to attend another meeting at the company’s Farmington office on February 11. (Tr. 68.) As a consequence, he sent an e-mail to Marilyn King on February 10, which stated:

I am still waiting for a meeting agenda for tomorrow’s meeting. I also informed you of my concerns for the lack of safety, professionalism and harassment of Chuck Wilson and Mike Fidel, not only to me but to the whole department.

The resolution I have requested is to work for someone who has electrical engineering competence and has the company’s interest of safety and professionalism.

As I’m sure you are aware we are in one of the most dangerous occupation [*sic*] and safety should be our primary goal not production. We are subject to spontaneous combustion in our underground coal mine. There has been a history of arcing in our underground switch houses and power centers. I gave you a copy of a root cause analysis for PC-20 with my recommendation with feedback from SMC. This is just one major example of Chuck Wilson’s disregard for safety by doing nothing. As recent as last saturday [*sic*] night a mechanic smelled something burning around East Mains SW-4, SW-4 had been arcing. If my recommendations had been implemented we would have detected this and not potentially start our mine on fire.

Chuck is also having the apprentices doing inspections and having Ed Neff sign them off. If audited by MSHA do you believed Ed can be in so many places at once?

We as a company need to review what Chuck has been aware of and has chose [*sic*] to do nothing for the High Voltage monthly breaker checks for the last year. MSHA could potentially shut us down by us not doing this as per our requirements of permissibility.

Another example of the disregard for safety by Chuck Wilson is the inappropriate use of the capacitor banks for the long wall. I have this documented with recommendations which were

presented to Chuck.

These are very serious safety issues described above and need to be included in our agenda when we meet.

Please reply back with the agenda of tomorrow's meeting. If you need more time to present an agenda please reschedule tomorrow's meeting, it is imperative that the next meeting we will be addressing all the appropriate issues to include recommendations of the ERP requirements of Mine Radio and miner location and GVB CH4 flows and control.

If you do not take action to resolve these issues I no longer want to work for BHP and want a severance package thru [sic] July 2010.

(Govt. Ex. 3.) (Paragraphs not indented in original.)

Abeyta sent another e-mail to King that night. It stated:

It is 10:00 PM and I haven't received a meeting agenda for tomorrows [sic] meeting to assure all my concerns are going to be addressed. At this point I don't feel comfortable to meet with BHP without legal council [sic] present. I will let you know when I have chosen my legal council [sic]. I received a call this evening at home and was told today that Chuck Wilson stated he terminated me for insubordination. I would caution Chuck for legalities for Defamation of Character [sic].

I would advise someone from legal to contact me to discuss.

(Govt. Ex. 4.) Abeyta did not attend the February 11 meeting. (Tr. 69.) He did, however, file a 103(g) complaint, 30 U.S.C. § 813(g), with MSHA on that date.² (Tr. 84, Govt. Ex. 1.)

Abeyta did attend a meeting with Chuck Wilson, Mike Fidel and Marilyn King on February 12, 2010. He testified that he again brought up the four safety concerns set out in his e-mail to Marilyn King and brought up an additional safety concern "about the accumulation of coal dust inside of the load centers." (Tr. 71.) He said he also informed them that he had filed a complaint with MSHA. (Tr. 84-85.)

On February 23, 2010, Abeyta was terminated by San Juan. The reasons for his termination, set out in his letter of termination, were given as follows:

² Section 103(g)(1) provides, in pertinent part, that: "Whenever . . . a miner . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner . . . shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger."

Effective immediately you are terminated for the following infractions of San Juan Coal Company's (SJCC) General Rules of Conduct (GRC), provided to you during your employment orientation.

GRC Basic Principles #1 and 2 and GRC rule #10 –

You admitted to seeing combustible material inside an electrical load center, left the material in the center and did not report the material's presence for several days or longer. This is a knowing violation of safety rules, which are part of your job duties.

GRC Basic Principle #1 and 2 and GRC rule #3 –

On numerous occasions you failed to perform your job duties and responsibilities by refusing to perform specific job assignments and violating your immediate supervisor's instructions, Chuck Wilson. These multiple, and in some cases ongoing, infractions date at least to November, 2009. Perhaps the most egregious example is your failure to perform tasks necessary for the Emergency Response Plan. You also refused to perform a written job plan related to this job duty.

GRC Basic Principle #2 and GRC rule #1 and 3

On February 4, 2010, you were found working without wearing your hearing aids while having a conversation with certain persons. As such, you were not fit for duty and failed to perform your job duties. Alternatively, you made an excuse to, or lied to, Mr. Wilson for failing to follow his direction.

GRC Basic Principle #2 and GRC Rule #6 and 17

On February 4, 2010, you left the work site without attending a meeting scheduled by your supervisor and then refused to return to work to attend that scheduled meeting.

On February 11, 2010, you did not report to work on a scheduled work day and on that day failed to attend a meeting to discuss these infractions.

GRC Basic Principle #3

On several occasions you alleged serious misconduct by co-workers, including Chuck Wilson. You raised these allegations to other SJCC employees, including myself. As described in the Code of Business Conduct, also provided to you at your

employment orientation, SJCC would not, and may not, discipline an employee for raising bona fide concerns about misconduct or safety issues. However, you raised many serious allegations without any investigation yourself. Your allegations, upon investigation, are without any factual basis. The number of allegations you raised, the manner in which you did so, and the lack of any factual basis, leads me to conclude that you are not treating your co-workers with the dignity and fairness required as a condition of your employment.

(Govt. Ex. 11.)

The company presented four witnesses, Jimmy Stewart, the MSHA Investigator investigating Abeyta's complaint; Steve Pierro, Conveyance Coordinator; Charles Wilson, Electrical Coordinator; and Mike Fidel, Maintenance Manager. In addition, I sustained an objection to the testimony of Steven Ellsbury as being irrelevant. (Tr. 208-09.) The company's position can be summed up as follows: (1) Abeyta's safety concerns were frivolous in that they had no basis in fact; (2) All but one of Abeyta's safety complaints occurred in the fall of 2009, but he did not report them until February 2010, because he was saving them as a defense against being disciplined;³ (3) Some of the safety complaints were very serious, and if true, it was unconscionable for an electrical engineer to wait four months before reporting them; (4) Most of Abeyta's complaints were not observed by him, but were based on hearsay; and (5) Abeyta should not be returned to work because he was a danger to the mine.

Findings of Fact and Conclusions of Law

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2) provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order immediate reinstatement of the miner pending final order on the complaint." When the operator contests temporary reinstatement, the Commission has established a procedure for making this determination with Commission Rule 45, 29 C.F.R. § 2700.45.

Rule 45(d), 29 C.F.R. § 2700.45(d), states that:

The scope of a hearing on an application for temporary

³ Steve Pierro testified that when Abeyta was given a disciplinary notice at the February 8 meeting, Abeyta responded by saying, "I told you not to go this way, and if you are going to go this way, then basically you're going to regret it. And then he started talking about problems with one of the power centers underground." (Tr. 180.) Abeyta denied making such a statement. (Tr. 105.)

reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

With regard to the hearing, in its most recent decision on temporary reinstatement, the Commission stated that it

has repeatedly recognized that the "scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *See Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990).

Sec'y of Labor on behalf of Lige Williamson v. Cam Mining, LLC, 31 FMSHRC 1085, 1088 (Oct. 2009).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Jim Walter Resources, Inc.*, 920 F.2d at 747 & n.9; *Secretary of Labor on behalf of Price*, 9 FMSHRC at 1306.

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981).

In this case, Abeyta testified that he made safety complaints to Chuck Wilson, and possibly Mike Fidel, in October and November of 2009, (Tr. 97-99), as well as making them on February 8, 11 and 12, 2010. He was terminated on February 23 and his termination letter referred to his making safety allegations, which the company concluded were unfounded. Thus,

if Abeyta's claims are found to be credible, he has established that he engaged in protected activity, by making safety complaints, and that he was terminated in close proximity to making those complaints. There is no doubt that the company had knowledge of the protected activity as it was referred to in the termination letter.

San Juan's evidence indicates that it may have a valid defense to Abeyta's complaint, but, as set out above, the purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Complainant establishes that his complaint is not frivolous, not to determine "whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources, Inc.*, 920 F.2d at 744. Consequently, the focus of the hearing is clearly on the evidence presented by the Complainant and the evidence presented by the Respondent is relevant only to the extent it demonstrates that the claim is frivolous. In deciding the case, it is "not the judge's duty . . . to resolve conflict[s] in testimony" or to make "credibility determinations in evaluating the Secretary's" case. *Cam Mining*, 31 FMSHRC at 1089; *Secretary of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999).

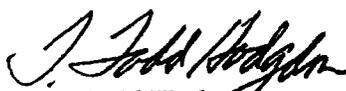
The evidence does not demonstrate that Abeyta's testimony was inherently incredible. Indeed, to find in San Juan's favor would require me to make credibility findings and to resolve conflicts in the testimony. The main thrust of its case is that Abeyta's complaints were unfounded and frivolous. The Commission held in *Cam Mining*: "Whether [the Complainant] was correct in his belief that the continuous miners were operating simultaneously is irrelevant to whether he made the safety complaint to his supervisor." 31 FMSHRC at 1089 n.2. Likewise, whether Abeyta was correct in his belief that safety violations had occurred is irrelevant to whether he made safety complaints to his supervisors.

Finally, in a temporary reinstatement proceeding, Congress intended that the benefit of the doubt should be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision since the employer retains the services of the employee until a final decision on the merits is rendered. *Jim Walter Resources, Inc.*, 920 F.2d at 748 n.11. Finally, if San Juan believes that the Complainant is a danger to the mine, there are ways to solve that problem within the context of this decision. However, making a determination as to whether he is a danger or not is clearly beyond the purview of this proceeding.

Accordingly, finding that Abeyta's complaint is not without merit, I conclude that his discrimination complaint has not been frivolously brought.

Order

Christopher L. Abeyta's Application for Temporary Reinstatement is **GRANTED**. San Juan Coal Company is **ORDERED TO REINSTATE** Mr. Abeyta to the position that he held on February 23, 2010, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**. In addition, San Juan is **ORDERED TO PAY** Mr. Abeyta his pay and benefits retroactive to **APRIL 28, 2010**.⁴



T. Todd Hodgson
Senior Administrative Law Judge

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/rps

⁴ Under normal circumstances this decision would have been issued on April 28, 2010, in accordance with Commission Rule 45(e), 29 U.S.C. § 2700.45(e). However, on April 27, the parties advised that a settlement was being negotiated and requested that the decision not be issued. In a telephone conference call between the parties and the judge on May 18, 2010, counsel for the Secretary advised that a written agreement had not been entered into and that Mr. Abeyta no longer wished to settle the case. Over the opposition of counsel for the Respondent, who wanted the oral agreement enforced, the Secretary requested that a decision on temporary reinstatement be issued. I find that as the agreement had not been reduced to writing, there was no agreement, and, in any event, that enforcement of an oral agreement is beyond the scope of my authority.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

May 21, 2010

PRAIRIE STATE GENERATING CO.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 2009-711-R
	:	Citation No. 6680548;09/17/2009
	:	
	:	Docket No. LAKE 2009-712-R
v.	:	Citation No. 6680549;09/17/2009
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Lively Grove Mine
ADMINISTRATION, (MSHA),	:	Mine ID 11-03193
Respondent	:	

DECISION

Appearances: R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Contestant;
Peter Nessen, Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Respondent.

Before: Judge Miller

These cases are before me upon Contestant's request for a hearing to challenge citation numbers 6680548 and 6680549 issued pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act" or "Mine Act"). The citations allege that Prairie State Generating Company, LLC ("PSGC") was operating its mine with an unapproved ventilation plan in violation of 30 C.F.R § 75.370(d) and an unapproved roof control plan in violation of 30 C.F.R. § 75.220(a)(1). The cited standards require, in essence, that the mine operator develop and follow a ventilation and roof control plan approved by the Secretary.

On August 28, 2009, PSGC re-submitted a ventilation and roof control plan dated July 31, 2009, to the Mine Safety and Health Administration ("MSHA"). The parties entered into negotiations and discussed various plan provisions. In September 2009, PSGC communicated its intent to implement the unapproved plan in order to bring this contest. By agreement between MSHA and the Contestant the mine began operation without an approved ventilation plan or approved roof control plan in place. Subsequently, on September 17, 2009, MSHA issued two citations signed by Inspector Keith Roberts. In addition, MSHA sent deficiency letters to PSGC that addressed the points at issue in each plan. Ex. M-3 (letter on ventilation plan); Ex. M-4 (letter on roof control plan). The letters and the citations list the specific items that are in dispute in both the roof control and ventilation plans. The parties stipulated at hearing to certain items listed in the citations. Specifically, the parties agreed that a number of items listed on the

operator's "contested issues" list are no longer in contention. Further, any item listed as "not in contention" has been withdrawn from the contest in this matter and will not be addressed in this decision.

MSHA argues that the items set forth in the deficiency letters that were not eliminated prior to hearing should be included in the specific plans in a manner that meets MSHA's goals of providing safe and effective ventilation and roof control plans for the mine. PSGC argues that the plans it proposes are safe and mine specific. One of the primary issues is the use of extended cuts; that is, instead of using the normal 20-foot cut by the continuous mining machine, the mine seeks to use an extended cut of 40 feet. MSHA seeks to impose a performance method at the mine which would first use 20-foot cuts, be evaluated for effectiveness, and then move to a 30-foot cut and eventually to a 40-foot cut. A secondary and related issue in both plans is the use of wider than normal entries.

PSGC's Lively Grove mine is newly opened and the plans at issue are the first plans to be put in place. Therefore, any issue regarding the suitability of a plan that is already in place is not raised here. Instead the Secretary must prove that the district manager did not abuse his discretion in determining that the plans proposed by MSHA are suitable to the Lively Grove mine. The Secretary argues that the district manager, with the assistance of others at MSHA, reviewed all factors and reached a reasonable conclusion regarding the plans. In this case, the assistance of others includes direction from the national office regarding the use of extended cut mining and wide entries. Lively Grove on the other hand argues that the district manager did abuse his discretion, did not consider all of the data available to him, and used an "across-the-board" policy regarding the use of extended cuts.

The first contested citation, Citation No. 6680548, alleges a violation of 30 C.F.R. § 75.370(d), which states that "[n]o proposed ventilation plan shall be implemented before it is approved by the district manager." In deciding whether to approve a proposed ventilation plan MSHA looks to § 75.370(a), which provides in pertinent part that "[t]he operator shall develop and follow a ventilation plan approved by the district manager [and] [t]he plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." 30 C.F.R. § 75.370(a).

The second contested citation, Citation No. 6680549, alleges a violation of 30 C.F.R. § 75.220(c), which states that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine."

As a general matter, the Commission has held that plan formulation under the Mine Act requires MSHA and the operator to negotiate in good faith for a reasonable period of time concerning disputed plan provisions. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). "Two key elements of good faith consultation are giving notice of a party's position and adequate discussion of disputed provisions." *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996). In this proceeding the parties have stipulated that they have negotiated in good faith.

For reasons that follow below, I affirm Citation No. 6680548 and Citation No. 6680549 and dismiss PSGC's contest proceedings.

I. FINDINGS OF FACT

Lively Grove is an underground coal mine that will exclusively serve a new 1,600 megawatt generating facility that is under construction adjacent to the mine. Stip. ¶¶ 2, 3. PSGC is an operator within the meaning of the Act, and is subject to the jurisdiction of the Mine Act. Stip. ¶¶ 6, 7.

The dispute in this case centers on whether 40-foot cuts and extra wide entries, without previous testing or evaluation, are a suitable part of the ventilation and roof control plans, given the conditions at the mine.

Inspector Keith Roberts, who has more than 30 years of mining experience, testified that he reviewed the ventilation plan at issue and drafted the deficiency letter. (Tr. 40, 43); Ex. M-3. Roberts explained the review process and the use of a checklist to ascertain whether each issue had been covered in the proposed plan. (Tr. 44-45); Ex. M-5. Roberts reviewed the ventilation plan dated August 28, 2009, Ex. M-1, and, after consultation with the district manager and armed with information from MSHA and the mine, drafted the list of deficiencies contained in the letter. (Tr. 47); Ex. M-3.

The mine plan called for the use of extended cuts, i.e., 40-foot cuts. The agency's position is that the mine must start with a standard 20-foot cut plan and use a performance-based approach to verify that the methane and respirable dust control standards could be met before a 30-foot cut could then be tested. If 30-foot cuts were then tested and found to meet the standards, then 40-foot cuts could be evaluated. (Tr. 49). Roberts, and subsequently district manager Robert Phillips, relied upon a procedural instruction letter ("PIL") that outlines the procedures for evaluating a request for extended cuts. (Tr. 50); Exs. M-13, M-14. Roberts is aware that mines in this area of Illinois can experience significant amounts of methane liberation and a significant number of roof falls. In order to avoid these at the outset, Phillips determined that cuts beyond the standard 20-foot cut should be evaluated prior to moving to longer cuts.

Shorter cuts allow for better methane and roof control according to Roberts. (Tr. 53-55). Section 75.330 sets the standard cut at 10 feet, however, over the years it has become an accepted practice to begin with cuts of 20 feet. (Tr. 55-56). It is the opinion of Roberts that "taking a deeper cut is never safer than taking a shorter cut." (Tr. 60). Many of the other issues addressed in the ventilation plan are based upon the 40-foot cut requested and, therefore, hinge on the approval of the depth of the cut. (Tr. 68-69).

Mark Odum, the roof control specialist for District 8, has more than 25 years of mining experience. He has a bachelor's degree in mining engineering, has worked in coal mines, and began work as a mine inspector with MSHA in 1991. Odum was responsible for reviewing the PSGC roof control plan, evaluating the plan, and drafting the deficiency letter. (Tr. 144-146); Exs. M-4, M-2. Odum described exhibit M-6 as the checklist used for a roof control plan

review, and acknowledged that the list was used as a guideline when he reviewed the plan at issue. Odum also agreed that a shorter cut, in terms of roof control, is always the safer option.

Robert Phillips, the MSHA district manager in Vincennes, Indiana at the time of this dispute, has been in the mining industry in various positions since 1960 and was employed by MSHA for 27 years. (Tr. 207-208). Phillips arrived in District 8 in the fall of 2007, and upon his arrival learned that the district had the largest number of unintentional roof falls and the largest number of respirable dust over-exposures of all the MSHA districts. He was instructed that part of his mission was to reduce these figures. (Tr. 217). Phillips, as a part of his efforts to reduce the overall roof falls in the district, asked the administrator for coal and the chief of health from MSHA to make presentations to the mine operators in District 8 regarding extended cuts.

In addition, Phillips changed the parameters in the roof and ventilation plans of the mines in District 8. (Tr. 229) The respirable dust levels had increased from 2006 to 2007 and into 2008. The same was true for the number of roof falls. In 2009, both numbers began to decline.

When Phillips arrived in District 8, the PSGC Lively Grove mine was just being developed and neither ventilation nor roof control plans had yet been approved for the mine. As is true of all plans, the assistants to the district manager began the process of meeting with the mine and reviewing conditions and information submitted by the mine. (Tr. 212).

Phillips explained that each district has its own procedure for processing and approving ventilation plans. Lively Grove's proposed ventilation plan, Ex. M-1, and the proposed roof control plan dated July, 31, 2009, Ex. M-2, went through the same process as any other plans for newly opened mines in the district. (Tr. 105). After much discussion and review, the district manager rejected both plans on September 17, 2009. (Tr. 212). Phillips relied on his roof control specialist, his ventilation specialist and guidance from the MSHA national office. In addition, he paid particular attention to the PIL addressing extended cut mining at new mines. He understood that the PIL directed him to evaluate extended cuts to "ensure compliance with [the Secretary's] 30 CFR standards." (Tr. 213).

a. Use of extended cuts, i.e., 40-foot cuts as opposed to 20-foot cuts, in Citation Nos. 6680548 and 6680549

The issue of the depth of cuts is found throughout both the ventilation plan and the roof control plan. There was obviously much discussion and disagreement about the safety of the extended cuts and the expert witness for PSGC made it clear that the use of extended cuts is an issue not only in District 8, but across the country. There is a dispute as to whether extended cuts are more or less safe in terms of dust control and in terms of roof support. The use of extended cuts makes production more efficient.

MSHA authored a PIL dated June 3, 2008 regarding extended cuts. Ex. M-14. This letter was circulated to mine operators and used by MSHA as guidance in evaluating PSGC's request to use 40-foot cuts. The operator asserts that Phillips uses the PIL for all mines and that

this "across the board" policy takes away from the mine-specific character of the plan negotiating process. Inspector Roberts explained that he uses the policy with all new mine operators and that his office would look at 20-foot cuts and, pending evaluation and compliance with applicable standards, would allow an operator to apply for approval to take 30-foot cuts, and, again, pending evaluation and compliance with the applicable standards, then allow application for 40-foot cuts. (Tr. 100). Phillips described this as a performance-based approach. (Tr. 100, 222).

MSHA's arguments with regard to extended cuts focus on the possibility of a greater number of roof falls with longer cuts and the presence of respirable dust. The MSHA roof control specialist, Odum, believes that the mine can better control the roof with 20-foot cuts as opposed to 40-foot cuts. (Tr. 162). PSGC argues that there are no issues regarding roof control that need to be addressed because its data, although not provided to the district manager, supports its position that the roof is good. Gary Hartsog, one of the experts who testified on behalf of PSGC, opined that it is "unlikely that roof conditions will be adverse." (Tr. 445-6). However, no one could testify that 20 foot-cuts are an imprudent way to proceed. The mine did point out that an extended cut generates less respirable dust, since a majority of the dust is generated at start-up and fewer start-ups are required for a longer cut.

b. Use of 20-foot wide entries as opposed to 18-foot wide entries in roof control and ventilation plans

Roberts believes that both entries are suitable for moving equipment, and, like the extended cuts, the wide entries may be approved based upon performance. (Tr. 113). The Secretary also believes that the wider the entry, the more difficult it is to control the roof. (Tr.152) William Jankousky, the mine's safety manager, explained his view that it is easier to maneuver in a wider entry, i.e., that the two additional feet make a difference in the ability of the equipment to maneuver a turn. (Tr. 374).

c. Use of 64 total diagonal feet at intersection, as opposed to the 68 feet sought by the mine operator in the roof control plan

This issue is related to the wider entries sought by the mine and, again, the district manager seeks to implement a performance based evaluation before wider intersections are used. (Tr. 153-154). Odum testified that, based upon information he reviewed in exhibit M-16, wider intersections presented more roof control issues than narrower ones. He testified that intersections are one of the main areas that roof falls occur and, therefore, it is best to keep them as narrow as possible. (Tr. 154-156). Phillips relied on information from Casey Sears, an MSHA roof control authority, regarding large diagonals at the intersection and testified in support of Odum's position. (Tr. 216). PSGC points out that the information relied upon by the district manager may not be thorough or reliable and there is other information regarding roof control that the district manager should have reviewed and relied upon.

d. Air velocities in last open crosscut

The issue involves how much air is needed to assure compliance with air velocities as the air reaches the continuous miner and additional working places. PSGC argues that the lower ventilation quantities it seeks are appropriate for the "fishtail" ventilation system designed at the mine. PSGC asserts that MSHA imposes higher quantities of air no matter what kind of ventilation system is utilized by the mine. Victor Daiber, the engineering manager at the mine, testified on behalf of PSGC that he used information from other mines to determine that 9,000 and 12,000 cfm would be adequate for the fishtail ventilation and would work at this mine. (Tr. 301). Roberts, however, stated that there are plans in the district that include lower velocities but, in reality, they use greater air quantities because they don't sufficiently address the levels of respirable dust. (Tr. 84-85). Roberts points out that since the mine has three open crosscuts and a line curtain in the fourth, it is typical to require more air in the last open crosscut as a means to ensure adequate ventilation. (Tr. 87). If the mine uses the lower velocities they seek, they will not meet the respirable dust standards according to Roberts. (Tr. 125). Phillips agrees that unless the mine uses 25,000 cfm, it will not have the necessary air throughout the system.

e. Red zone issues in the roof control plan

The red zone issues relate to the persons working and moving cable in the area around the miner. (Tr. 74). PSGC, through Jankousky, indicates it would prefer to not address red zone issues in the roof control plan. Instead, the mine argues that it can handle safety policies for the red zone through internal programs and policies and, hence, did not include it in the roof control plan. (Tr. 361, 383). The mine also raises the red zone issues in terms of the 20-foot cuts and explains that less moving of the machine means fewer accidents. However, according to Roberts, it is the method chosen to move the equipment, not the number of times you do it, which is of critical importance.

f. Limit to turn no more than two turns in the crosscuts

If the mine wishes to turn the cross-cuts from both sides, then, according to MSHA, it needs to depict such on a sketch submitted with the plan. (Tr. 82). Odum relied upon an MSHA document showing the best practices for turning crosscuts with remote control continuous mining machines. (Tr. 163-164); M-15. Taking a limited number of turns helps limit the number of overly large intersections and, consequently, is a factor in roof control. The mine argues that it is a ventilation issue. Daiber, the engineering manager for PSGC, believes that more than two turns are necessary for ventilation control. (Tr. 289).

g. Curtain setback

The mine suggests a setback of five feet greater than the depth of the approved cut, i.e., a 25-foot setback. Jankousky testified that the miner operator can see the cut better at 25 feet than at 20 feet because the curtain does not get in the way. (Tr. 379) MSHA counters that see-through curtains may be used to improve visibility; however, the mine rejects that solution. (Tr. 381).

h. Using mesh in-cycle in roof control plan

The Secretary requests that the mine install mesh in certain areas of the roof to avoid roof falls. PSGC argues that loose materials accumulate in the mesh and, when it comes time to remove the mesh, it is difficult to do it safely. (Tr. 278). MSHA argues that the mesh prevents unplanned falls of roof and rock that may injure miners working or traveling in the area. (Tr. 168). Odum suggests that the safety benefits are “tremendous.” Phillips agrees that placing the mesh during the roof bolting cycle provides additional safety from roof falls.

There are many competing safety issues at a mine, and those issues must be weighed against one another in making decisions about the best plan. There are a number of other related issues raised by PSGC that are set forth in the Contested Issues submitted by the mine and a number of the items will need to be clarified or revised as the mine moves to longer cuts. (Tr. 93-94). The district manager has replied, ably, to each of those issues in the deficiency letter. That reply has been supplemented by the testimony of Roberts and Odum. (*See e.g.*, Tr. 160-162). I rely on those factors in determining that the deficiencies cited by MSHA are reasonable, based on relevant information, and contain a rational connection between the facts found and the choice made by the district manager.

II. CONCLUSIONS OF LAW

While plan contests are based on consultations between the Secretary and the operator, the Commission has recognized that “the Secretary is [not] in the same position as a private party conducting arm’s length negotiations in a free market.” *C.W. Mining Co.*, 18 FMSHRC 1740, 1746 (Oct. 1996). As one court has noted, “the Secretary must independently exercise [her] judgment with respect to the content of . . . plans in connection with final approval of the plan.” *UMWA v. Dole*, 870 F.2d 662, 669 n. 10 (D.C. Cir. 1989), *quoting* S. Rep. No. 95-181, at 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 613 (1978).

The framework for resolution of a plan dispute has been established by the Commission in a number of cases. *See Twentymile Coal Co.*, 30 FMSHRC 736, 748 (Aug. 2008). The Commission has held that “absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan’s approval.” *C.W. Mining Co.*, 18 FMSHRC at 1746. At issue here is whether the Secretary properly exercised her discretion and judgment in the plan approval process. The standard of review incorporates an element of reasonableness. *See Monterey Coal*, 5 FMSHRC 1010, 1019 (June 1983). I must therefore, look at the issue of suitability in terms of the discretion of the district manager.

a. Unsuitability of the current PSGC plan

The Lively Grove mine is a new mine that has been in the development stage for a period of time, but has now reached the point of mining coal and, therefore, has submitted proposals for both the ventilation and roof control plans. The plans at issue in this case are the initial plans of the mine, with no former plan to review for unsuitability.

b. *Suitability of the MSHA plan*

The Secretary must show that the district manager did not abuse his discretion in determining that the MSHA-proposed ventilation and roof control plans are suitable to the conditions at the Lively Grove mine. More specifically, the Secretary must show that the actions of the district manager were not arbitrary and capricious in his review and decision-making regarding the plans and their suitability. The Commission has defined "suitable" as "'matching or correspondent,' 'adapted to a use or purpose: fit,' 'appropriate from the view point of . . . convenience, or fitness: proper, right,' 'having the necessary qualifications: meeting requirements.'" See *Peabody Coal Company* 18 FMSHRC 686, 690 (May 1996)(omission in original), quoting *Webster's Third New International Dictionary* 2286 (1986), *aff'd* 111 F.3d 963 (D.C. Cir. 1997). The plans proposed by the Secretary, including the performance-based evaluation of the extended cuts and wide entries, must be suitable to this mine.

In examining suitability in this matter the primary focus is on the use of extended-cut mining, which encompasses wider entries and wider diagonals at intersections. Since PSGC is a start up mine, the district manager proposed that the mine start with shorter cuts of 20 feet, test them, and then move into longer cuts if the conditions prove to be appropriate. The district manager did this using national policy and guidelines regarding the use of extended cuts. Use of a guideline does not *per se* make it suitable or unsuitable to a plan, nor does "across the board" use of a policy automatically make it unsuitable for this particular mine. It is the position of PSGC that instead of using the national policy the district manager should have relied on studies conducted by the mine and general studies regarding roof and ventilation. Either way, the district manager is expected to rely on documents and information generated by the Mine Safety and Health Administration as a part of his review.

The mine argues first, that there are a number of studies to show that extended cuts are no more dangerous than 20-foot cuts. Daiber reviewed studies about extended cuts and reached the conclusion that there is no difference as to the ventilation of a 40-foot cut as opposed to a 20-foot cut. (Tr. 315). He testified that, based on the studies, there is "no significant difference" in respirable dust control between a 20-foot cut and a 40-foot cut. However, when pressed, both Daiber and another PSGC expert, Hartsog agreed that the roof conditions may be affected by extended cuts as the conditions are an unknown until mining actually begins. Although engineering and technical methods give the mine a good indication of what roof conditions it may encounter, it is by no means fool-proof, and the mine may encounter unexpected conditions. (Tr. 346, 445-446). Daiber essentially agreed that mining the area is the best way to determine the conditions at the mine and, therefore, taking smaller cuts in the beginning and evaluating them is a more prudent way to proceed. (Tr. 341, 346).

The evidence presented by the Secretary clearly demonstrates that the MSHA proposal is suitable as it relates to the Lively Grove Mine. First, I credit both Robert's and Odum's testimony far more than the generalization made by Hartsog, PSGC's expert. Hartsog is a self-employed mining engineer, who came into the case to support PSGC's stance after the citations were issued by the Secretary. (Tr. 418-423). Hartsog, like Daiber, testified that there is minimal, if any, difference between a 20-foot cut and a 40-foot cut as far as ventilation is concerned. (Tr. 431, 433-435). While the parties agree that the ventilation differences are

minimal, Hartsog insists that the potential for injury is higher with 20-foot cuts, than with longer, because the equipment is moved more frequently in a short cut than in a long. Hartsog however, does not address the safety of the roof in an extended cut in his initial support of the concept, but later admits that he can think of roof issues that would make a 40-foot cut less safe than a 20-foot cut. (Tr. 439, 441).

The district manager, in making his determinations about the suitability of ventilation and roof control plans, takes direction and guidance from MSHA experience and studies. The operator suggests that the directives used by the district manager somehow limit his discretion or take away from the suitability of the plan to this mine. I am not persuaded by the argument. The directives regarding the extended cuts, the wide entries, and the diagonals of the entries are directives used to determine what is suitable to the mine. The evidence presented by the Secretary regarding the use of extended cuts bears out the district manager's decision to evaluate their use prior to total approval. That can only be done by taking one step at a time, testing the effectiveness of the system, and then moving on. A conservative, careful approach, even if based on a PIL, on the part of the district manager does not undermine the prospect of what is suitable to this mine; in fact, the step-by-step approach enhances it.

c. Decision of the district manager

The Commission in *Twentymile Coal* applied the following guidance in determining if the actions of the district manager are arbitrary and capricious:

The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing the explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

30 FMSHRC at 754-755, quoting *Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

I find that the district manager in this case met the requirements of examining relevant data by seeking out data, information, and opinions from a number of highly qualified people. He articulated a reasonable explanation for his finding that the provisions sought by MSHA are

suitable. I find that the district manager made reasonable decisions and did not abuse his discretion in making those decisions.

PSGC argues that the arbitrary and capricious standard applies only to ERP (emergency response plan) cases, yet the arbitrary and capricious standard was upheld by the Commission in addressing the roof control plan in the *C.W. Mining* case cited by PSGC. In determining the applicability of the arbitrary and capricious standard to this case, I agree with PSGC, that some element of reasonableness must be apparent in the decisions made by the district manager. While there are disagreements about what provisions are best for the mine, the district manager has balanced the conflicting ideas and articulated a rational connection between the facts shown and the choices he made. While not the plan the mine would like to see, it remains a reasonable one given all of the evidence.

Lively Grove raises two primary issues with regard to the alleged arbitrary and capricious nature of Phillips decisions regarding the plans. First, PSGC argues that Phillips should not have used the PIL in making his decision regarding the mine. Specifically, PSGC argues that the use of the PIL is arbitrary because it is tantamount to using it as a binding rule, without the benefit of rulemaking. PSGC agrees that the PIL is not a rule, but argues it was used as such here. PSGC Br. 22. The fact that Phillips applied the PIL to the new mines in his district does not automatically render his decisions any less reasonable. The PIL guidance assists MSHA's district managers in determining how to best address a request for extended cuts, and, at a new mine such as was the case here, allows MSHA and the operator to evaluate the plan at each step. Phillips did not rule out the extended cuts, he simply wanted more information, based upon experience at *this* mine, in order to make a determination. I find Phillips' approach extremely reasonable. The Commission recognizes that while mine plans must be tailored to the specific conditions of a mine, they can include certain universal provisions. *Carbon County Coal Co.*, 7 FMSHRC 1367 (Sept. 1985). Much like a "universal provision", the PIL is based on MSHA experience and knowledge. It is a nationwide policy that a district manager has available for his consideration, and its purpose is to assist the district manager in reviewing plans.

The second argument that PSGC raises is that the district manager did not review all the relevant available data in making a decision about allowing the use of extended cuts at this mine. I disagree; the Secretary demonstrated that the district manager did consider all relevant facts, even if he did not review every document the mine suggests he should have reviewed. First, it is pure speculation on the part of the mine that the district manager did not review all relevant information or as the mine put it, all information that he "had readily available to him." I am aware that the parties rely on their knowledge and information from other sources when developing mine plans and that the information is often gathered from other mines and sources within MSHA. The parties don't start anew each time but, rather, start with time-tested practices and data gathered over time. I do not accept, however, that in determining whether the district manager abused his discretion, I must examine whether he found and reviewed every single piece of information that may be related, particularly when that information is not brought to his attention by the mine operator.

Next, it is not an abuse of discretion to rely on information he had available and in front of him, rather than on the information presented for the first time at the hearing. PSGC had a

number of experts testify regarding the two plans, including Hartsog concerning ventilation and Gadde about roof control. Neither of them was involved in the plan development or presentation of the plans to the district manager. The information put together by the experts was created after the plans were found deficient and solely for the purpose of hearing. Even so, the mine did not take the information back to the district manager for re-consideration. Respondent agrees that the evidence presented by Hartsog and Gadde was not presented to the district manager; however, PSGC wants to assume that the district manager had knowledge of the studies used by both and would have me agree that it is an abuse of his discretion not to have found it on his own and used it in his evaluation.

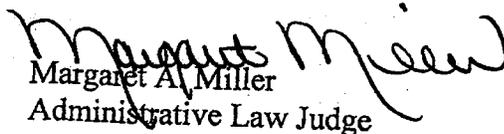
I agree with the Secretary that the “[d]istrict manager’s decision is entitled deference under the arbitrary and capricious standard if he takes into account the statutory and regulatory elements of suitability, makes a full appraisal of the relevant and available facts, and is reasonable in his conclusions.” Sec’y Br. 5. While MSHA agrees with PSGC that extended cuts and wider entries may be appropriate after study, MSHA seeks to take the safer route of testing before taking the larger step. I find that the district manager was not arbitrary and capricious in making the determination regarding the plans.

d. Other matters

During the course of the hearing, PSGC attempted to introduce evidence concerning the ventilation and roof control plans at other mines, specifically mines that are using extended cuts. I refused to allow that evidence primarily because it is not relevant to the decision regarding the circumstances and suitability of the plan to this mine. While I understand that many plans are based upon the experience at other mines, it is unlikely that two underground coal mines would present exactly the same factual situation and the same needs in their ventilation plan.

Since I must examine whether the actions of the district manager are arbitrary and capricious, I must look at how he made his decision, what he had before him at the time, and what information he used. Any document generated after that time is not relevant and will not assist me in making an informed decision in this matter. Therefore, a number of those documents were excluded from evidence as having no relevance.

I conclude that the Secretary has met her burden of proving that the district manager did not abuse his discretion. Accordingly, Citation No. 6680548 and Citation No. 6680549 are affirmed and Contest Proceedings, Docket Nos. LAKE 2009-711-R and LAKE 2009-712-R are hereby dismissed.


Margaret A. Miller
Administrative Law Judge

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June 1, 2010

SECRETARY OF LABOR, MINE SAFETY	:	TEMPORARY REINSTATEMENT
AND HEALTH ADMINISTRATION,	:	PROCEEDING
on behalf of RICKEY JOE STRATTIS,	:	
Applicant	:	Docket No. WEVA 2010-991-D
	:	HOPE CD 2010-06
	:	
v.	:	
	:	
ICG BECKLEY, LLC,	:	Beckley Pocahontas Plant
	:	Mine ID 46-09216
Respondent	:	

ORDER ON TEMPORARY REINSTATEMENT

Appearances:

Jessica R. Hughes, Esq., U.S. Department of Labor, Arlington, Virginia, on behalf of the Applicant;

R. Henry Moore, Esq., Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Moran

Pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. § 815, *et seq.*, as amended, and 29 C.F.R. § 2700.45, this matter is before the Court on an Application for Temporary Reinstatement filed by the Secretary of Labor ("Secretary") on behalf of Rickey Joe Strattis, Applicant. The Application seeks to have Mr. Strattis reinstated to his former position as a dozer operator at Respondent's facility.¹ A hearing on the Application, made at the request of the Respondent, was held in Charleston, West Virginia on May 24, 2010. The Court considered the evidence at the hearing, the closing statements offered by the parties and the post-hearing briefs in making its determination.

¹The parties agreed that, should the Court make a finding that Mr. Strattis' Application was not frivolously brought, (and as reflected in the body of this Order, it does so find that the Application is not frivolous) the reinstatement will be an economic reinstatement, which is to include Mr. Strattis' benefits and which does not diminish his status as the miners' representative.

The law is well-established on the issue of temporary reinstatement under the Mine Act. Section 105(c)(2) of the Act provides, in pertinent part, that the Secretary shall investigate a discrimination complaint, “and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.” The Commission has established a procedure for making this determination. Commission Rule 45(d), 29 C.F. R. § 2700.45(d) states: “The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of [her] application for temporary reinstatement, the Secretary may limit [her] presentation to the testimony of the complainant. The respondent shall have an opportunity to examine any witness called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was not frivolously brought.”

Accordingly, the scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's complaint was frivolously brought. *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987); *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it “appears to have merit.” S. Rep. No. 181, 95th Cong. 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of Federal Mine Safety and Health Act of 1977, at 6240625 (1978). The “not frivolously brought” standard has been equated to the “reasonable cause to believe” standard applied in other contexts. *Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d at 747; *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (February 2000).

Although an application for temporary reinstatement need not prove a *prima-facie* case of discrimination, the elements of a discrimination claim are noted here as part of the context in which it is assessed whether the evidence meets the non-frivolous test. Commission case law has set forth the essential elements of an action under Section 105(c) of the Act, by articulating that a complaining miner bears the burden of establishing: (1) that he or she engaged in protected activity, and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Paula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom.; Consolidation Coal Co. v. Marshall*, 773 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom.; Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

The Commission has frequently acknowledged the difficulty of establishing “a motivational nexus between protected activity and that adverse action that is the subject of the

complaint.” See, e.g., *Sec’y on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953 (September 1999). Consequently, the Commission has held that, “(1) knowledge of protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action” are all indications of discriminatory intent. *Id.* at 957. These examples are not in the conjunctive. Consequently, the coincidence in time between the protected activity and Strattis’ discharge by itself can be a basis upon which to infer an illegal motive on ICG Beckley’s part. See: *Durango Gravel*, 21 FMSHRC at 957.

The Court has determined that the evidence here establishes that Mr. Strattis’ Application was not frivolously brought. The Secretary established that Mr. Strattis, by filing a 105 (c) complaint in November 2009, engaged in protected activity. The Secretary maintains that Mr. Strattis’ subsequent discharge was motivated, at least in part, by that protective activity. MSHA investigator Mr. Kelly Acord testified that he requested information from the Respondent in connection with his investigation of the complaint on April 9, 2010. The Applicant was discharged on April 14, 2010. In this regard the Secretary notes the close temporal connection between the date on which MSHA sought additional information from the Respondent and Mr. Strattis’ discharge, which occurred only three business days after that. Mr. Strattis testified that ICG Beckley’s General Manager told him on the date of his discharge that MSHA had made a document request in connection with his discrimination claim and that he characterized Strattis as a “nuisance.”² On this record it is clear that Mr. Strattis had no knowledge that MSHA had asked ICG Beckley for additional information in connection with its on-going investigation of his claim of discrimination. Although the Applicant filed his discrimination claim in November of the previous year, there had been no prior discipline meted out; he had not been suspended nor discharged until shortly after the MSHA request for additional information.

The Court also concurs with the Secretary’s point that decisions, such as the Commission’s recent issuance in *CAM Mining LLC*, 31 FMSHRC 1085, October 22, 2009, 2009 WL 3802726, enunciate the proper test and that the test in a temporary reinstatement proceeding is not about making credibility determinations between competing versions of the events, but rather whether the claim is frivolous.³ For that reason, contentions raised in the Respondent’s post-hearing brief, such as whether the Applicant was constantly confronting others, whether he misused his equipment, and whether the real genesis of the discrimination claim was the Applicant’s desire to work a day shift, are all matters for the subsequent full proceeding on the

²To be clear, the Court does not make a credibility determination that Mr. Strattis’ version of the events on the date of his discharge represent what transpired. Rather, the Applicant’s testimony is assessed only in terms of deciding whether the claim is frivolous.

³Having noted the limited inquiry which is made in a temporary reinstatement proceeding, that limited determination in no way foreshadows the outcome of the full hearing on the discrimination claim because, in that setting, a court must often make credibility determinations among competing versions of the events.

claim of discrimination, as distinct from this temporary reinstatement matter.⁴ Instead, the Court's task is to "evaluate[] the evidence of the Secretary's prima facie case and determine[] whether the miner's complaint of discrimination 'appear[s] to have merit.'" *CAM Mining* at 1089.

It is undisputed that Mr. Strattis engaged in protected activity and suffered the adverse action of discharge and that, for purposes of temporary reinstatement, the claim is not frivolously brought. Accordingly, for the reasons articulated above, Respondent is ORDERED to economically reinstate Mr. Strattis to the position he held on April 14, 2010, at the same rate of pay and with the same benefits to which he was then entitled. Mr. Strattis' reinstatement will be deemed effective as of the date of his discharge.⁵

William B. Moran

William B. Moran
Administrative Law Judge

⁴Thus the Secretary's point is well-taken that the presence of supporting and detracting evidence of protected activity in the record is not ripe for resolution now, as that would move away from the limited determination of whether the claim is frivolous.

⁵In its cover letter to the post-hearing brief, Respondent's Counsel requests that, if reinstatement is ordered, the Secretary be directed to comply with the time requirements of Section 105 (c) (3), providing that it provide the miner of the results of the investigation within 90 days of the filing of the complaint. Although not jurisdictional, reinstatement is not open-ended and the Secretary does have an obligation to complete its investigation promptly. Should there be a protracted delay in this regard, the Court trusts that the Respondent will so advise the Court with an appropriate motion.

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June 3, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, on behalf of RICKEY JOE STRATTIS, Applicant	:	TEMPORARY REINSTATEMENT PROCEEDING
	:	Docket No. WEVA 2010-991-D
	:	HOPE CD 2010-06
	:	
v.	:	
	:	
ICG BECKLEY, LLC, Respondent	:	Beckley Pocahontas Plant Mine ID 46-09216

ORDER MODIFYING TERMS OF TEMPORARY REINSTATEMENT

Appearances:

Jessica R. Hughes, Esq., U.S. Department of Labor, Arlington, Virginia, on behalf of the Applicant;
R. Henry Moore, Esq., Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Moran

The Court's Order of June 1, 2010 is modified to correct the Court's misstatement that Mr. Strattis' reinstatement was "deemed effective as of the date of his discharge." June 1, 2010 Order at 4. Obviously the Court should have stated that the reinstatement was effective as of the date of the June 1st Order. To state otherwise would make the subsequent discrimination proceeding pointless on the question of back pay. The Court apologizes for the confusion it created by misstating the date of reinstatement. All other aspects of the Court's June 1st Order remain unchanged. Accordingly, Mr. Strattis' reinstatement is deemed effective as of June 1, 2010.

William B. Moran

William B. Moran
Administrative Law Judge

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June 11, 2010

SECRETARY OF LABOR	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on	:	
behalf of RICKY LEE CAMPBELL,	:	Docket No. WEVA 2010-1030-D
Complainant,	:	HOPE-CD 2010-09
	:	
v.	:	
	:	Slip Ridge Cedar Grove Mine
MARFORK COAL COMPANY, INC.,	:	Mine ID 46-09048
Respondent	:	

DECISION AND ORDER
REINSTATING RICKY LEE CAMPBELL

Appearances: Samuel Lord, Esq., U.S. Department of Labor, Arlington, Virginia, for Complainant and Secretary of Labor, Jonathan W. Price, Esq., The Bell Law Firm, PLLC of Charleston, West Virginia, for Complainant, Ricky Lee Campbell,

Thomas S. Kleeh, Esq. and J. A. Curia, Esq., Steptoe and Johnson, PLLC, Charleston, West Virginia, for Respondent.

Before: Judge L. Zane Gill

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary on behalf of Ricky Lee Campbell, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). Campbell filed a complaint with the Secretary’s Mine Safety and Health Administration (MSHA) alleging that his April 23, 2010 termination was motivated by his protected activity. The Secretary contends that Campbell’s complaint was not frivolous, and seeks an order requiring the employing entity, Marfork Coal Company (“Marfork”), to reinstate Campbell to his former position as a general laborer at the Slip Ridge Cedar Grove Mine (“Slip Ridge”), pending the completion of an investigation and final decision on the merits of his discrimination complaint. ¹ An expedited hearing on the

¹ The Secretary’s original Application for Temporary Reinstatement of May 17, 2010, included an allegation in paragraph 10 that Campbell had provided information in a federal investigation while he was employed at Slip Ridge. The Secretary provisionally withdrew this allegation prior to the June 4, 2010 hearing.

application was held in Beckley, West Virginia, on June 4, 2010.²

For the reasons that follow, I grant the application and order Campbell's temporary reinstatement.

SUMMARY OF THE EVIDENCE

The parties stipulated that Campbell is a "miner" under the Mine Act and that this court has jurisdiction to hear this case. (Tr.8.)

Campbell worked at various times relevant to this case as a shuttle car operator and bolter for several mines operated by subsidiaries of Massey Energy Company ("Massey"), including Parker Peerless Mine ("Parker Peerless) and Slip Ridge, both operated by Marfork Coal Company ("Marfork"), and the Upper Big Branch-South Mine ("Upper Big Branch"), operated by Performance Coal Company. (Tr. 17-18.)

Campbell began working for Marfork at Parker Peerless, in November of 2009. (Tr. 17.) He worked there for approximately three months before he was transferred to Upper Big Branch, where he worked for approximately four months. (Tr. 18.) Campbell returned to Parker Peerless for three days before starting work at Slip Ridge. (*Id.*)

On April 5, 2010, Campbell started to work at Slip Ridge. (Tr. 8.) According to Campbell's testimony, he immediately voiced safety issues concerning the shuttles he was operating. (Tr. 19, 38-39.) Campbell stated that each of the three shuttles he operated had maintenance issues, including brakes and tram pedal malfunctions. (*Id.*) Campbell testified that he had to take his hand and pull the tram pedal so he could slow two of the shuttles down. (*Id.*) Campbell testified that he repeatedly reported the problem to employees of Slip Ridge, including his immediate supervisor, the chief electrician, the mine foreman, the superintendent, and others mentioned in his testimony without names. (Tr. 20.) In addition, Campbell stated that he shut down a shuttle due to safety issues, but was ordered by supervisors to continue operating the shuttle. (Tr. 43-44.)

On April 5, 2010, the day Campbell began working at Slip Ridge, the Upper Big Branch-South Mine exploded, killing 29 miners. The tragic incident has received extensive media coverage.

On April 7, 2010, Campbell returned to Upper Big Branch to pick up his last paycheck and was approached by a Pittsburgh reporter who was accompanied by a television camera. (Tr.

² The only witness examined at the hearing was Ricky Lee Campbell, although counsel for the Respondent made an offer of proof of additional witness evidence that was excluded in response to objections made by counsel for the Secretary.

22.) The interview was printed in the *Pittsburgh Post-Gazette*, and the video was posted on the newspaper's website. (Ex. R.4.) A DVD copy and a transcript of the television interview were admitted into evidence. (Ex. G1 and G2.)

On April 8, 2010, Slip Ridge management gave Campbell a written warning. (Tr. 58, 92.) He was issued the warning after he severed a continuous miner power cable with a shuttle. (*Id.*) Campbell testified that this was the first time he ran the "left side buggy," and he did not know that the brakes were malfunctioning. (*Id.*) The continuous miner was out of operation for about an hour and a quarter while repairs were performed. (Tr. 59.)

Shortly before Campbell was terminated (date uncertain), he shut down the mine equipment he was working with because he believed it to be unsafe. Campbell testified that the mine foreman, Jeremy Hall, instructed him to continue to work with the equipment nonetheless. Campbell believed that the foreman's tone was loud and animated. The equipment in question was out of service for about 30 minutes. (Tr. 84.)

On April 14, 2010, Slip Ridge management suspended Campbell from his duties. On April 23, 2010, Campbell was terminated. (Tr. 8.) The Secretary alleges that Campbell's dismissal was motivated by the safety complaints he voiced while working at Slip Ridge and by his on-camera interview with a Pittsburgh media outlet, during which he criticized the safety conditions and practices at the Upper Big Branch Mine, where he worked prior to Slip Ridge. (Ex. R3 at 3; Ex. G1.)

During the April 14, 2010 meeting in which Campbell was notified of his suspension, mine superintendent Tim Shea used coarse and hostile language when speaking to Campbell. (Tr. 71.) Campbell did not ask for, nor did anyone else volunteer a reason for the suspension. (Tr. 73.)

During the termination meeting on April 23, 2010, the tone was neutral, not hostile. No one on the management side mentioned the media coverage. (Tr. 81.) No one told Campbell that his termination had anything to do with his complaints about equipment safety. (Tr. 77.)

On May 18, 2010, the Commission received the Application for Temporary Reinstatement brought by the Secretary of Labor on behalf of Campbell. On May 24, 2010 Respondent Marfork requested a hearing on the Application for Temporary Reinstatement. On May 27, 2010, I conducted a telephone conference call with the parties to discuss procedural issues and to set a hearing schedule. During the conference call Mr. Lord made an oral motion *in limine* on behalf of the Secretary to exclude certain evidence. On May 28, 2010, I issued an order denying the Secretary's oral motion for *in limine*. On June 3, 2010, the Secretary filed a motion for reconsideration of the aforementioned Motion in Limine. The motion for reconsideration was denied at the hearing on June 4, 2010, in Beckley, West Virginia.

DISCUSSION OF RELEVANT LAW

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

When a person covered by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) notifies the Secretary that he/she believes discrimination has occurred, the Secretary is obligated by Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2) to investigate, "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis [. . .], shall order the immediate reinstatement of the miner pending final order on the complaint."

The Commission has established a procedure for making the reinstatement decision. Commission Rule 45(d), 29 C.F.R. § 2700.45(d) states:

The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the complaint was frivolously brought. The burden of proof is upon the Secretary to establish that the complaint was not frivolously brought. In support of [her] application for temporary reinstatement, the Secretary may limit [her] presentation to the testimony of the complainant. The respondent shall have an opportunity to examine any witness called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was not frivolously brought.

29 C.F.R. § 2700.45(d)

As the above makes clear, and as I noted at the hearing on June 4, 2010, the scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's complaint was frivolously brought. *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (August 1987); *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). It is "not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of the proceedings." *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). In reviewing a judge's temporary reinstatement order, the Commission has applied

he substantial evidence standard.³ See *id.* at 719; *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993).

The legislative history for section 105(c) reveals that Congress discussed the term “frivolous” with the understanding that a complaint is not frivolous if it “appears to have merit.” S. Rep. No. 181, 95th Cong. 1st Sess. 36-37 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of Federal Mine Safety and Health Act of 1977*, at 6240625 (1978). The “not frivolously brought” standard has also been equated to the “reasonable cause to believe” standard applied in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 157 (February 2000).

Under section 105(c) of the Act, the Secretary bears the burden of establishing: (1) that the miner engaged in protected activity, and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Paula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom.*; *Consolidation Coal Co. v. Marshall*, 773 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom.*; *Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

Thus, an applicant for temporary reinstatement need not prove a *prima facie* case of discrimination with the attendant requirement of proving all necessary elements at a higher evidentiary standard, as would be required in a trial on the merits. But the applicant must provide evidence of sufficient quality and quantity (substantial evidence) to allow the judge to find by application of the “reasonable cause to believe” standard that: (1) the applicant engaged in protected activity, and (2) that there is sufficient showing of a nexus between the protected activity and the alleged discrimination, to support a conclusion that the complaint of discrimination is not frivolous.

Regarding the nexus requirement, other judges and the Commission have adopted elements of the full *prima facie* case to create an analytical framework that comports with the strictures of the limited evidentiary scope of the temporary reinstatement process yet is useful in

³ 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)).

bridging the sometimes difficult gap between alleged actions and the intentions behind them. In recognition of the fact that direct evidence of intent or motivation is rarely found, the Commission has identified several circumstantial indicia of discriminatory intent: (1) hostility or animus toward the protected activity, (2) knowledge of the protected activity, and (3) coincidence in time between the protected activity and adverse action. *Secretary of Labor, Mine Safety and Health Administration (MSHA) on behalf of Lige Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089 2009 WL 3802726, (F.M.S.H.R.C.), October 22, 2009, KENT 2009-1428-D.

APPLICATION OF LAW TO THE EVIDENCE

The Secretary has established by the standards set out above that Campbell engaged in protected activity.⁴ Campbell testified that he immediately and repeatedly brought what he believed to be complaints about faulty equipment to the attention of appropriate management individuals. He also shut down equipment he was working with due to his concern that it was unsafe. There is no question that Campbell's complaints about faulty mine equipment are enough to invoke the miner protections in section 105(c) of the Mine Act.⁵

The Secretary has also established by the standards set out above that there is sufficient nexus between Campbell's protected activity and the adverse action, i.e., his suspension and ultimate termination. The Secretary's evidence is sufficient to establish that mine management knew or should have known that Campbell was complaining about faulty equipment. Campbell expressed concern about the safety of the equipment he was operating clearly and frequently enough to bring it to the attention of his superiors. There is also sufficient evidence in the record to establish the temporal proximity between the protected activity and the adverse action. The short period of time between Campbell's transfer to the Slip Ridge facility, his safety complaints to management, and his ultimate termination underscore this point. The coincidence in time between the protected activity and Campbell's termination can be a basis on which to infer an illegal motive on CAB's part. *Durango Gravel*, 21 FMSHRC at 957.

The evidence of animus on the part of the employing mine is less clear though still sufficient. The evidence of the timing and tone of management actions is sufficient for a person reviewing these facts to reasonably believe that management's actions were, at least in part, a reaction to Campbell's safety complaints.⁶ In addition to the short time periods discussed above,

⁴ It is not necessary to decide if Campbell's statements to the press constitute protected activity. His complaints to persons tasked with mine management about the safety of the equipment he operated satisfy that portion of section 105 (c) of the Act.

⁵ Counsel for the mine operator conceded that Campbell's complaints about perceived equipment safety constitute protected activity. (Tr. 23)

⁶ As mentioned above, the events related to the Upper Big Branch disaster and Campbell's involvement with media coverage are not taken into account in this decision.

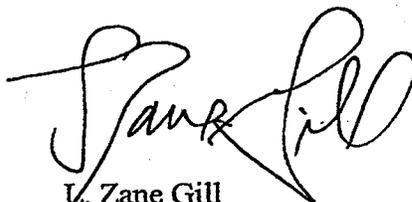
the evidence of hostile, coarse, and abrupt tone on the part of management is sufficient to sustain a reasonable conclusion of animus. Accordingly, I conclude that this element of the nexus analysis is also satisfied to the level required by the law discussed above.

In summary, all elements of the analytical framework discussed above are satisfied to the level required by the relevant statutes, rules, and case law precedents. The Secretary has carried her burden of adducing substantial evidence to support a reasonable cause to believe that Campbell engaged in protected activity, and that there is a nexus between the protected activity and the adverse action of suspension and termination. I conclude that the complaint of discrimination was not frivolously brought.

ORDER

For these reasons, Marfork Coal is **ORDERED** to reinstate Campbell to the position he held on April 14, 2010, or to an equivalent position, at the same rate of pay and with the same hours and benefits to which he was then entitled.

Campbell's reinstatement is not open-ended. It will end upon a final order on Campbell's complaint. 30 U.S.C. § 815 (c)(2). Therefore, it is incumbent on the Secretary to determine promptly whether or not she will file a complaint with the Commission under section 105(c)(2) of the Act based on Campbell's May 4, 2010, complaint to MSHA. Accordingly, the Secretary is **ORDERED** to advise counsel for Marfork Coal and the court of her decision by **July 26, 2010**, and, if a decision has not been made by that date, I will entertain a motion to terminate the reinstatement.



L. Zane Gill
Administrative Law Judge

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/cd

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 17, 2010

TWENTYMILE COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2008-787-R
v.	:	Order No. 7610956; 03/12/2008
	:	
SECRETARY OF LABOR,	:	Foidel Creek Mine
MINE SAFETY AND HEALTH	:	Mine ID: 05-03836
ADMINISTRATION, (MSHA),	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2008-352
Petitioner	:	A.C. No. 05-03836-134666
	:	
v.	:	Docket No. WEST 2008-1321
	:	A.C. No. 05-03836-155287-01
	:	
TWENTYMILE COAL COMPANY,	:	Docket No. WEST 2008-1576
Respondent	:	A.C. No. 05-03836-161331
	:	
	:	Foidel Creek Mine

DECISION

Appearances: R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Twentymile Coal Company;
Kristi L. Henes, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and Larry R. Ramey, Conference & Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for the Secretary of Labor.

Before: Judge Manning

These cases are before me on a notice of contest filed by Twentymile Coal Company ("Twentymile") and petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA") 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 parties introduced testimony and documentary evidence at a hearing held in Steamboat Springs, Colorado.

Twentymile operates the Foidel Creek Mine, a large underground coal mine in Routt County, Colorado. The mine extracts coal in panels using a longwall system. As discussed below, the parties settled most of the citations at the start of the hearing, so only Order No. 7622519 and Citation No. 7622452 were adjudicated.

I. ORDER No. 7622519; WEST 2008-1576

A. Background

On July 8, 2008, Inspector Carol Miller issued Order No. 7622519 under section 104(d)(2) of the Mine Act, alleging a violation of 30 C.F.R. § 75.380(d)(7)(iv) as follows, in part:

The lifeline in the escapeway of 22 Right at crosscut 62+50 in the No. 1 entry, crosscut 71+25 to crosscut 75+00 in the No. 2 entry was not located in such a manner for miners to use effectively to escape. The lifeline was covered by a pump cable in the No. 1 entry. In the No. 2 entry, the lifeline at crosscut 65+00 was covered by a communication cable. From 71+50 to crosscut 75+67 in two locations the lifeline was cut in half and tied to the mesh with 6 feet and 2.5 feet of continuous cable not intact plus the cable was hung from the roof with a snap link, cable hangers, and hooked in the roofing mesh throughout this location.

(Ex. G-1). The inspector determined that an injury was unlikely but that any injury would result in lost workdays or restricted duty. She determined that the violation was not significant and substantial (“S&S”) and that the company’s negligence was high. The unwarrantable failure determination was based, in part, on the fact that the mine was issued a citation on July 3, 2008, for a similar violation. Section 75.380(d)(7)(iv) provides that “[e]ach escapeway shall be . . . (7) [p]rovided with a continuous, durable directional lifeline or equivalent device that shall be . . . (iv) [l]ocated in such a manner for miners to use effectively to escape.” The Secretary proposes a penalty of \$4,000.00 for this order.

Inspector Miller testified that as she inspected the mine she followed the route of the primary escapeway for the 22 Right longwall section. While traveling the route, she encountered two areas where the lifeline had been severed as well as other areas where the lifeline was not accessible to miners who may have needed it in the event of an emergency. (Tr. 13). The lifeline had been lifted up to the roof and hooked to the roof mesh by an assortment of snap links and high voltage cable hangers. (Tr. 13-14, 33). She testified that because the roof was nine feet high, the lifeline could not be reached by miners in those areas where it was hanging from the

roof. (Tr. 15). Inspector Miller further testified that pump cables and communication cables were also hung from the roof and crossed under the lifeline with the result being that a miner might not be able to pull down the lifeline during an emergency. (Tr. 14). Finally, she testified that the lifeline had been cut in two areas and the ends had been tied to the roof mesh creating a gap of six feet and another gap of two and a half feet in the lifeline. (Tr. 13-14, 21-22).

Inspector Miller testified that the violative conditions existed in several locations over about 1,300 feet of the lifeline. The lifeline was either not continuous or was not located in an area where it could be reached by miners. She testified that lifelines are designed to allow miners to use their hands to find their way out of the mine in the event of an emergency. (Tr. 39). The lifeline and attached cones provide a visual and tactile means of conveying the route and direction of the escapeway. (Tr. 41). In a smoke-filled environment, miners are trained to locate and follow the lifeline out of the mine as quickly as possible. (Tr. 17).

Rob Coop worked in Twentymile's safety department at the time of the inspection. Coop testified that the cited conditions existed because there had been a power move during the previous (graveyard) shift. A power move generally involves turning off and locking out power to the belts, disconnecting hydraulic equipment, removing the water lines from the pumps, disconnecting the power, moving the power train and pumps, moving the cables, and then reconnecting everything back together. (Tr. 48-49). He testified that snap links and cable hangers were used to put the lifeline up near the ceiling during the power move so that the equipment would not snag or cut the lifeline. (Tr. 51). Mr. Coop testified that, more than likely, the lifeline had been cut so that the hoses and cables could be dropped down during the power move. (Tr. 50). Coop assumed that the lifeline was not fixed after the power move because the crew "got busy and did not get back to it." *Id.* He did not believe that it was necessary for the crew to cut the lifeline during a power move but that the crew probably did not want to disconnect the power cables because they are large, heavy, and difficult to move. (Tr. 59-62). He stated that the cable connectors weigh between 90 and 100 pounds. (Tr. 62). Coop could not explain why the preshift examiner did not observe the conditions cited by Inspector Miller. (Tr. 59).

Tuck Timothy Walker was a scoop operator who was functioning as a step-up lead man for the outby areas at the time the order was issued. (Tr. 64). Walker testified that he conducted a preshift examination of the subject area on July 8, while Scott Simpson, the longwall foreman, conducted the preshift examination of the longwall face area. (Tr. 67-69). He testified that his shift started at 6:00 a.m. on July 8 and that he would have reached the cited area during his examination between 6:45 a.m. and 7:00 a.m. (Tr. 71-72). Walker said that he was not sure if he had traveled through the cited area before the order was issued by Inspector Miller, but that he would definitely have examined it at some point during his preshift on July 8. (Tr. 74).

Inspector Miller testified that on July 3, 2008, five days before the issuance of the subject order, she issued Citation No. 7622518 for a violation of the same safety standard. (Tr. 18-19; Ex. G-3). Miller cited a lifeline that had been rendered inaccessible because various cables

crossed under the lifeline and would have prevented miners from pulling the lifeline down from the roof and using it to guide them out of the mine. She said that a crew had completed a power move eight days before the citation was issued and it appeared that the condition had not been corrected during that time. (Tr. 36). Inspector Miller testified that she discussed the violation and what she perceived as a developing pattern of lifeline violations at the mine with Richard Conkle, Twentymile's safety manager, at the closeout conference during the July 3 inspection. (Tr. 20). His usual practice after receiving a citation is to make copies of the citation, place the copies in the supervisors' office, and then review the citation with these supervisors. (Tr. 85-86). The supervisors then review the citations with the crews before they go underground. Conkle was fairly certain that these steps were taken after the July 3 citation was issued. (Tr. 86). Conkle testified that it was very unlikely that there would be so much smoke in an escapeway that a miner would have to use a lifeline. (Tr. 87). Coop testified that he was aware of the July 3 citation. (Tr. 55).

Inspector Miller testified that she based her high negligence and unwarrantable failure finding on a number of factors. She said that she discovered the violation when she came to the mine to terminate the citation she issued on July 3 for a violation of the same standard. (Tr. 16, 25). Miller believed that the previous citation, as well as several other prior citations for similar conditions, put Twentymile on notice regarding the seriousness of the violation and that it needed to take greater efforts to comply with the lifeline standards. (Tr. 19-20, 23-24). She testified that at the time she arrived on July 8, coal was being mined but no efforts were being made to correct the violative condition. The crew had been in the mine for a little over an hour at the time she discovered the violation.

Inspector Miller also testified that the cited condition should have been detected during the preshift examination. (Tr. 16). The inspector did not talk to Walker, but she did talk to Simpson who told her that the area would have been preshifted by Walker. Inspector Miller recognized that while a preshift examiner should be looking for immediate hazards, such as dangerous rib conditions or methane accumulations, he should also be concerned with other conditions, such as the condition of the lifeline because it is important and easy to observe. (Tr. 43-44). Miller testified that the cited area was preshifted every eight hours and that, with a shift coming on after the power move, a foreman should have been aware of the condition. (Tr. 16).

The inspector testified that the power move was made on the previous shift and the miners who moved the power center and the foreman in charge of the move should have made it a priority to make sure that the lifeline was available for use after completion of the move. (Tr. 17, 18, 22). Further, if the mine was going to hang the lifeline from the roof, breakable ties should have been used that would have allowed miners to pull down the lifeline for use in the event of an emergency. (Tr. 33-34). Miller testified that the cited conditions were very obvious. (Tr. 17). She also believed that the violative condition was extensive because it was not isolated to a single area but existed over a distance of about 1,300 feet of the lifeline. (Tr. 17, 21). Miller acknowledged that there was a second escapeway that went in by the longwall and that this escapeway was completely isolated from the cited escapeway. (Tr. 29-30).

B. Summary of the Parties' Arguments.

The Secretary argues that the order should be affirmed as written. The Secretary contends that the unwarrantable failure and negligence findings are supported by the evidence. Inspector Miller issued an almost identical citation five days earlier and that citation put Twentymile on notice as to what was required. In spite of this notice, Twentymile created this condition on the previous shift and did not immediately correct it after the power move. The condition was extremely obvious, yet it was not recognized during the preshift or onshift examinations and it was not corrected. The condition was also rather extensive as it existed over about 1,300 feet of the lifeline.

Twentymile contends that the Secretary did not establish that the violation was the result of its unwarrantable failure to comply with the safety standard. A move of the longwall power center during the prior shift necessitated severing the lifeline in two areas and hanging the lifeline near the roof. These steps were taken to protect the lifeline from damage during the move of the power center. This condition lasted for a short period of time. Although the 8-hour cycle preshift examination for the day shift had begun, the examiner had not reached the area cited by Inspector Miller. The condition was not extensive and it was limited to a small area of the lifeline that extended through thousands of feet of escapeway. Further, the issuance of the citation for a similar violation on July 3 is not dispositive of an unwarrantable failure finding.

C. Analysis.

The plain language of the safety standard provides that a lifeline must be (1) "continuous," and (2) "located in such a manner for miners to use effectively to escape." See *Jim Walter Resources, Inc.*, 31 FMSHRC 1208 (Oct. 2009) (ALJ); *Cumberland Coal Resources*, 31 FMSHRC 1147 (Sept. 2009) (ALJ) (Pet. for disc. rev. granted by Comm. on Oct. 15, 2009). In the present case, the lifeline had been cut in half in two places and it was covered by a pump cable and by a communication cable in other locations. Thus, I find that Twentymile violated both of the requirements set forth in the standard. The lifeline was not continuous in several locations and it was not located where miners could use it for escape in other locations.¹

In *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the Commission restated the law applicable to determining whether a violation is the result of an unwarrantable failure:

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more

¹ Twentymile frequently hangs the lifeline from the roof with hangers so that it is not down on the ground and it can be easily reached by miners. In the case at hand, the lifeline was pulled up to the roof, or close to the roof, during the power move. In this state, miners might not be able to reach it. Because it was above power and communication cables, miners would also not be able to easily pull it down even if they could reach it.

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 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) (“*R&P*”); see also *Buck Creek [Coal, Inc. v. FMSHRC]*, 52 F.3d 133, 136 (7th Cir. 1995)] (approving Commission's unwarrantable failure test).

Whether conduct is “aggravated” in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator’s knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) . . . ; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). 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. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

I find that the Secretary established that this violation was the result of Twentymile’s unwarrantable failure to comply with the safety standard. The first aggravating factor to be addressed is the length of time that the violative condition existed. It appears that the violative condition first existed during the graveyard shift that began on July 7, 2008, during which a power move was conducted. The lifeline was severed and raised to the roof in order to prevent tearing the lifeline with the equipment that was being moved. It is not clear what time on July 7

the power move crew created the condition but, more than likely, it was one of the first tasks they completed. The condition was not abated until about 8:25 a.m. on July 8, 2008.

Twentymile asserts that the short duration of the violative condition necessitates a finding that the violation "cannot properly be considered an unwarrantable failure." (Twentymile Br. 2). Although the condition existed for less than a full shift, it was a condition that was knowingly created by the shift conducting the power move. This crew neglected to fix the condition upon the completion of the move or to make sure that the oncoming crew corrected the condition at the start of the following shift. Instead, Twentymile began mining coal the following shift without taking steps to repair the lifeline. Twentymile argues that the condition would have been discovered by Mr. Walker during his preshift. Assuming that to be true, it must be remembered that the purpose of a preshift examination is to look for hazardous conditions, not to make sure that work crews are doing their job. Twentymile should not rely on preshift examinations to make sure that lifelines are repaired after power moves. It should have been part of the crew's job to fix the lifeline after the power station was moved or, if the crew ran out of time, to take steps to ensure that it was repaired at the start of the following shift.

The second aggravating factor that must be looked at is the extent of the violative condition. Inspector Miller testified that this was not an isolated violation. Rather, it existed for approximately 1,300 feet of the lifeline. The lifeline had been severed in two places and was inaccessible to miners for an extended length. Twentymile argues that the violative condition only existed for a small portion of the total lifeline that extended for thousands of feet through the mine. This argument is troubling. A severed, inaccessible lifeline serves very little purpose in a smoke-filled environment, which is exactly the kind of environment that lifelines are designed to address. Inspector Miller found that 20 people were affected by the violative condition. An interruption in, or inaccessible portion of, a lifeline has the potential to render useless the remaining length of the lifeline that exists outby the violative condition. If a miner inby the violative condition begins to utilize the lifeline and comes upon an interruption or inaccessible portion, they may never have the chance to find and utilize the remainder of the lifeline that exists on the other side of the interrupted or inaccessible portion.

The third aggravating factor that must be addressed is whether the operator has been placed on notice that greater efforts are necessary for compliance. On July 3, 2008, Inspector Miller issued a citation for violation of the same standard that is the subject of the order in question. Twentymile argues that the citation issued on July 3, 2008, cannot be independently dispositive of the unwarrantable failure issue. That is true, but it is one of the factors that must be considered. The Commission has recently stated that, in addressing whether a violation is the result of an unwarrantable failure, "[w]hile an administrative law judge may determine, in his discretion, that some factors are not relevant, or may determine that some factors are much less important than other factors under the circumstances, all of the factors must be taken into consideration and at least noted by the judge." *IO Coal Co., Inc.*, 31 FMSHRC 1346, 1351 (Dec. 2009). The July 3rd citation was issued for cables and hoses passing under the lifeline, thereby making the lifeline inaccessible to miners who may have needed it in the event of an emergency.

The subject order was issued in an area described as "some distance" from the area that was the subject of the earlier citation. Be that as it may, the violative conditions are very similar. Inspector Miller spoke with Conkle during a closeout conference for the July 3rd citation and expressed her concern regarding a series of lifeline citations that had been issued. Conkle indicated that, generally, copies of citations are posted for all miners to see, placed in the supervisor's office, and reviewed and discussed with supervisors who then do the same with their crews. Coop indicated that he was aware of this violation. I find that Twentymile was on notice that greater efforts were necessary for compliance with the lifeline standard.

The fourth aggravating factor that must be addressed is the operator's effort in abating the violative condition. As discussed above, Twentymile was not in the process of eliminating the hazard when Inspector Miller encountered the condition and it had not been entered in the company's examination books. If the outby crew were in the process of repairing the lifeline when Inspector Miller arrived, then it could be said that the operator was attempting to correct the condition.

The fifth aggravating factor that must be addressed is whether the violation was obvious or posed a high degree of danger. According to Inspector Miller, the condition was very obvious. Coop testified that he observed the condition at the same time Miller did, but he was unable to offer an explanation as to why the condition was not recognized by a preshift or onshift examiner, or the foreman in charge of the power move on the July 7. Given the importance of lifelines in the event of an emergency, the fact that lifelines are designed with reflective tape to make them easily visible, and the fact that both Miller and Coop noticed the condition, I find that the violation was "obvious." As Miller noted, miners should always be conscious of the condition of the lifeline, which in some cases may be their only means of finding a way to safety.

The sixth, and final, aggravating factor that must be considered is the operator's knowledge of the existence of the violation. There is no dispute that the lifeline was severed and raised to the roof by the crew that conducted the power shift. It is clear that Twentymile's employees was aware of the cited conditions because they created them. The conditions were not remedied because the crew got busy and did not get back to it. Thus, Twentymile was aware of the condition, but it decided to not fix it and instead concerned itself with resuming production.

The above analysis of aggravating factors, combined with the lack of substantive mitigating factors, demonstrates that Twentymile engaged in aggravated conduct constituting more than ordinary negligence. In this particular case, the aggravated conduct is most accurately characterized as "indifference" or "a serious lack of reasonable care" on the part of Twentymile. The cited condition was created in order to more easily conduct the power move. Further, the violative condition was not timely addressed after the power move was completed. For the same

reasons, Inspector Miller's finding of high negligence is appropriate.² I find that a penalty of \$5,000.00 is appropriate for this violation.

II. CITATION No. 7622452; WEST 2008-1321

A. Background

On April 11, 2008, Inspector Art C. Gore issued Citation No. 7622452 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 75.380(d)(2) as follows:

Each escapeway in the mine shall be clearly marked to show the route and direction of travel to the surface. The red reflectors in the alternate escapeway located in 20 Right #3 entry from crosscut 15+00 outby were completely covered with dust and could not be seen.

(Ex. G-5). The inspector determined that an injury was unlikely but that any injury would result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company's negligence was moderate. Section 75.380(d)(2) provides that "[e]ach escapeway shall be . . . (2) [c]learly marked to show the route and direction of travel to the surface." The Secretary proposes a penalty of \$946.00 for this citation.

While at the mine, Inspector Gore traveled through the 20 Right No. 1 entry.³ He noticed that there was dust on the reflectors hanging from wires attached to the center of roof. The mine uses reflectors to mark escapeways and different colors are used to designate different escape routes. Inspector Gore testified that the red reflectors in the entry used as the alternate escape route were caked with a combination of rock dust and coal dust. (Tr. 95, 100). He stated that no reflective material could be seen on the reflectors when a light was shined down the entry because they were covered with dust. Gore testified that it is crucial for mine operators to keep reflectors clean so that miners will know where to go in the event of an emergency that requires escape from the mine. He further testified that the Secretary's safety standard requires escapeways to be clearly marked and that the reflectors in the present entry were too dirty to provide guidance to miners in the event of an emergency. This condition existed for about 1,000

² Twentymile also argues that the gravity of the violation was improperly evaluated under the assumption that an emergency had occurred and the lifeline needed to be used. Inspector Miller determined that an accident or injury was unlikely and that the violation was not S&S. She determined that, if there were an injury, it would likely result in lost workdays or restricted duty. She determined that 20 people were affected by the violation based on the number of people on the longwall crew. I find that the inspector's gravity determination is supported by the evidence.

³ At the hearing, Inspector Gore admitted that the reference in the citation to the No. 3 entry was incorrect and that the condition he cited was actually in the No. 1 entry. (Tr. 93).

feet in the alternate escapeway, which is the tailgate entry for the longwall section and is a return air course. (Tr. 95, 97, 102).

Gore acknowledged that, otherwise, the escapeway was well maintained, the miners were well trained, and the operator has effective training policies for underground escape routes. (Tr. 96-97). He noted that he has previously issued similar citations to Twentymile. (Tr. 99-100). Inspector Gore testified that the reflectors were cleaned during the weekly examination and that six days had passed since the last examination. (Tr. 101). He said that six days would have allowed enough time for dust to build up on the reflectors but it was not enough time for a person to become aware of it. *Id.* Loren Young, a former Twentymile employee, testified that he would regularly clean off the reflectors during his weekly examinations of the escapeways. (Tr. 114).

Gore acknowledged that he believed that there was a lifeline in the alternative escapeway, but he did not know whether the lifeline was color coded in order to distinguish the alternate escapeway from the primary escapeway. (Tr. 102, 109). Gore was accompanied by an MSHA trainee inspector. His notes reflect that a lifeline was present in the escapeway. (Tr. 102-103). Inspector Gore stated that lifelines are to be used in combination with reflectors and not to replace them. (Tr. 106).

Dick Conkle testified that there was a lifeline in the cited escapeway and that it met all of the requirements of the cited safety standard. (Tr. 121). He testified that the lifeline had reflective material on the directional cones and that these cones clearly marked the escapeway. (Tr. 123).

B. Summary of the Parties' Arguments.

The Secretary argues that Twentymile violated section 75.380(d)(2) when it failed to maintain a clearly marked escapeway which would show the route and direction of travel to the surface. Specifically, the Secretary asserts that the dust-covered reflectors were too dirty to clearly mark the alternate escapeway. (Tr. 129). The Secretary argues that, in evaluating whether there is a violation of the cited escapeway standard, the judge must assume the existence of an emergency. (Tr. 128).

The Secretary argues that the issuing inspector, as well as other MSHA inspectors, had cited this condition on multiple occasions prior to the issuance of the citation in question, thereby placing Twentymile on notice of what was required for compliance. (Tr. 129). Further, the Secretary contends that the presence of a lifeline, which may satisfy lifeline standards added by the 2006 MINER Act, does not satisfy the cited standard and Twentymile must still maintain the reflectors in the escapeway. (Tr. 128-130) (*citing Spartan Mining Co.*, 30 FMSHRC 699 (Aug. 2008)).

Twentymile argues that the citation should be vacated given that the lifeline clearly marked the alternate escapeway. There is little to no guidance regarding what "clearly marked"

means within the cited standard. (Tr. 132). Further, reflectors are not required, nor are they the only means of “clearly marking” an escapeway. (Tr. 132). The cited standard is general and utilizes vague language. (Tr. 133). On the other hand, the lifeline standard at Section 75.380(d)(7) is specific and necessarily satisfies the more general standard that the Secretary alleges was violated. (Tr. 133; Twentymile Br. 2). Where two associated standards exist, the rules of statutory interpretation dictate that the more specific standard controls the more general. (Tr. 133; Twentymile Br. 3 (*citing Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992))).

Reflectors, while beneficial in marking a smoke-free escapeway, provide little assistance in a smoke-filled escapeway and don’t provide a directional component, regardless of whether they are covered in dust. (Tr. 133). A lifeline with reflective materials and directional cones clearly marks the escapeway in a smoke-free environment in addition to providing tactile directional input to a miner in a smoke-filled environment. (Tr. 133).

C. Analysis

Neither the Commission nor its ALJs have directly addressed the issue of what is required to “clearly mark” an escapeway such that it shows the “route and direction of travel to the surface.” There is no direct guidance regarding the use of a lifeline to satisfy the cited standard’s requirement that escapeways be “[c]learly marked to show the route and direction of travel to the surface.” The Secretary contends that the presence of a lifeline does not satisfy the cited standard. Moreover, she argues that the two standards, i.e., 75.380(d)(2) and 75.380(d)(7), are not duplicative requirements and, therefore, require different means of satisfaction. As support for her argument she references *Spartan Mining Co.*, 30 FMSHRC 699 (Aug. 2008). The *Spartan* case cited by the Secretary addresses the issue of whether two citations are duplicative of each other, thereby punishing the operator twice for the same violation. That is not the issue here. Here, the issue is whether a lifeline is capable of “clearly marking” an escapeway “to show the route and direction of travel to the surface.” Only one citation was issued in this instance and, therefore, duplication is not an issue. The lifeline was not cited nor was it referenced in the citation as a possible way of marking the escapeway. Nevertheless, Inspector Gore acknowledged that reflectors were not the only way of marking an escapeway and, further, that a lifeline is capable of marking an escapeway. (Tr. 103-105). For that reason, an analysis must be undertaken that asks whether the particular lifeline present in the alternate escapeway at the Foidel Creek Mine “[c]learly marked [the escapeway] to show the route and direction of travel to the surface.”

In *Phelps Dodge Tyrone, Inc.*, 30 FMSHRC 646, 651-652 (2008), the Commission outlined the means of interpretation of a regulatory term as follows:

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. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citations omitted); see also *Utah Power & Light Co.*, 11 FMSHRC1926, 1930 (Oct. 1989) (citations omitted); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. See *Energy West Mining Co. v. FMSHRC*, 40 F.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 . . . 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)).

The "language of a regulation . . . is the starting point for its interpretation." *Dyer [v. United States]*, 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In the absence of a regulatory definition or technical usage of a word, the Commission would normally apply the ordinary meaning of the word. See *Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (table).

(Footnote omitted). The cited standard is somewhat ambiguous. The plain meaning of the language is instructive. "Clear," the adverb form of the adjective in question, is defined as "easily visible : PLAIN [,] . . . free from obscurity or ambiguity : easily understood : UNMISTAKABLE." *Webster's New Collegiate Dictionary* 205 (1979). "Marked" is defined as "having an identifying mark." *Id.* at 697. "Mark" is defined as "a conspicuous object serving as a guide for travelers." *Id.* Based on the plain meaning of these words, the cited standard requires that escapeways be equipped with easily visible or understood, conspicuous objects, that show the route and direction of travel to the surface.

Inspector Gore agreed that a lifeline is capable of marking an escapeway. (Tr. 103, 105). When presented with a sample of a lifeline at the hearing, Inspector Gore also agreed that it included reflectors and that the lifeline with cones installed would mark the escapeway. (Tr. 103-105; Ex. G-2, Ex. TM-3). The inspector agreed that the safety standard does not required reflectors, it only requires that escapeways be clearly marked. (Tr. 104).

There is no pertinent legislative history that discusses either the regulatory or statutory language that requires escapeways to be "properly" or "clearly" marked. However, given the facts of this case, and the argument raised by the operator regarding lifelines, the legislative history of the 2006 MINER Act and its requirement that lifelines be installed in escapeways may

be helpful. A Senate Report on the MINER Act included the following language regarding lifelines:

Providing underground personnel with assistance in locating and following escape routes, particularly in circumstances of diminished visibility, is an important feature in any emergency plan. Flame-resistant directional lifelines are likely the most common method for achieving this end, and are the most reasonably calculated to remain usable in a post-accident setting.

S. REP. NO. 109-365 (2006).

There is little to no dispute regarding the facts in this matter. The dust-covered reflectors were not easily visible. Coal and rock dust were caked on the reflectors hanging from the roof such that, when a light was shined down the entry, no reflective material could be seen. Inspector Gore testified that, while it was obvious to him that the round, dust-covered objects hanging from the roof were reflectors designed to mark the escapeway, the reflectors were nevertheless difficult to see. (Tr. 106-107). Further, both parties acknowledged that, in a smoke-filled entry, the dust-covered reflectors would be nearly impossible to see. In an emergency, a miner should not have to spend too much effort searching for his escapeway. Operators must take more than general precautions to ensure that miners can quickly and safely exit the mine in an emergency. The plain meaning of the cited standard requires that escapeways be equipped with easily visible or understood, conspicuous objects, that show the route and direction of travel to the surface.

Inspector Gore testified that reflectors were not the only means of marking an escapeway. Gore acknowledged that white signs with black lettering were capable of marking escapeways. Further, he acknowledged that lifelines were capable of marking escapeways. He qualified that statement by saying that lifelines should only be used to "enhance" the reflectors, yet he could not point to any formal guidance or policy that indicated such. I see no reason why a lifeline should *per se* be incapable of satisfying the cited standard. To say that something is incapable of satisfying one standard because it satisfies another standard defies logic and finds no support within Commission case law. Therefore, it becomes necessary to analyze whether the lifeline in the alternate escapeway at the Foidel Creek Mine satisfied the cited standard.

Gore testified that he thought there was a lifeline in the escapeway. MSHA trainee Paulson's notes indicate that there was a lifeline. Gore offered no testimony that the lifeline in the alternate escapeway failed to "clearly mark" the escapeway. The testimony of Inspector Gore and Conkle indicates that the lifeline had reflective material attached, as well as directional cones with reflective material on them. No testimony was offered to contradict this testimony or to establish that the lifeline was obscured or otherwise rendered ineffective by the dust. The lifeline was a continuous line with directional cones to lead miners from the section, through the

escapeway, and out to the surface. The lifeline provided an easily understood or visible, conspicuous object, that showed the route and direction of travel to the surface.

In addition, a lifeline, in many situations, may provide an even better means of “clearly marking” the escapeway than reflectors hung from the roof. First, once a lifeline is found, either by sight or feel, a miner need only locate a directional cone and follow the line to the surface. Once located, the lifeline and attached cones provide the direction and route to the surface, and require little of the miner beyond holding on to the line and continuing to move. This, in turn, allows the miner to direct more of his attention to avoiding trip and fall or other hazards. On the other hand, reflectors, or other purely sight-driven means of identifying the escapeway, hanging from the roof of the entry require a miner to continually scan the roof as he makes his way to the surface. This, in turn, takes the miner’s eyes off of the floor, thereby making him more susceptible to potential trip-and-fall or other hazards.

Second, in a smoke-filled environment reflective materials provide little to no assistance. On the other hand, lifelines may be located by touch/feel in a smoke filled environment, and would provide a direction and route out of the mine.

Third, in a smoke-free environment the lifeline appears to provide just as clear a marking of the escapeway as clean reflectors would. Nothing in the record indicates that the lifeline would be any less visible in a smoke-free environment. All of these factors, combined with Inspector Gore’s testimony that the miners at this mine are well trained and that the operator had effective escapeway policies, lead me to believe that the lifeline clearly marked the route and direction of travel to the surface, thereby satisfying the cited standard in spite of the fact that the roof reflectors may not have done so.

Based on the above, I find that this citation should be vacated.

III. SETTLED CITATIONS

At the hearing, the parties proposed to settle the remaining citations in these cases. In WEST 2008-352, the parties propose to settle Citation No. 7621461. (Tr. 137). The parties propose that the penalty be reduced to \$5,390.00 and that the negligence remain “high.” The penalty was originally specially assessed under 30 C.F.R. § 100.5. In WEST 2008-1576, the parties seek to reduce the level of negligence in Citation No. 7610949 and to reduce the gravity in Citation Nos. 7610950 and 7610952. (Tr. 136-138). They also propose modifying Order No. 7610956 to a section 104(a) moderate negligence citation. *Id.* They propose that the total penalty be reduced to \$36,818.00 for these citations. I have considered the representations and documentation presented and I conclude that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The motion to approve settlement is **GRANTED**.⁴

⁴ At the hearing, the Secretary also agreed to vacate Citation No. 7621738 in WEST 2008-0989 and Citation No. 7621766 in WEST 2008-1124, which were also noticed for hearing. (Tr. 5-6). I granted the motion and these cases were dismissed by my written order dated April 7, 2010.

IV. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The record shows that Twentymile had about 502 paid violations at the Foidel Creek Mine during the two years preceding July 8, 2008. (Attachment to Stipulations). Twentymile is a large mine operator as is Twentymile's parent company, Peabody Energy. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Twentymile's ability to continue in business. The gravity and negligence are discussed above.

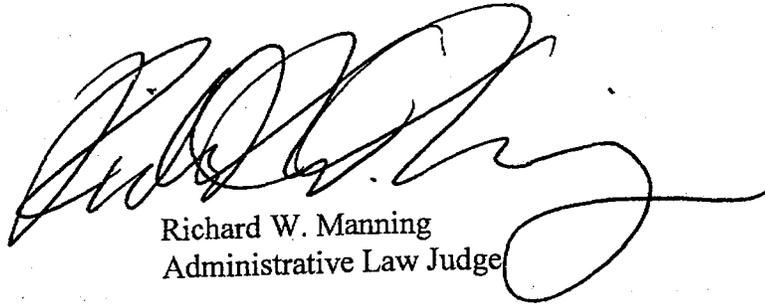
V. ORDER

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 2008-0352		
7621461	75.400	\$5,390.00
WEST 2008-1321		
7622452	75.380(d)(2)	Vacated
WEST 2008-1576 & WEST 2008-0787-R		
7284492	75.403	1,111.00
7610949	75.517	4,690.00
7610950	75.503	4,690.00
7610952	75.503	7,000.00
7610956	75.512	18,742.00
7622519	75.380(d)(7)(iv)	5,000.00
7622520	75.380(d)(1)	585.00
TOTAL PENALTY		47,208.00

For the reasons set forth above, Order No. 7622519 is **AFFIRMED** and Citation No. 7622452 is **VACATED** as set forth above. The settlement of the remaining citations is **APPROVED**. Twentymile Coal Company is **ORDERED TO PAY** the Secretary of Labor the

sum of \$47,208.00 within 30 days of the date of this decision.⁵ Upon payment of the penalty, these proceedings are **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

⁵ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 17, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. CENT 2009-334-M
Petitioner	:	A.C. No. 39-00024-178265
	:	
v.	:	
	:	
SPENCER QUARRIES, INC.,	:	Spencer Quarries, Inc.
Respondent	:	

DECISION

Appearances: Ronald S. Goldade, Conference and Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for Petitioner; Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Spencer Quarries, Inc., (“Spencer”) 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 case involves two citations issued at the quartzite quarry operated by Spencer in Hanson County, South Dakota. An evidentiary hearing was held in Sioux Falls, South Dakota, and the parties introduced testimony and documentary evidence.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 6328706

1. Summary of the Evidence.

On January 27, 2009, Inspector Daniel Scherer issued Citation No. 6328706 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 56.11016 as follows, in part:

The elevated walkway located along the surge feed belt had not been sanded, salted, or cleared of snow or ice prior to miners traveling it. This elevated walkway is on a grade of approximately

28% and is approximately 200 feet long. Tracks were visible where a miner had slid down the length of the walkway. This walkway is accessed daily at various times. A miner sliding down this walkway is exposed to injuries

The inspector determined that an injury was reasonably likely to occur and that any injury would likely be fatal. He determined that the violation was of a significant and substantial nature (“S&S”) and that the company’s negligence was moderate. Section 56.11016 provides that “[r]egularly used walkways and travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable.” 30 C.F.R. § 56.11016. The Secretary proposes a penalty of \$334.00 for this citation.

Inspector Scherer testified that Spencer employs approximately 20 employees. (Tr. 12). When he first arrived at the quarry he met with the woman who was the scale operator. Jim Zens, another Spencer employee, joined them a few minutes later. The inspector was advised that the scale operator and Mr. Zens were the only two people working at the quarry that day because the remaining employees were getting their annual MSHA-required training that day at an off-site location. (Tr. 14). The inspector testified that it was his understanding that Zens was the assistant superintendent but that he primarily worked in the loadout area and the stockpile area. (Tr. 17). The quarry had operated the previous day, but it was not operating on January 27. Indeed, the gate on the fence that surrounds the perimeter of the pit and plant was locked on January 27 and Zens had to unlock it for Inspector Scherer. (Tr. 57).

Inspector Scherer testified that there was snow on the ground when he arrived at the quarry on the morning of January 27. (Tr. 20). He issued Citation No. 6328706 because he was concerned about some snow and ice that had built up on the walkway located alongside the surge feed belt. He stepped up onto the walkway and quickly determined that it was slippery. (Tr. 23). The inspector observed two tracks on the walkway that came from the top and went to the bottom in “one continuous slide.” *Id.* He determined that the walkway was about 200 feet long and was at a grade of about 28 percent. The photograph that the inspector took shows the two tracks on the walkway. (Tr. 25; Ex. G-2 p. 5). Based on these tracks, Inspector Scherer concluded that someone had slid down the entire length of the walkway on the ice and snow that had accumulated there. *Id.* (Tr. 62, 67). The inspector did not observe anyone on the walkway and he did not talk to anyone who saw or heard that a miner slid down the walkway. (Tr. 53, 55).

Scherer testified that Zens told him that someone had probably walked along the walkway at the end of the shift on January 26 to clean up or do some light maintenance. (Tr. 27). Zens told him that it was company policy to clean off ice and snow at the beginning of every shift. Inspector Scherer testified that he based his gravity and S&S determinations on the fact that the walkway is used everyday, there were tracks on the walkway, the slick conditions, and the angle of the walkway. (Tr. 29-30). In addition, Inspector Scherer testified that he talked to some miners the following day and that one miner told him that the walkway can be “real nasty” because it is so steep. (Tr. 34). The citation was abated after the walkway was cleared of ice and

snow and Spencer agreed that it would clear the walkway "as frequently as necessary as conditions warranted throughout the course of any shift." (Tr. 31, 60). When he arrived at the plant on January 28, the walkway had already been salted and cleared of snow. (Tr. 59-60). Spencer uses salt and sand as part of the process of keeping the walkway clear. Scherer testified that he was told that, before the citation was issued, Spencer only cleared the walkway at the beginning of each day. (Tr. 32).

Mark Sedlacek, the crusher operator, testified for Spencer. He said that he worked at the crusher on January 26, the day before the citation was issued. (Tr. 87). He said that he swept the cited walkway with a broom that day. There were about two inches of loose snow on the walkway. This walkway was in good shape on the morning of January 26, but it started snowing during the afternoon. (Tr. 88). He testified that he decided to clean off the walkway before he left work that day. He swept the walkway but did not salt it because the crusher would not be operating the following day. (Tr. 88, 91). The idea was that the sun might melt any remaining snow on January 27 and that it would be salted the morning of January 28, if needed. *Id.* He estimated that he cleaned off the snow at about 3:30 p.m. on January 26. He said that no other person went up the walkway that day after he cleared it. Sedlacek testified that the two tracks that Inspector Scherer observed on the walkway on the morning of January 27 were the tracks he made when he was cleaning off the walkway on January 26. He did not slide down the walkway, he simply shuffled his feet as he walked back down the walkway. (Tr. 90). He said that he was not out of control when he walked down the walkway on January 26. (Tr. 91). He also said that he was holding onto the handrail with one hand and sweeping with the other. (Tr. 97). He testified that the walkway was in good shape at the end of the workday on January 26 and that no other employee traveled on the walkway that day. The temperature dropped over the night of January 26-27, so it is not surprising that the walkway was slippery the morning of January 27. (Tr. 93, 103-04). In addition, it may have continued snowing overnight. (Tr. 93). Sedlacek testified that Spencer employees cleaned walkways of ice and snow whenever it was needed, not just at the beginning of the shift. (Tr. 100).

Dennis Ruden is the jaw operator for Spencer. He said that he observed Mr. Sedlacek sweeping the walkway. (Tr. 106, 109). Mr. Sedlacek was the last person to walk on the walkway until the MSHA inspector observed the walkway the next day. Moreover, he testified that on January 27, the day of Inspector Scherer's inspection, most of Spencer's employees were in Mitchell, South Dakota, for eight-hour MSHA-required annual refresher training. (Tr. 107). When Ruden returned to work on January 28, he salted the walkway at 7:00 a.m. that morning as one of his first tasks. (Tr. 108-109). He was not told to salt the walkway; he just did it prior to the start of production as part of his ordinary job duties.

Ward Tuttle, Spencer's production foreman, testified about the annual refresher training. He testified that there was no production at the mine on January 27. (Tr. 135). The quarry and plant were behind a locked fence that day. (Tr. 138). Someone unlocked the gate on the morning of January 27 so that Inspector Scherer could conduct his inspection. He said that all but two employees were at the offsite annual training. (Ex. R-1). The only employees working

that day were an employee in the scale house and Jim Zens, who normally works in the quality control laboratory, but who also uses a loader to load customer trucks with product, when necessary. (Tr. 128, 146-147). Zens does not work in the production area of the mine and would have little knowledge of Spencer's practices or policies in the production areas. (Tr. 129). Tuttle testified that the quarry was only open for the purpose of allowing customers to obtain material from existing stockpiles. (Tr. 146). When the quarry was operating, Zens would not normally enter the area of the pit and plant. (Tr. 155). He would go into the plant area once a month to check the fire extinguishers. *Id.* Neither Zens nor the employees in the scale house would have any reason to walk up the cited walkway. (Tr. 156).

Tuttle testified that it was company policy to keep the walkway at the surge feed belt clean. (Tr. 133). The area would be swept as needed and salted as needed. (Tr. 134). He testified that Spencer did not change its policy with respect to cleaning and salting the walkway following the issuance of the subject citation. *Id.* Tuttle testified that it is possible someone could slip or fall when walking down the cited walkway. (Tr. 150). He also admitted that the photographs that Inspector Scherer took of the walkway show snow and ice. (Tr. 161).

Richard Waldera, Spencer's general manager, testified that it has always been the company's policy to clean snow-covered walkways whenever it is necessary. (Tr. 167-168). The company did not change its policy after it received this citation. (Tr. 168, 175).

2. Analysis.

I find that the Secretary did not establish a violation. The quarry was closed on January 27 and the evidence clearly and unequivocally shows that nobody would have walked up the cited walkway on that date. Inspector Scherer inspected the walkway the morning of January 27. I cannot assume that the conditions he saw were the same as Sedlacek experienced when he cleared the walkway at 3:30 p.m. on January 26. For example, additional snow could have fallen and the walkway could have frosted over during the night. When Ruden arrived on the morning of January 28, he immediately salted the walkway without being told to do so. There is no evidence to show that he salted the walkway in order to abate the citation.

The evidence establishes that Spencer complied with the requirements of the safety standard. Although the subject walkway was not used all that frequently, I find that it was "regularly used" as that term is used in the safety standard. Sedlacek cleared the snow on the afternoon of January 26 near the end of the shift. There is absolutely no evidence that anyone was on the walkway after it was cleared that day. There is evidence that the quarry was experiencing snow flurries on the afternoon of January 26. Spencer salted the walkway first thing in the morning the next business day. I credit the testimony of Spencer's witnesses with respect to the events of January 26 through January 28. The evidence demonstrates that, at all pertinent times, the walkway was "sanded, salted, or cleared of snow and ice as soon as practicable." *See e.g. Empire Iron Mining Partnership*, 19 FMSHRC 1912, 1922 (Dec. 1997) (ALJ). There was no need to sand, salt, or clear the snow on the morning of January 27 because

the plant was shut down for the day. Neither Zens nor anyone working in the scale house would have entered the production areas of the quarry that day and, even if they did, they certainly would never have traveled up the walkway alongside the surge feed belt.

A number of extraneous issues were raised at the hearing. The Secretary contends that, before the citation was issued, Spencer's employees only cleaned off the walkways in the morning, even if snow and ice developed later in the day. That issue is not on point here because the evidence establishes that the subject walkway was cleared near the end of the shift on January 26 and again at the start of the shift on January 28, thereby meeting the requirements of the safety standard. In addition, I credit Spencer's witnesses that the walkways were cleaned more frequently than once a day when conditions warranted. Another issue that was raised concerned whether the decking used on the walkway was appropriate for that application given the grade of the walkway. The surface of the cited walkway is what is called "tread plate," "diamond plate," or "deck plate." (Tr. 42). That issue is not before me. Citation No. 6328706 is hereby vacated.

B. Citation No. 6328712

1. Summary of the Evidence.

On January 28, 2009, Inspector Scherer issued Citation No. 6328712 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 46.12(a)(2) as follows, in part:

The mine operator failed to provide the independent contractor whose employees were working at the mine site of the contractor's obligations to comply with MSHA regulations including the requirements of Part 46 of 30 CFR. The contractor has been doing construction of mine facilities at the mine site for approximately one year and had employed up to 11 new miners. These miners were exposed to mine hazards and none of these employees had received their new miner training.

The inspector determined that an injury was reasonably likely to occur and that any injury would likely be fatal. He determined that the violation was S&S and that the company's negligence was moderate. Section 46.12(a)(2) provides that "[e]ach production-operator must provide information to each independent contractor who employs a person at the mine on site-specific mine hazards and the obligation of the contractor to comply with our regulations, including the requirements of this part." 30 C.F.R. §46.12(a)(2). The Secretary proposes a penalty of \$1,304.00 for this citation.

Spencer admitted that the citation states a violation of the regulation. (Tr. 217). It contends that the violation was not S&S. Inspector Scherer testified that Spencer did provide the independent contractor with a list of the mine-specific hazards. (Tr. 181). Records of this training were maintained. Spencer failed to make sure that the contractor and its employees were

aware of MSHA's safety standards and training requirements. (Tr. 182). The contractor, O.L. Bussmus Construction, Inc., was building a new screen wash plant and other mine facilities. The construction project had begun during the spring of 2008. Bussmus had up to eleven employees at the site. These employees were exposed to the hazards that are generally found at surface mines. (Tr. 183). One Bussmus employee was injured on the job at the quarry in July 2008 when some material fell from a flat-bed truck. The inspector testified that an untrained miner is a hazard to himself and to other miners working at the quarry.

Inspector Scherer determined that the violation was serious and S&S because the condition created a discrete hazard and it was reasonably likely to result in an injury of a reasonably serious nature. (Tr. 185). The inspector testified that Mr. Waldera thought that he had complied with MSHA training requirements when Spencer gave them a list of site-specific hazards. (Tr. 185-186). Inspector Scherer also issued several citations to Bussmus. (Tr. 187; Ex. G-11). Scherer said that Mr. Bussmus told him that he would have gladly complied with MSHA's regulations had he known about them. (Tr. 188).

Mr. Waldera testified that Spencer provided site-specific training to the Bussmus employees. (Tr. 200; Ex. R-8). The training forms used by Spencer lists the typical hazards encountered by vendors, salesmen, delivery men, and repair men. (Ex. R-8). Waldera admitted that new miner training is different from site-specific hazard training. (Tr. 205). He also admitted that, if a contractor is unaware of MSHA's training requirements, it would be unable to develop a training plan for its employees.

2. Analysis

An S&S violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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

This evaluation is made in terms of “continued normal mining operations.” *U.S. Steel*, 6 FMSHRC at 1574. 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 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

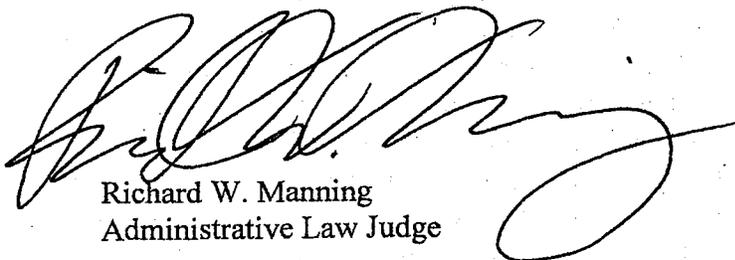
I find that the Secretary established that this violation was S&S. The Secretary established all four elements of the S&S test. Although it is true that many of the hazards that the contractor’s employees faced would not be substantially different from the hazards they normally face on construction projects, the mining environment presents challenges that are not typically present at other construction sites. As stated above, the third element of the S&S test requires that the secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. Spencer did not advise Bussmus that it had to have a training plan in place so that its employees could receive new miner training. As a consequence, the employees of Bussmus had not completed MSHA-required training while they worked at the quarry. Bussmus apparently knew nothing about MSHA or its regulatory requirements. Based on the evidence presented at the hearing, I find that, if the violative condition had not been abated, there was a reasonable likelihood that it would have contributed to an injury of a reasonably serious nature. I also affirm the inspector’s gravity and negligence determinations. As Inspector Scherer stated, an untrained miner is a hazard to himself and to others. The training regulations are a key part of the mine safety program established by the Mine Act.

II. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. The record shows that Spencer had five paid violations at this quarry during the two years preceding this inspection. (Ex. G-13). Only one of these violations was S&S. The mine worked about 41,375 employee-hours in 2008 and 41,250 employee-hours in 2009, making it a relatively small operation. The violation was abated in good faith. No evidence was presented to show that the penalty assessed in this decision will have an adverse effect on Spencer's ability to continue in business. The violation was serious and Spencer's negligence was moderate. Based on the penalty criteria, I find that the Secretary's penalty of \$1,304.00 is appropriate.

III. ORDER

For the reasons set forth above, Citation No. 6328706 is **VACATED** and Citation No. 6328712 is **AFFIRMED**. Spencer Quarries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,304.00 within 30 days of the date of this decision.¹ Upon payment of the penalty, this case is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

Distribution:

Ronald S. Goldade, Conference & Litigation Representative, Mine Safety and Health Administration, P.O. Box 25367, Denver, CO 80225-0367 (Certified Mail)

Jeffrey A. Sar, Esq., Baron, Sar, Godwin, Gill & Lohr, PO Box 717, Sioux City, IA 51102 (Certified Mail)

RWM

¹ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19th Street, Suite 443
Denver, CO 80202-2500
303-844-3577/FAX 303-844-5268

June 23, 2010

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

v.

SPENCER QUARRIES, INC.,
Respondent

CIVIL PENALTY PROCEEDING

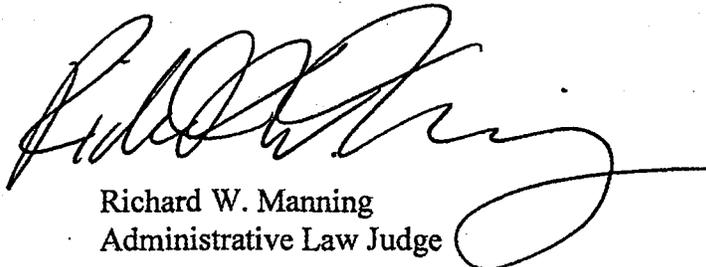
Docket No. CENT 2009-334-M
A.C. No. 39-00024-178265

Spencer Quarries, Inc.

ORDER CORRECTING DECISION

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Spencer Quarries, Inc., (“Spencer”) 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 case involves four citations. Citation Nos. 6328706 and 6328712 were adjudicated at a hearing held on April 13, 2010 and Spencer agreed to pay the Secretary’s proposed penalties for Citation Nos. 6328708 and 6328711. On June 17, 2010, I issued my decision on the two adjudicated citations but I inadvertently did not include in the decision a discussion of the other two citations. Citation No. 6328708 alleges a violation of section 56.11012 of MSHA’s safety standards and the Secretary proposed a penalty of \$100.00 for the citation. Citation No. 6328711 alleges a violation of section 56.14100(d) of MSHA’s safety standards and the Secretary proposed a penalty of \$100.00 for the citation. I find that these proposed penalties are appropriate under the criteria set forth in Section 110(i) of the Act.

Consequently, Citation Nos. 6328708 and 6328711 are **AFFIRMED** and my order in Section III of my June 17, 2010, decision is **CORRECTED** to show that Spencer Quarries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,504.00 within 30 days of the date of this order.¹


Richard W. Manning
Administrative Law Judge

¹ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 17, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-1067
Petitioner,	:	A.C. No. 46-07273-178983-01
	:	
v.	:	
	:	
INDEPENDENCE COAL COMPANY, INC.,	:	Mine: Justice #1
Respondent.	:	

DECISION

Appearances: Ben Chaykin, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Carol Marunich, Dinsmore Shohl LLP, Charleston, West Virginia, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Independence Coal Company Inc., (“Independence”) 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” or “Act”). The case involves one citation issued by MSHA under section 104(d) of the Mine Act at the Justice #1 mine operated by Independence Coal Company, Inc. The parties presented testimony and documentary evidence at the hearing held in Charleston, West Virginia on May 5, 2010. At the conclusion of the hearing, the parties made oral arguments, and a decision was rendered from the bench. This decision incorporates the decision issued from the bench, and adds to that decision. There is some minor editing of transcript pages 226 through 249, which is incorporated into this decision and set out below. For the reasons stated on the record, and as further explained below, Citation No. 8073156 is affirmed as issued and Independence Coal is ordered to pay the proposed penalty of \$63,000.00.

The parties entered into certain stipulations that were accepted by the Court and entered as Exhibit 1 in the case.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Independence Coal Company, Inc., operates the Justice #1 Mine (the "mine"), an underground, bituminous, coal mine in Boone County, West Virginia. The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Independence is an operator as defined by the Act, and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. Ct. Ex. 1.

In the matter of Independence Coal Company, Docket WEVA 2009-1067, I will enter the following order:

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against Independence Coal pursuant to Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, the Mine Act. The case involves one citation issued by MSHA under Section 104(d) of the Mine Act at the Justice No. 1 Mine operated by Independence Coal. The parties presented testimony and evidence at a hearing held in Charleston, West Virginia, on May 5th, 2010.

At the beginning of the hearing, the parties introduced certain stipulations that were accepted by the Court and entered as Court Exhibit 1, which will be made a part of the file. These stipulations relate primarily to the jurisdictional issues in this case. Independence Coal Company operates an underground bituminous coal mine, the Justice No. 1 Mine[, located in] . . . Boone County, West Virginia. The mine is subject to regular inspections by the Secretary's Mine Safety and Health Administration pursuant to Section 103(a) of the Act. As I mentioned, the parties stipulated that Independence is an operator as defined by the Act and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission.

(Tr. 227-228).

On January 20, 2009, John Crawford, an MSHA inspector, conducted a methane spot inspection at the Justice No. 1 mine. The mine is on a five day spot inspection due to high liberation of methane. Crawford was accompanied during most of his inspection by Greg Neil, the mine foreman. While at the mine, Crawford issued the (d)(1) citation at issue.

a. *Citation No. 8073156*

Inspector Crawford issued Citation No. 8073156 to Independence for a violation of Section 75.380(d)(1) of the Secretary's regulations. The citation alleges that:

[t]he secondary escapeway on the no. 9 track at Break 18 is not maintained in a safe condition to assure passage of anyone including disabled persons. Water covers the entry for approximately 150 feet (modified to 332 feet), rib to rib, and was measured 15 inches deep in one area. The water is dark and cloudy in color and not transparent. The track, ties, loose rock and coal under the water make travel perilous. This condition is obvious, extensive, has existed for numerous shifts and was known by the foreman and examiners, who recorded it as "water on track". Water marks on the mine ribs measure more than 12 inches above the current water levels. This is more than ordinary negligence and the operator displayed aggravated conduct in allowing persons to work with only one escape way. This is unwarrantable failure to comply with a mandatory standard. Persons were in the area to examine, set pumps and check the pumps. Crews were removed from the mine until two travelable escape ways were provided.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that forty persons would be affected, and that the violation was the result of reckless disregard on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$63,000.00.

1. The Violation

John Crawford, an MSHA mine inspector since April 2007, has worked in the mining industry since 1974. Crawford is an inspector in the Madisonville MSHA office.

Inspector Crawford testified that on January 20, 2009, prior to going underground, he was reviewing records of the Justice #1 mine when he overheard comments by Greg Neil, a mine foreman, about water in the escapeway. The primary escapeway in this mine is a great distance from the secondary and is very narrow, steep and wet. The second escapeway, the subject of the citation at issue, contains a track for travel along the escapeway.

When Crawford arrived at #9 headgate, he looked outby and observed water covering the escapeway from rib to rib. The water was cloudy, dark and non-transparent, obscuring the bottom. This particular entry is a track entry with an uneven bottom. The entry floor has rails, ties, and blocks to level the track, as well as loose coal and rock. Crawford credibly testified that he measured the depth of the water to be 15 inches, but that it got deeper as the escapeway progressed. He felt it was not safe to go on traveling through the water because he couldn't see what he was walking on. He originally estimated that the water went on for 150 feet, but later learned that it extended for more than 300 feet. There were higher water marks on the wall, i.e.,

at one point a water mark was more than 12 inches above the actual water level at the time of the inspection.

Crawford explained that it was not only unsafe to walk in that escapeway, it was also not safe to drive anything in that depth of water since the water could enter into the electrical part of the man-trip, cause a short, and result in miners being stranded in even deeper water while the vehicle blocked the passage of other miners behind it.

Once the citation was abated, and the water removed, Crawford was better able to observe the area. He observed the condition of the roadway and could see blocking of track, track ties and the uneven mine bottom. Further, he recalled areas that had an eight-inch ledge and blocked the outside rails. The escapeway sloped downhill after passing the area where he took the 15-inch water depth measurement and then gradually sloped back uphill. Crawford could see that the downhill portion was deeper than the 15 inches he measured. Neil explained that the deeper area is where water is pumped from and, in some instances, held when pumping from other parts of the mine.

The Respondent argues that there is no violation because miners would use a mantrip to get out of this area and would not have to walk on the uneven bottom. Further, it argues that there is another escapeway, and that the condition was not as bad as Crawford described. Neil testified that he could walk the area without stumbling or falling. Neil also testified that miners are trained in an emergency to move slowly and not panic and, therefore, they could pass through this area.

I credit Crawford's testimony that the area was not passable, especially in an emergency. Since miners would need to move quickly through the area, the water and obstructions would cause miners, especially stretcher bearers or others assisting disabled persons, to slow their egress, to slip and fall, or drop the stretcher, thereby hindering their ability to escape at all. I find that the escapeway was not maintained in a safe condition and that it would be difficult for miners, particularly disabled miners, to travel the escapeway. For those reasons, and reasons that follow, I find that a violation is established. At hearing, I read the following findings into the record:

On January 20th, 2009, Inspector John Crawford conducted a methane spot inspection at the mine. This was a five-day spot inspection, which is the highest level due to the methane emissions at the Justice No. 1 Mine. He was accompanied during his inspection by Greg Neil, the mine foreman. While at the mine, Crawford issued the (d)(1) citation at issue here, which is Citation No. 8073156. Inspector Crawford issued the citation to Independence Coal Company for a violation of 75.380(d)(1) of the Secretary's regulations.

The citation alleges that the secondary escapeway on the No. 9 track at break 18 is not maintained in a safe condition to assure passage of anyone, including disabled persons. The inspector goes on to explain and testified that the water covered the entry for approximately 100 feet as he could initially see it. Later when he was able to measure it, he determined that it covered the entry for 332 feet, approximately, rib to rib and was measured 15 inches deep in one area. The water was dark and cloudy in color, not transparent. The track, ties, loose rock, and coal under the water made travel perilous. The condition is obvious, extensive, has existed for numerous shifts, and was known by the foreman and examiners who recorded it as "water on track." Watermarks on the mine ribs measured more than 12 inches above the current water levels.

This is more than ordinary negligence, and the operator displayed aggravated conduct in allowing persons to work with only one escapeway. This is an unwarrantable failure to comply with the mandatory standard. Persons were in the area to set pumps, examine, and check the pumps. Crews were removed from the mine until two travelable escapeways were provided.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that 40 persons would be affected, and that the violation was the result of reckless disregard on the part of the operator. The Secretary initially proposed a civil penalty in the amount of \$63,000.

Mr. Crawford testified that he has been a mine inspector since April 2007. He worked in the mines since 1974. He's worked in various positions in underground coal mines and for a time was an EMT and paramedic.

Inspector Crawford testified that he went to the mine on January 20th, 2009. While he was looking at the books or the records, he overheard Mr. Neil talking about water in the escapeway. He talked a little bit about how narrow the primary escapeway is, that it's wet and steep. The area he issued a citation is the secondary escapeway.

Mr. Neil and Inspector Crawford went to the No. 9 headgate area, and as he looked outby, he saw water rib to rib -- Inspector Crawford did. The water was cloudy, dark, not

transparent. He could not see the bottom. This is a track entry, so it has rails, ties, blocks to level the track, coal, rock, and an uneven bottom.

He credibly testified that the depth was 15 inches in some places. He walked into the water until he thought it was no longer safe to go on. He measured it with a ruler and measured it to be 15 inches. He couldn't see under the water that was murky, so he decided to turn around and that it was not safe to go on through the escapeway at that time. He estimated the water to extend for about 150 feet, and, as I said, he later modified that to 332 feet when he had a chance to actually measure it. At one point, he noted a watermark on the wall that indicated the water level had at one time been approximately 12 inches higher than it was . . . [at the time of his inspection.]

Inspector Crawford testified that it was not safe to take anything into the water, to not walk in it, or to take the mantrip, as the water could enter into the electrical parts of the mantrip and cause a short, thereby causing the mantrip not to work and become stuck in the escapeway.

Inspector Crawford noticed that there was no action taken to remove the water, so he removed the crews from the mine. The fire boss shut off the water feeding the area and went to get a pump or a different pump. It took about four hours to remove the water from the entryway. At that point, he returned to the area and measured it to be 332 feet.

He observed the condition on the roadway and could see -- once the water was gone, he again observed the condition of the roadway, and he could see blocking of track, track ties, the mine rough bottom, and remembers in areas that there had been an 8-inch ledge blocking outside of the rails. The area went downhill at a location past where he took the 15-inch measurement, and then it went back uphill. At the downhill point, it was deeper than the 15 inches where there is a low spot.

The water accumulations created a tripping and stumbling hazard. If anyone had traveled the area, they could get fractures from falling, dislocation. If they struck their head, they could become unconscious and it would be fatal. If they were carrying an injured miner on a stretcher, that would multiply the risk. Inspector Crawford testified that the mine operator is required to

maintain the escapeway for travel of all persons and considered this to be a violation. He determined that it was unsafe to travel through the escapeway. 75.380(d)(1) requires that each escapeway shall be maintained in a safe condition to always assure passage of anyone, including disabled persons.

Inspector Crawford looked at the water, at the color. He couldn't see the bottom. He understood there were drop-offs, that there were rock, coal, tracks, and a number of tripping hazards under the water that could not be seen by walking in the water. The type of the bottom was rough, and it extended over a long area. This is an area where the roof is about 6 to 7 feet high. The water was rib to rib in many areas. Stumbling and falling is the primary hazard. Carrying a stretcher multiplies the hazard, and escaping in smoke and fire in an emergency, this would be a difficult place to travel. It's not safe for persons during an emergency evacuation.

As Inspector Crawford testified, the slip-and-fall hazard precluded swift passage. It would be difficult at best to negotiate the slippery, rocky bottom with the tracks carrying a stretcher. During an emergency, miners would likely need to move quickly through the area in order to seek safe passage away from what could be a dangerous underground environment. This would slow down the evacuation, if not prevent it altogether. So I credit the testimony of Inspector Crawford and find that there is a violation as he cited and for the reasons that he cited.

[The mine argues] . . . that there is not a violation because there is no hazard, that Mr. Neil traveled the area and didn't see a hazard He could walk through it, as he did after leaving the inspector. I disagree with Mr. Neil and, based on the testimony of Inspector Crawford, find that the conditions clearly presented a hazard in the escapeway.

There was a lot of testimony about methane behind the seals, ignition sources, and the fact that no other citations were issued that day that contributed to this hazard. However, I'm not required to find that there was the possibility of a methane or other mine fire, because this is an emergency situation and I look to the fact that the standard goes to an emergency, and I look at the emergency conditions in that case.

I also relied upon several cases that are very similar to this: Maple Creek Mining, 27 FMSHRC 555 (August 2005), and Eagle Energy, Inc., 23 FMSHRC 829 (August 2001). Both are very similar to this case, and in both cases the Commission upheld the violation, the significant and substantial nature of the violation, and the unwarrantable failure. Although, obviously, I base it on the facts of this case, I do rely on the legal conclusions of the Commission in those two cases.

I would also mention with regard to the hazard that there was some discussion about evacuation during an emergency, and I certainly -- I understood Mr. Neil's testimony that he had been, in his experience, especially as an EMT -- had to negotiate difficult passages. However, I credit Inspector Crawford's testimony that, in reality, these miners try to escape quickly. If there's smoke in the area, they're disoriented by the smoke.

(Tr. 228-234).

30 C.F.R. § 75.380(d)(1) requires that “[e]ach escapeway shall be . . . [m]aintained in a safe condition to always assure passage of anyone, including disabled persons.”

In *American Coal Company*, 29 FMSHRC 941 (Dec. 2007), the Commission held that an operator violates the requirements of Section 75.380(b)(1) to “provide” escapeways when its miners are “substantially hindered or impeded from accessing designated escapeways.” In reaching this conclusion, the Commission stated the following regarding the purpose and legislative history of escapeways which is equally applicable to the case here:

There is no disputing that escapeways are needed for miners to quickly exit an underground mine and that impediments to a designated escapeway may prevent miners from being able to do so. The legislative history of the escapeway standard states that the purpose of requiring escapeways is “to allow persons to escape quickly to the surface in the event of an emergency.” S.Rep No. 91-411, at 83, *Legis.Hist.*, at 209 (1975).

29 FMSHRC at 948.

This case is very similar to *Maple Creek Mining Inc.*, 27 FMSHRC 555 (Aug. 2005), and *Eagle Energy Inc.*, 23 FMSHRC 829 (Aug. 2001), in which the Commission found a violation of 30 C.F.R. § 75.380, where it was demonstrated that miners could not quickly and safely exit the mine in the case of an emergency.

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of*

Respirable Dust Sample Alteration Citations, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). The Secretary has met her burden of proving that, on the day of inspection, the escapeway was not maintained in safe condition. I find that the Secretary has established a violation.

2. Significant and Substantial Violation

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

[i]n 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

As noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violations, i.e., the danger associated with persons not being able to evacuate the area safely and quickly during an emergency. Third, I find that, in addition to the risks associated with not being able to safely and quickly evacuate the mine, there is also a slip-and-fall hazard, which can create injuries for anyone walking in the area. Fourth, I find that it is reasonably likely that any injury resulting from the aforementioned hazards would be serious or even fatal.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. 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 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In this case, the significant and substantial element must be considered in terms of an emergency. If there were a fire, smoke would be present, visibility would be poor, dust would be in the air and all lights would more than likely be out. Smoke causes miners to become disoriented and panic. Crawford, who has been in a mine accident, explained that, in an emergency, it is easy to forget the things you have been previously taught to do. When a miner’s sense of sight is rendered useless during an emergency, it is reasonably likely that the condition of the subject escapeway would prevent escape. Miners would be left standing in cold water as the water level became higher and higher. This, in turn, may force the miners to look for another way out and be further hindered in their escape.

I credit Crawford’s testimony regarding the likelihood of the slip-and-fall hazard that precluded swift passage out of the mine. The area would be difficult to negotiate given the slippery, rocky bottom, especially when carrying a stretcher. Neil testified on behalf of the operator that the area was passable, and that he had seen worse as an EMT. However, the evidence established that during an emergency, miners would likely need to move quickly through the area in order to seek safe passage away from what could be a dangerous underground environment. The condition of the escapeway, as cited by Crawford, would slow down the evacuation, if not prevent it. At hearing, I read the following findings into the record:

I find that the Secretary has met the burden of proving all elements of the alleged violation by a preponderance of the evidence in this case, so I will now address the significant and substantial nature, and I have already addressed some of the factors I’ve relied on in finding that this violation is significant and substantial.

A significant and substantial violation is described, in Section 104(d)(1) of the Act, as a violation of such a nature as could significantly and substantially contribute to the cause and effect of the coal or other mine safety or health hazard. A violation is designated S & S if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to or resulted in injury or illness of a reasonably serious nature, and that's the National Gypsum case [T]he Commission set out a four-part test in the Mathies case which I rely on here.

First, in order to establish the violation -- to establish S & S, I must find that there is a violation, and I have already done that in this case. Second, I must find that there is a discreet safety hazard, a measure of danger to safety contributed to by the violation, and as I have discussed above, I do find that there is a discreet safety hazard that existed as a result of this violation, the danger of persons not being able to evacuate the area safely and quickly during an emergency. In addition to that, I find that there is a slip-and-fall hazard separate and apart [from] . . . an emergency that is a hazard to anyone walking in the area.

The third part of Mathies is a reasonable likelihood that the hazard contributed to or resulted in an injury, and the hazards described by Inspector Crawford, the slip-and-fall hazard, the hitting-of-his-head hazard, and the failure [of] . . . being able to escape adequately during an emergency will result not only in an injury from the slip and fall, which would be a broken bone, or from a head injury, but could result in a fatal injury if the miners are not able to escape during an emergency, and tied together with that is a reasonable likelihood that the injury will be serious, and I think I've addressed that. It is very serious. The injuries would be very serious.

I understand that Mr. Neil testified that he thought it might be a -- the only injury he could see would be a twisted ankle or getting wet, but I credit Inspector Crawford's testimony that it's far more serious than that and that it could lead to a fatality, especially if there is an emergency evacuation and miners cannot get through this escapeway. Or even if they're slowed down getting through the escapeway, that's enough to cause a fatality.

The evaluation I have made is made with the consideration of the length of the time that the condition existed prior to the

citation, which was . . . five shifts and several days. And if it had continued to exist in normal mining operations, and I think it would have -- given the testimony of Mr. Neil that 15 inches he didn't consider a hazard, that it was routine for the mine, this would have [remained] . . . unabated unless Inspector Crawford had stepped in and done something about it.

I'm going to address the number of persons affected. Inspector Crawford relied on Mr. Neil to tell him how many miners were at the mine that day, and I understand that that number was 40 working underground. Inspector Crawford relied on that number, and I agree it's . . . accurate. I understand that the mine's argument is that not all 40 of them were working in the area, or maybe not all 40 of them would have used that escapeway. However, if there were a mine emergency and the primary escapeway was blocked, which is one of the reasons for a secondary escapeway, all of the miners would have had to maneuver through the secondary escapeway, and I agree with [Crawford] that 40 people would have been affected by that condition.

I think the fact that Inspector Crawford stepped into the water and decided that it was not safe to walk any further certainly shows that it was a serious hazard. I know that Mr. Neil said he did walk through it and that he wasn't injured; however, the case law does not require me to find that an accident has occurred, based on someone's actions on that day.

Crawford testified that the slip and falls in the muck could result in broken bones, leg and back injuries, and, of course, I've already addressed the injuries associated with the not being able to escape during an emergency. Any delay in miners evacuating the mine in an emergency increase the dangers posed by the emergency, and a delay would prevent miners from getting out alive.

There were at least two fires at this mine, one in 2008 and another in 2009. There is methane at this mine, as it is on a five-day spot inspection, and there are ignition sources in the mine. At the same time, on the same day, there was a citation issued in this same area for a lifeline violation, which also would have been related to anyone who was trying to escape at that time.

I find that the preponderance of the evidence establishes that it was reasonably likely that the hazards present in the area cited would contribute to an injury in the event of an emergency evacuation, and even without an emergency evacuation, the slip-and-fall hazard would be there. I rely on the testimony of Inspector Crawford in reaching this conclusion. He believed that the hazards present were tripping and falling and not being able to escape during an emergency. [The various injuries would be the direct result of having to walk in 15, or more, inches of water on uncertain terrain filled with many hazards.] I credit his testimony that if the man-trip were used, it is not reliable, would stop if water reached the electrical parts of the man-trip. It would stall and further block the escapeway.

I have taken into consideration the ability of the miners to transport an injured miner out of the mine as the safety standard requires. And if I didn't mention that, I will mention that the safety standards require that I consider disabled persons, including the ability of someone to escape on a stretcher, and I think I addressed that. But given the uneven footing, the hidden obstructions, the murky water, it would make it reasonably likely that someone -- even more reasonably likely that someone carrying a stretcher would trip and fall and hinder the evacuation process.

Now, the evacuation process may be mitigated by the exercise of caution, the ability to walk cautiously on the part of miners, but the Mathies formula does not require me to evaluate the ability of the miners to walk cautiously, and I'm not sure they could do it, and if they could, this area would still slow them down if they had to stop and walk cautiously.

In addition, I credit Crawford's testimony that it is not likely, in an emergency situation, that someone can walk cautiously through smoke avoiding the necessary hazards. So I find that the Secretary has satisfied the four Mathies criteria and established the violation as S & S.

(Tr. 235-241)

I find that the preponderance of the evidence establishes that it was reasonably likely that the hazards present in the subject area would contribute to an injury in the event of an emergency evacuation. I rely on the testimony of Inspector Crawford in reaching this conclusion. I have taken into consideration the ability of the miners to transport an injured miner out of the mine, as the safety standard requires. The uneven footing, the hidden obstructions, the murky water; all

these factors make it reasonably likely that a trip/fall would occur, and, during an evacuation, would result in slowing down or halting the exit of miners. Further, as mentioned previously, it is reasonably likely that these hazards would result in injuries of a reasonably serious nature.

3. Unwarrantable Failure

The term “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.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator’s efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator’s knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *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). 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. *Consol.*, 22 FMSHRC at 353.

The day the subject citation was issued, Crawford described the condition as extensive, obvious and as existing for an extended period of time. He designated the negligence level as “reckless disregard” and found the violation to be an unwarrantable failure to comply with the mandatory standard. Crawford talked to management and learned that they knew that the escapeway was full of water and that it had been in that condition for some period of time. Crawford credibly testified to each and every factor used to determine unwarrantability. The violation was present for at least five shifts and little action was taken to abate the condition. Neil testified that he had requested that some pumping be done but that he had a limited number of pumps. This action was not enough. Neil agreed that the condition was obvious and extensive, but disagrees that it was unsafe. He agreed that the condition was known for several shifts but insisted that the mine was actively attempting to remedy it and, therefore, was the result of ordinary negligence, and not reckless disregard.

Based upon the preshift and onshift reports, and the testimony of all witnesses that the accumulation existed on January 18, 19 and into the 20th when the inspector arrived, I find that the mine did not approach the problem with the seriousness it demanded. While some records show “pumping” as a result of the water, others show no action at all. Ex. 3, 4.

This mine had been issued previous violations for accumulation of water in escapeways. Three citations in the three months prior to this one were issued for escapeways; one in December, one in November and one in October. In addition, prior to August 2008, the mine had received 25 escapeway violations in a little over a year. Ex. 14.

The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. That's the Emery Mining Corporation, 9 FMSHRC 1997 and again in 2004.

Unwarrantable failure is characterized by such conduct as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. Aggravating factors include the length of time the violation existed, the extent of the violative condition, whether the operator had been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the condition was obvious, proposed a high degree of danger, and the operator's knowledge of the existence of the violation. 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 factors exist.

In this case, . . . the mine has met all of the factors for unwarrantable failure. The length of time the condition exists was days. The extent of the violation was very extensive. I think Mr. Neil and Mr. Crawford agree on that point. Whether the operator had been placed on notice that greater efforts were necessary for compliance, I will address the history of violations that show that there have been many violations for escapeway issues. The operator's efforts in abating the violative condition, I understand that there was testimony that the mine tried to pump some of the water out, but I don't think it was enough. The efforts were not enough. Whether the violation was obvious, I don't think there is any question about that. Everyone agrees that it was obvious and extensive and posed a high degree of danger. I understand that Mr. Neil and that the mine operator disagree with the inspector's characterization as to the high degree of danger, and . . . I've already addressed that I credit the inspector's testimony that there was a high degree of danger, and the knowledge of the existence of the violation, which is borne out by the preshift and onshift reports in this case.

The day the subject citation was issued, Mr. Crawford described the condition as extensive, obvious, and existing for a period of time and marked the citation as reckless disregard. . . . When he first walked into the area, he saw that the problem was obvious. He had talked with Mr. Neil who clearly knew about the problem. It had been in the preshift books for a number of shifts, and although some of the preshift books mentioned that someone was working on it, given the depth of the water and the number of

times it continued to be in the preshift books, not much was being done about it.

The danger posed by this condition is found and is similar to the S & S findings, the slip-and-fall hazard posed by the condition, the consequences of an emergency, a stretcher team having to navigate through the escapeway. The stretcher team would be subject to the same slip-and-fall hazard, and, in addition, would unduly delay the provision of critical medical treatment to an injured miner and would delay the evacuation of the mine and endanger everyone, all 40 miners. Impeded, the evacuation could lead to the death of more than one miner and certainly could lead to the death of many miners.

Inspector Crawford found no mitigating circumstances, and I understand the mine's position that they could not have done more, that they were working on pumping the water, but my concern is this -- and I credit Inspector Crawford's testimony in this regard. The mine may have had some pumps in the area, and I think that was routine, and the fact, number one, that they thought 15 inches of water is routine and shouldn't really have much done with it causes me to think they were indifferent to the problem, to the problem of the water in the escapeway and the hazards that were caused by it, the fact that it was in the preshift and onshift for a number of shifts, that the preshift and onshift reports and the testimony of all witnesses that the accumulation existed on January 18th, 19th, and on the 20th when the inspector arrived. The company did not approach the problem with the seriousness it deserved. They had full knowledge of the condition and were not doing anything to make the escapeway safe. It had been that way for several shifts, and it was their decision not to stop what they were doing, turn off the water, and pump the area as they did once the inspector arrived. A number of the preshifts showed no action taken, but some did show some action was taken later, but it certainly wasn't enough, and it was taken seriously. The water was obvious and extensive. Everyone knew about it, and it had been known for several shifts.

The evidence shows that in the three months prior to this citation, there had been a citation issued each month that related to an escapeway, and 25 escapeway violations in a little more than a year prior to August 2008. That should put the mine on notice that they have issues with their escapeway and maybe it should be taken more seriously than they did in this case. Given their history

of methane and the fires that were reported in the mine, it's even more obvious in this case.

There were pumps in place. When they went down, did they replace them in a reasonable time? I think given the fact that once they stopped what they were doing, put the pumps in place, and turned the water off, it only took a few hours to abate the violation. It could have been much sooner, and the mine did not pay enough attention to get it done like they should have. There is really no excuse for waiting such a long time to make that escapeway travelable.

Mr. Neil did not convince me that he was diligently working on the water problem and getting it done or that he took the issue seriously. He said it was not a hazard and he could walk through it. I find that there are a lot of excuses at this mine about why something isn't done, but this seems like a simple thing that was known about and should have been done.

In addition, I find it curious that Mr. Neil agreed that there was a violation of safeguard, but had not done anything to correct that violation that he had believed was also there. It just contributes to the indifference that I saw at this mine.

The mine argues, of course, that they would use a mantrip and not walk through, that the mine is pumping and getting water out, and that these are mitigating circumstances, that they were doing all that they could. However, it's not borne out by the fact that once they focused on the job, it took only several hours to get it done, and that given the evidence, the water had reached a much higher level than it was at the time the inspector was there, and it still seemed not to concern anyone.

This case is very similar, as I said, to the Maple Creek Mining case where the Commission considered the obviousness and the danger posed by the blocked escapeway and the previous citations as aggravated factors in determining that the violation was unwarrantable. I find that the violation was unwarrantable, and I find that the facts [as stated in the citation] and the citation as issued by the inspector is correct, and I will uphold that citation . . . [as written and uphold all findings made by the inspector].

(Tr. 241- 247)

This case is nearly identical to *Maple Creek Mining Inc.*, 27 FMSHRC 555 (Aug. 2005) and *Eagle Energy Inc.* 23 FMSHRC 829 (Aug. 2001) with regard to the unwarrantable failure findings. In those cases, the Commission considered the obviousness of the condition, the danger posed by the water in the escapeway, and the previous citations as aggravating factors. Those same factors, and more, are present here.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges “authority to assess all civil penalties provided in [the] Act.” 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, “in assessing civil monetary penalties, the Commission [ALJ] shall consider” six statutory penalty criteria:

[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. 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that “findings of fact on the statutory penalty criteria must be made” by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge’s penalty assessment for a particular violation is an exercise of discretion, which is “bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator’s size (large operator) and ability to continue in business. The violation was abated in good faith, and no evidence has been presented to the contrary. The history shows a number of escapeway violations in the months prior to this order, including the violations discussed above. I find that the Secretary has established that the negligence amounted to reckless disregard for the violation and that the gravity determined in the order is accurate. The total proposed penalty of \$63,000.00 is appropriate in this case, given the statutory criteria.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$63,000.00 for this violation. Independence Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$63,000.00 within 30 days of the date of this decision.


Margaret A. Miller
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 18, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2009-223
Petitioner,	:	A.C. No. 12-02010-171751-01
	:	
v.	:	
	:	
BLACK BEAUTY COAL COMPANY,	:	Mine: Air Quality #1
Respondent	:	

DECISION

Appearances: R. Peter Nessen, Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”), acting through the Mine Safety and Health Administration (“MSHA”), against Black Beauty Coal Company (“Black Beauty”), 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” or “Act”). The case involves twenty violations, including one 104(d)(2) order issued by MSHA under section 104(d) of the Mine Act at the Air Quality #1 Mine operated by Black Beauty. The parties presented testimony and documentary evidence on Order No. 6672489 at a hearing held in Evansville, Indiana on March 31, 2010. The remaining 19 violations were settled on the record at hearing.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

At all pertinent times Black Beauty operated the Air Quality #1 Mine (the “mine”), an underground coal mine near Gibson, Indiana. The Air Quality #1 Mine mined coal and/or coal byproducts which affected commerce. The mine is subject to regular inspections by the Mine Safety and Health Administration pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Black Beauty is an operator as defined by the Act, and is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission. Stip. ¶¶ 1-3.

a. *Order No. 6672489*

On March 4, 2008, Johnny Moore, an MSHA inspector, issued Order No. 6672489 to Black Beauty for a violation of Section 75.1722(c) of the Secretary's regulations. Moore determined that the violation was the result of an unwarrantable failure to comply with the cited standard.

The citation alleges that:

[t]he guards for the 2 Main West conveyor belt tail piece have not been secured in place during equipment operation. The guards have been hung by belt chains, tie-wire and loosely fastened together with tie-wire. Accumulation of coal fines and mud approximately 3 feet deep has created openings up to 19 inches wide in the guards. The guards will separate with little pressure and swing in several directions. The condition is obvious, extensive and existed for a significant amount of time. This violation is an unwarrantable failure to comply with the mandatory standard.

The inspector found that a permanently disabling injury was highly likely to occur, that the violation was significant and substantial, that one person would be affected, and that the violation was the result of high negligence on the part of the operator. The Secretary has proposed a civil penalty in the amount of \$60,000.00.

1. The Violation

Johnny Lee Moore has been an MSHA mine inspector since September 2005. (Tr. 72). Moore has worked as a regular inspector and, as recently as seven months prior to hearing, held the title of Field Office Supervisor for the Vincennes, Indiana MSHA office. (Tr. 40-41). Moore is currently the acting ventilation supervisor in MSHA District 8. (Tr. 39). Prior to working for MSHA, Moore was employed in the mining industry as an engineer. (41-42). He has a mining engineering degree from the University of Kentucky, and extensive MSHA training on guarding. (Tr. 42-43).

On March 4, 2008, Inspector Moore traveled to the Air Quality #1 Mine to conduct an inspection. Terry Courtney, the shift manager, accompanied Moore during the inspection. (Tr. 110). After inspecting one conveyor belt, Courtney drove ahead on the mantrip while Moore began to inspect the tail piece of the two main west ("2MW") conveyor. (Tr. 53). Moore described the area near the tail piece as "muddy" and noted that there were slip, trip and fall hazards along with a semi-buried water line that was slick. (Tr. 59). Further, he stated that the ribs were "kind of bad." (Tr. 59).

The 2MW conveyor tail piece is protected by three guards. Two of the guards hang on the sides of the tail piece, while the third guard is suspended at the end of the tail piece.¹ A large sump is located at the end of the conveyor. (Tr. 56). Moore testified that that the sump was filled with mud and coal fines approximately three and one half feet deep, and that a pile of the same material had accumulated below the tail roller and was pushing the guards apart such that a 19 inch gap in the guarding had developed. (Tr. 56, 60-61); Gov. Ex. 3 p. 16-17 of 3/4/08 notes. According to Moore, there was limited to no walkway around the end of the sump, i.e., approximately 9-10 inches wide at most. (Tr. 56). Further, Moore testified that, had he not utilized a sounding rod to probe the depth of the sump as he carefully traveled around the end of the tail piece, he very well could have “stepped off into [the sump] and grabbed a guard” as he fell. (Tr. 61). Moore observed that the guards had been hung like curtains around the tail piece using a combination of rusty tie wire² and chains³. (Tr. 57-58, 60). According to Moore, while tie wire may be properly used to fasten corners, it should never be used to hang guards and, instead, the guards should be attached with studs or some type of metal fastener. (Tr. 74). Del Culbertson, an examiner at the mine, testified that he was aware that Moore had in the past recommended that guards be attached by bolts in order to properly secure them. (Tr. 107). Moore noted that some of the tie wire being used to hang the guards was barely hooked at the connection points and had not been locked. (Tr. 58). Further, he determined that the guards were not secure and could be easily pushed or swung with the application of minimal pressure. (Tr. 63).

According to Moore, while there is little reason for a day-to-day miner to be in the subject area, miners would still need to come to this area to conduct preshift examinations and service the equipment. (Tr. 57). Moore testified that in order to adequately inspect the end of the conveyor it would be necessary to carefully hang on to one of the side guards so that you could lean around and observe the rear guard. (Tr. 56-57). In the alternative, one could walk around to the far end of the sump, however, according to Moore, that would not give a very good view of the tail piece or surrounding guards. (Tr. 56-57).

Culbertson testified that it was unlikely that anyone would slip and fall into the sump because most people would not walk around the sump, and rather would just use the crossover approximately 20 feet from the tail piece. (Tr. 101). However, he also testified that during an examination it was common for him to walk around the sump at the 2MW tail piece. (Tr. 97). Culbertson indicated that the guarding arrangement on the tail piece had not been changed in the past six to seven years, and that he conducted the examination of the 2MW belt on March 3rd,

¹ Moore testified that small pieces of guarding were attached to the bottom of the three guards surrounding the tail pieces. These small additional guards were buried in the mud and were not discovered by Moore until the area was cleaned. (Tr. 58).

² According to Moore, tie wire can be different gauges, but the particular wire used on the subject guards was similar to the thickness of a clothing hanger and was very flexible. (Tr. 68-69). Generally tie wire is used to tie up cable. Moore indicated that, although tie wire is generally coated in rubber, it begins to rust quickly in the corrosive mine environment if the rubber wears off. (Tr. 68-69). According to Terry Courtney, tie wire is not as strong as a chain. (Tr. 118).

³ Moore testified that the use of chains to hang the guards is satisfactory. (Tr. 74).

and found no deficiencies, including no buildup of accumulations at the tail end of the conveyor. (Tr. 99, 106).

Terrance Kiefer, also a mine examiner, conducted the examination of the subject belt the day the order was issued, i.e., March 4th. (Tr. 137). Kiefer testified that he used the crossover to examine the tail piece from each side so that he didn't have to go around the sump. (Tr. 137, 138). Kiefer could not remember any problems with the guards on March 4th, and, if there had been any problems he would have put them in his notes. (Tr. 139). He further testified that, on March 4th, he did not see any accumulations of mud or dirt pushing the guards out at the tail end. (Tr. 142).

Moore testified that the condition was obvious and that the "poor construction [of the guards] was immediate and very noticeable right off the bat." (Tr. 53, 60). He instructed Culbertson to shut down the conveyor. (Tr. 53, 60, 100). Moore issued order number 6672489 as a 104(d)(2) order for a violation of 30 C.F.R. § 75.1722(c). (Tr. 45); Gov. Ex. 2.

Shortly after the belt was stopped and the order issued, Terry Courtney returned to the area of the 2MW tail piece. (Tr. 54, 111-112). As Courtney traveled around the tail piece, he slipped and, while falling into the sump, grabbed on to the end of one of the guards that was hung by a chain. (Tr. 57, 113). Moore did not see Courtney grab the guard, but he heard him fall into the sump. (Tr. 67-68). According to Moore, Courtney told him that he had grabbed the guard. (Tr. 67-68). Courtney testified that the guard did not fail when he grabbed it and he did not come in to contact with the tail roller. (Tr. 113).

Moore testified that the alleged violative condition was abated by cleaning the area, including the sump, so that the guards were accessible, fabricating one guard to replace the end guard which was in very poor condition and, finally, securely attaching the guards with mechanical fasteners. (Tr. 67); Ex. G-2. According to Moore, the cleaning and repairing of the guards took approximately five hours. (Tr. 65)

The Commission has recognized that "[t]he purpose of section 75.1722(c) is to prevent accidents in the use of equipment." *Arch of Kentucky, Inc.*, 13 FMSHRC 753, 758 (May 1991), *aff'g* 12 FMSHRC 536 (Mar. 16, 1990) (ALJ). The regulation requires that "[e]xcept when testing the machinery, guards shall be *securely* in place while machinery is being operated." 30 C.F.R. § 75.1722(c)(emphasis added). The Secretary's regulations do not define what it means for a guard to be "*securely* in place." The Commission has held that in the absence of a regulatory definition of a word, the ordinary meaning of that word may be applied. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997); *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997). If, however, a standard is ambiguous, courts have deferred to the Secretary's reasonable interpretation of the regulation. *See Energy West Mining Co. v. FMSHRC*, 40 F.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 . . . 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)). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation[] and . . . serves a

permissible regulatory function.” *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted).

The ordinary meaning of “secure,” the verb form of the adverb in question, is instructive. Webster’s defines “secure” as “to make fast.” *Webster’s New Collegiate Dictionary* 1037 (1979). Webster’s goes on to define “fast” as “1 a: firmly fixed . . . c: adhering firmly . . . d: not easily freed . . . e: [stable].” *Id.* at 413. Relying upon the ordinary meaning of these words, the Secretary’s regulation seems to require that guards be firmly fixed in place such that they are not easily moved while machinery is in operation. The Secretary’s interpretation of the cited standard, set forth in the MSHA Program Policy Manual (“PPM”), seems to echo the ordinary meaning. The PPM, for purposes of this particular analysis, states that “[g]uards installed to prevent contact with moving parts of machinery shall . . . [b]e firmly bolted or otherwise installed in a stationary position.” V MSHA, U.S. Dep’t of Labor, *Program Policy Manual*, Part 75.1722 (“PPM”). Based on the above analysis, the cited mandatory standard requires guards to be firmly fixed in a stationary position.

I credit Inspector Moore’s testimony that the poor condition of the guards was easily noticed and that the guards could be easily pushed or moved with the application of minimal pressure. I find that the guards, specifically those guards hanging by the rusty tie wire, were not fastened in a manner that could be described as “firmly fixed” or “in a stationary manner.” In fact, the guards were so loose that they were being pushed away from the tail piece by accumulations of materials that had built up in the sump and under the tail piece, thereby creating a large gap in the guarding. I question whether Culbert or Keifer were conducting adequate exams given that they failed to notice these accumulations. The guards were not “securely” in place, as required by the cited standard. The belt was running at the time Moore began his inspection of the tail piece, and no evidence has been presented that any sort of testing was underway. For those reasons, I find that Black Beauty violated the cited standard.

Black Beauty argues that the guards were secure, as evidenced by Courtney falling and grabbing the guard which prevented him from coming into contact with the tail pulley. However, I credit Inspector Moore’s testimony that it was only by chance that Courtney happened to grab the end of a guard that was hung by a chain, as opposed to rusty tie wire. I further credit Moore’s testimony that, had Courtney grabbed the end of a guard hung by tie wire, the inadequate securing of the guard would not have prevented contact with the pulley. For those reasons, I reject Black Beauty’s argument.

Black Beauty also argues that the 19 inch gap in the guarding is not a violation of the standard at issue and, in addition, need not be guarded because there is no “reasonable possibility of contact and injury,” as required by Commission case law. BB Br. 11 (*citing Thompson Brothers Coal*, 6 FMSHRC 2094, 2097 (Sept. 1994)). Again, I reject Black Beauty’s argument. While I need not reach the question of whether the gap in the guard is a violation of the cited standard, I take note of the fact that the gap was caused in large part by the unsecure nature of the guards, which allowed the guards to be pushed outwards by accumulations which had built up underneath the tail piece. Nevertheless, I credit Inspector Moore and his drawings which indicate that the gap spanned 19 inches at the widest point. While the gap may not be 19 inches

at the top, it is a gap nonetheless, and provides an opening where a miner may come in contact with the pulley at a distance much less than 30 inches. Based on Courtney's fall, the mine cannot dispute that it is easy for a miner to slip and fall into the guarding. When that happens, it is reactionary to grab onto, or attempt to grab onto, anything in reach. I find that the gap in the case, whether it was 19 inches or narrower, was a direct result of the guards not being "securely" in place.

In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152. The Secretary has met her burden of proving that, on the day of inspection, the mine failed to comply with the cited standard. I find that the Secretary has established a violation.

2. Significant and Substantial Violation and Gravity

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

[i]n 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.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also*, *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

First, as noted above, I find that there is a violation of the mandatory safety standard as alleged by the Secretary. Second, I find that a discrete safety hazard existed as a result of the violation. The guards were capable of being easily moved by the application of limited pressure. The guards were loosely hung by tie wire and had been pushed away from the tail piece by accumulations of coal and mud, thereby exposing an area where a miner could have gotten caught in the conveyor or a pinch point on the conveyor belt.

The difficulty with finding a violation S&S normally comes with the third element of the *Mathies* formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

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

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. 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 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Third, I find that there is more than a reasonable likelihood that the hazard described will result in an injury. As discussed above, the guards were inadequately secured, with some of the guards having been loosely hung by rusty tie wire, as opposed to chains. The danger in such a situation is that a miner could fall into the unsecured guards which, given their unsecure nature, would not prevent the miner from coming into contact with moving machinery of the tail piece. If a miner were to come into contact with the moving machinery, in this case a tail pulley or moving conveyor belt, they could be caught in the conveyor or a pinch point on the conveyor belt. While improperly secured guards may in some instances present all that is needed to find a violation to be S&S, here, the situation is exacerbated by the condition of the area in which the inadequate guards were located. The mud and coal accumulations, slick water line, and narrow walkway around the sump presented a serious slip and fall hazard.

I credit Inspector Moore's testimony that, had he not utilized a sounding rod to probe the depth of the sump as he carefully traveled around the end of the tail piece during his inspection, he very well could have "stepped off into [the sump] and grabbed a guard" as he fell. (Tr. 61). As further evidence of the slip and fall hazard and the likelihood of injury, I note Courtney's fall into the sump. Courtney, a shift manager at the time the order was issued and an individual who would presumably have knowledge of the sump at the end of the conveyor in question, slipped while traveling around the tail piece and, while falling into the sump, grabbed the end of one of the guards that happened to be hung by a chain. Had he grabbed an end that was hung by rusty tie wire, the tie wire would not have held his weight and he would have fallen into the tail pulley machinery. While the conveyor was off at the time Courtney fell, assuming normal mining

operations, the conveyor would have been on when other miners were examining or passing through the area. Even if the area was not frequented by a large number of miners per day, the hazardous conditions presented by slip, trip and fall hazards made it highly likely that any individual traveling around the tail piece would fall into the unsecured guarding and, in turn, come in contact with the moving machinery of the tail piece. I further credit Inspector Moore's testimony that the ribbed tail roller increases the hazard and potential for injury. (Tr. 61-61). According to Moore, ribbed rollers, as opposed to smooth rollers, are much more difficult to break free from once an individual becomes entangled.

Fourth, I find that it is reasonably likely that an injury sustained as a result of the hazard presented would be of a reasonably serious nature. I credit Moore's testimony that accidents in which miners are caught in the pinch points of machinery often result in the loss of fingers, arms or other appendages, and can result in the death of a miner. (Tr. 61).

Moore testified that, in his experience, the subject violation was certainly S&S. Black Beauty argues that it is unlikely that a miner will be in a position to get caught in the conveyor. Specifically, it argues that belt examiners are the only individuals who would be in the area while the belt was in operation, and the only other miners likely to be in the area, maintenance people, would de-energize the conveyor before beginning work near the tail piece. While there may be limited exposure, I credit the inspector's testimony and find that the unsecure guarding, combined with the trip and fall hazard and the fact that examiners would be in the area at least once per shift, make it more than reasonably likely that an injury would occur and that the injury would be of a reasonably serious nature. Further, I find that only one person would be affected by this condition, given that it is unlikely that two people would be in the area and fall in into the conveyor simultaneously. For the above reasons, I affirm the citation as written with regard to the Secretary's S&S and gravity findings.

3. Unwarrantable Failure and Negligence

The term "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.* at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *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). 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. *Consol.*, 22 FMSHRC at 353.

In order to conduct an appropriate analysis of the aggravating factors, it is important to consider the context in which the order was issued, specifically those events that occurred prior

to the date the order was issued. Moore testified that in January of 2008 he traveled to Black Beauty's Air Quality #1 Mine to conduct a routine inspection. (Tr. 44). During the course of the inspection, Moore issued a number of citations for conveyor belt guarding violations, including violations for unsecure guards. (Tr. 47). On January 28, 2008, Moore informed Marty Wade, a Black Beauty employee, that many of the conveyor guards were unacceptable and could contribute to miners being injured. (Tr. 48). The following day, Moore had additional discussions concerning the guarding with Ron Madlem, Rick Kerry, Gary Campbell, Terry Courtney, Brandon Flath, and Chris Robinson. (Tr. 48-50). At some point during the days following the discussions, Moore and members of Black Beauty management created a list of the conveyors at the mine. (Tr. 49). Moore testified that he struck an agreement with Black Beauty management that the mine would, at the rate of one conveyor per day, examine and make necessary repairs to the guards on each of the 25 to 26 conveyor belts at the mine. (Tr. 49-50). Courtney testified that he was aware of the list of belts that required guarding repairs, but he was not aware that the use of tie wire was problematic. (Tr. 117). According to Moore, Brandon Flath, who was in charge of the belt crew, told Moore that after the meeting he, along with a group of other Black Beauty employees, had examined the belts and prioritized the conveyor drives that needed the most work on their guarding. (Tr. 50-51). Flath testified that the belts were not addressed in order of priority, but rather by starting in one area and then working across the mine. (Tr. 129). Flath testified each drive had approximately 17 sheets of guarding, and that to redo the guarding on a drive he would have to fabricate components and build new hangers. (Tr. 122-123).

Flath testified that he was aware of the list and that Moore didn't want to see tie wire attached anywhere on the guards; however he never informed the belt examiners of Moore's problem with tie wire. (Tr. 120-121, 130-131). Kiefer, an examiner, testified that he was not aware of the list, but that he had heard that Inspector Moore had a problem with the way the guarding was affixed to the conveyors. (Tr. 141). Ronald Madlem, a safety supervisor at the mine, testified that he was aware of the list and Inspector Moore's concern with using tie wire. (Tr. 145). Flath further testified that, in spite of the list, he never committed to examining/repairing one conveyor per day. (Tr. 123). When questioned regarding his response to Moore's proposed plan Flath stated "I didn't say I couldn't do it. . . . I didn't think it was possible, . . . [but] I didn't say, no, that's impossible, we can't do that. I'm not going to do that. I just - you know, okay." (Tr. 130). Flath testified that he only committed to doing his best. (Tr. 123).

Moore noted in his testimony that many of the conveyors did not need actual work or repairs, and could have easily been checked off after a quick examination. (Tr. 49). However, he noted, while many of the guards were well constructed, it was the method of hanging and securing those guards that was unacceptable and needed to be addressed. (Tr. 49-50). Specifically, Moore cited the unacceptability of using tie wire to hang guards. (Tr. 50). Moore testified that in the weeks and days following the meeting he noticed that the agreed to examination/repair schedule was not being adhered to. (Tr. 52). According to Flath, the guarding of only five or six belts had been examined/repared as of March 4th, the day the subject order was issued. (Tr. 124). Moore testified that on March 6th, two days after the order was

issued, he spoke to Brandon Flath, who told Moore that the mine was working on the guarding but that they had fallen behind schedule. (Tr. 78).

I credit Moore's testimony with regard to the agreement that was reached and Black Beauty's subsequent failure to abide by that agreement. Further, I find that the agreement not only put Black Beauty on notice that greater efforts were required for compliance, but also expressly set out what was required for compliance. In spite of that notice, Black Beauty failed to make a reasonable effort to repair the guards which, in turn, resulted in the subject order.

In addition, I find that the violative condition existed for an extended period of time and, while some effort was made to abate the violation, it was minimal at best. The condition existed during Moore's January 28th inspection, and had not been abated prior to the March 4th inspection during which the order was issued. The mine had indicated to the inspector that it would repair the guards on one conveyor each day. I was not persuaded by Flath's testimony that he was diligently working on the guards or that he did not commit to repairing one conveyor per day. I credit Moore's testimony that Black Beauty was not fulfilling its end of the bargain, and, in doing so, allowed the violative condition, which I have found to be of an S&S nature, to exist for over a month. The violative condition took five hours to abate. That time included cleaning the area, fabricating the appropriate guarding, and securely attaching the guarding. This particular drive required a great deal more work than many of the other drives, yet its condition was corrected in approximately five hours: 25 to 26 days was more than enough time to repair the guarding on the conveyors at the mine, regardless of any agreed to schedule, yet Black Beauty failed to do so. In fact, the only step taken by Black Beauty to abate the violative condition was to place the 2MW belt on the list of belts that needed to be examined.

I find that the violative condition was obvious. I credit Inspector Moore's testimony that the condition was obvious and immediately noticeable when he entered the area. The guards were hung at some points by rusty tie wire, which was described as being approximately the same thickness as a clothing hanger. In addition, the guards were capable of being easily moved with the application of minimal pressure. Further, the guards had been pushed away from the tail piece by a pile of accumulations. Such conditions are very obvious and should have been easily noticed by Black Beauty's examiners.

Black Beauty avers that it has used the same guarding practices for years without issue. While this may be true, it stands to reason that guarding systems deteriorate over time and must be repaired. In this case, it appears that stop-gap repairs were made in lieu of more permanent fixes. As mentioned above, the condition was obvious, and therefore should have been addressed by Black Beauty regardless of whether it had been cited in the past.

Moore testified that the mine had received approximately 33 violations related to guarding since May 2006 and he, personally, had issued 17 violations for guarding since July 2007. Management was notified in several meetings with Moore that there was a serious problem with the guarding systems. Ample time was given to the belt boss and the shift managers to conduct the inspections and make corrections. The mine had a recent history of guarding violations, and was on notice of the need to comply. In spite of that, the serious lack

of reasonable care exhibited by management resulted in continued guarding violations, including the one at issue, and clearly amounts to aggravated conduct constituting more than ordinary negligence. For the above reasons, I find that Black Beauty has unwarrantably failed to comply with the mandatory standard and I affirm the Secretary's high negligence finding.

b. Remaining nineteen citations.

The parties entered into a stipulation at hearing regarding the remaining 19 violations in this docket. The Secretary agreed to modify Citation Nos. 4263729, 4263730, 6669996, 6670742, 6670747, 6681052, 6681084, 6681086 and 6682005 to non-S&S violations and to remove the unwarrantable designation from Citation No. 6678358. The parties agreed that the Respondent will pay the penalty as assessed for Citation Nos. 6669994 and 6682100 and that the Secretary will reduce the remaining violations, primarily by modifying the level of negligence. The entire docket was originally assessed at \$317,405.00 with \$60,000.00 of that amount assessed to the Order that was tried, leaving \$257,405.00 for the citations that are settled. The Respondent has agreed to pay \$71,518.00 of that amount.

There was a discussion on the record about the settlement and the details of the modification of each alleged violation are set forth in the transcript. The discussion revolved around the reasons for this particular settlement and other recent settlement motions that have been filed concerning this mine operator. I am reluctant to approve a settlement that has such a drastic reduction in penalty and so many modifications to the citations. However, given the representations of the parties and a review of the file, I find that the proposed settlement is appropriate and the Motion to Approve the Settlement is **GRANTED**.

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that, "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

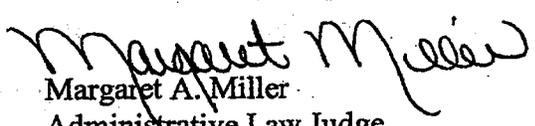
[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business. The violations were abated in good faith, and no evidence has been presented to the contrary. The history shows a number of violations for guarding in the 15 months prior to this order, including the violations discussed above. I find that the Secretary has established that the negligence is high for the violation and that the gravity determined in the order is accurate. The total proposed penalty of \$60,000.00 is appropriate in this case, given the statutory criteria.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$60,000.00 for the contested order, and **ORDER** Black Beauty Coal Company to pay the Secretary of Labor the sum of \$131,518.00 within 30 days of the date of this decision.


Margaret A. Miller
Administrative Law Judge

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determining the issue. 32 FMSHRC 88-89. The Commission instructs me to reconsider the unwarrantable failure issue in light of the factors.

Following the remand, I ordered counsels to explore settlement of the matter. If they could not agree to a settlement, I ordered them to submit briefs addressing the unwarrantable issue. The settlement discussions proved futile, and the briefs were received.¹ In view of the Commission's instructions, I find that the violation was the result of Coal River's unwarrantable failure to comply with the standard.

In the underlying decision, I concluded that the violation of section 75.340(a) occurred because, as the Secretary charged, the scoop charger located at Spad No.1965 was neither provided with a fire suppression system nor housed in a proper area. It was the practice at the mine to meet the standard's requirements either by charging a scoop's batteries on the scoop or, if batteries are charged off of the scoop, by applying Pyro-Chem to the ribs of the area where the batteries were charged. In this particular instance, the scoop's batteries were charged on the floor, off of the scoop, and Pyro-Chem was not applied to the ribs. Therefore, I found that the company violated section 75.340(a). 31 FMSHRC at 206-206.

Although I concluded that the company intended to apply Pyro Chem to the ribs, the procedure was not carried out, despite the instructions of the Superintendent. 37 FMSRHC at 207. The Secretary points out that it was the practice at the mine, if batteries were charged on the ground, to apply Pyro-Chem to the ribs. Mine managers knew this. They also knew Pyro-Chem had not been applied to the ribs because the Pyro-Chem was stored on the surface and, because it was January, the Pyro-Chem was frozen. Management did not take any action to provide other Pyro-Chem or to make sure batteries were not charged on the ground. In other words, management knew of the violation but did not prevent it.

In addition, the record establishes that the violation existed long enough that it should have been reported by the pre-shift examiners, and it was not. Although the application of rock dust to the walls made the lack of Pyro-Chem difficult to detect (*see* 31 FMSHRC at 208), a proper examination would have revealed that it was missing.

Moreover, given the fact that the lack of fire proofing on the walls of the charging station could have resulted in the fire endangering eight or nine miners (31 FMSHRC 206-207), mine management was under a heightened standard of care to prevent such a hazard. Management did not meet this duty.

¹ Counsel for Coal River also filed an unsolicited Supplemental Decision. Counsel for the Secretary moved to strike the Supplemental Decision on the grounds that it was neither requested nor was permission given to file it. Counsel for the Secretary is right on both counts, and the motion **IS GRANTED**. In reaching this Decision on Remand the Supplemental Decision has not been considered.

Given these factors and given the Commission's explicit and implicit instructions, I conclude the violation of section 75.340(a) set forth in Citation No. 7249165 was the result of the company's unwarrantable failure to comply with the standard. I further find the violation was the result of the company's high negligence. Managers knew the walls were not coated with Pyro-Chem and they did not ensure the defect was correct even in view of the serious hazard posed by the violation. In view of findings I made with regard to other applicable civil penalty criteria, findings that were not disturbed on review, I conclude that a civil penalty of \$4,000.00 is appropriate and Coal River **IS ORDERED** to pay this amount for the violation.²

Upon compliance with the Order set forth at 31 FMSHRC 2117-218 as modified in n. 2, *infra*, these proceedings **ARE DISMISSED**.


David F. Barbour
Administrative Law Judge

Distribution: (Certified)

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/crp

² Since the only parts of the underlying decision vacated on review were the unwarrantable failure and negligence findings made in connection with Citation No. 7249165 and the civil penalty assessed for the violation (27 FMSRHC at 99), the Order entered in the underlying decision is modified to increase the total civil penalty due for all of the violations to \$14,000.00 and to delete the instruction to the Secretary to modify the inspector's negligence finding on Citation No. 7249165 from "high" to "moderate."

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 29, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2008-1407
Petitioner	:	A.C. No. 15-15978-148474
v.	:	
	:	
	:	
	:	
SHELTON BROTHERS ENTERPRISES,	:	Martin Plant
Respondent	:	

AMENDED DECISION APPROVING SETTLEMENT

Before: Judge Feldman

The captioned matter is before me based upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). 30 U.S.C. § 815(b). The Secretary filed a motion to approve a settlement agreement and to dismiss this civil penalty proceeding. A Decision approving the parties' settlement terms was issued on April 22, 2010. The settlement terms included the respondent's agreement to pay a reduced civil penalty of \$1,050.00 instead of the \$1,500.00 initially proposed. The Decision Approving Settlement required the respondent to pay the civil penalty within 30 days.

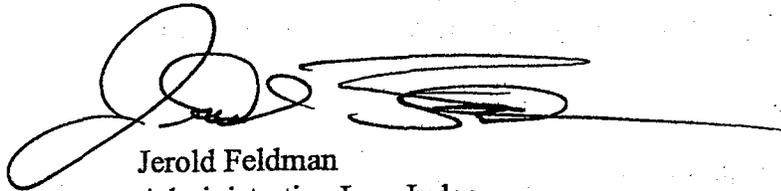
On or about May 24, 2010, when the 30 day period after the Decision approving settlement had expired, the respondent telephoned my law clerk to request a twelve month payment schedule for the \$1,050.00. It is unclear whether the respondent's telephone request occurred several days before or several days after May 24, 2010, as the date of the telephone contact was not recorded. What is clear is that the respondent had telephoned my secretary with a similar request several days prior to telephoning my law clerk. After speaking to my law clerk, the respondent was requested to submit its request in writing. The respondent's request for a twelve month payment schedule was filed by facsimile on June 1, 2010.

Upon receiving the respondent's request, my law clerk telephoned counsel for the Secretary to determine if there was any opposition. On June 17, 2010, the Secretary filed a motion to oppose the respondent's motion for a payment schedule. The Secretary's opposition is based on her assertion that my Decision ordering the respondent to pay the entire \$1,050.00 penalty within 30 days has become final thirty days after its issuance.

As a threshold matter, the April 22, 2010, Decision Approving Settlement noted that this case would not be dismissed until timely payment of the entire \$1,050.00 civil penalty was received. Consequently, I still retain jurisdiction in this matter. Moreover, the respondent's initial contact with my secretary occurred less than 30 days after the settlement decision was issued, and the telephone contact with my law clerk occurred shortly thereafter. Accordingly, the retention of my jurisdiction notwithstanding, the respondent's motion to reopen is timely even if the April 22, 2010, Decision were to become final after 30 days.

Finally, the request to pay the civil penalty in monthly installments rather than in its entirety is procedural rather than substantive. Consequently, approving the twelve month payment schedule does not substantively alter the terms of the parties' settlement agreement. Significantly, the Secretary does not contend that the respondent's proffered twelve month payment schedule is unreasonable.

In view of the above, the respondent's motion to pay the \$1,050.00 civil penalty in twelve monthly installments **IS GRANTED**. Consequently, **IT IS ORDERED** that the respondent pay \$87.50 per month, for a total of twelve (12) months until the total proposed penalty of \$1,050.00 is received. Payment is to be made on the first of each month for twelve consecutive months beginning on September 1, 2010. **IT IS FURTHER ORDERED**, that if any one of the respondent's monthly payments is more than ten days late, the remaining sum of the initially proposed \$1,500.00 civil penalty shall become immediately due and payable. Upon timely receipt of the \$1,050.00 civil penalty, the captioned civil penalty proceeding **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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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, DC 20001

June 30, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2008-737
Petitioner	:	A.C. No. 15-18267-144079
v.	:	
	:	
	:	
MANALAPAN MINING CO., INC.,	:	RB No. 10 Mine
Respondent	:	

DECISION

Appearances: Uche N. Egemonye, Esq., Carmen L. Alexander, Esq., Office of the Solicitor, U.S. Department of Labor, MSHA, Atlanta, Georgia, for the Petitioner; John M. Williams, Esq., Rajkovich, Williams, Kilpatrick & True Lexington, Kentucky, for the Respondent.

Before: Judge Feldman

This civil penalty proceeding concerns a Petition for the Assessment of Civil Penalty filed on May 15, 2008, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 820(a), by the Secretary of Labor against the respondent, Manalapan Mining Company, Inc. ("Manalapan"). The petition initially sought to impose a total civil penalty of \$833,600.00 for four alleged "flagrant" violations of the mandatory safety standard contained in section 75.400, 30 C.F.R. § 75.400, of the Secretary's regulations.¹ Section 75.400 prohibits accumulations of combustible coal dust and loose coal in active workings in underground coal mines. The violations were cited as a result of an October 2, 2007, mine inspection.

¹ Section 110(4)(b)(1) of the Mine Act as amended by the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), 30 U.S.C. § 820(4)(b)(1), provides that a mine operator committing a violation deemed to be "flagrant" may be assessed a civil penalty of not more than \$220,000. Section 110(4)(b)(1) defines "flagrant" as "... a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory safety or health standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

On November 3, 2009, the Secretary filed what I construe as an amendment to the May 15, 2008, civil penalty petition removing the “flagrant or reckless disregard” charge for the 104(d) citation and three 104(d) orders that are the subject of this proceeding. In addition, the Secretary reduced the total proposed penalty from \$833,600.00 to \$240,000.00 to conform with the maximum civil penalty of \$60,000.00 for each of the four alleged combustible accumulation violations that the Secretary asserts is attributable to Manalapan’s unwarrantable failure. (Letter from Dana L. Ferguson, Esq., to John M. Williams, Esq., October 30, 2009).

This matter was heard on January 12 and January 13, 2010, in Richmond, Kentucky. The parties’ post-hearing briefs and replies are of record and have been considered in this disposition.

I. Statement of the Case

Manalapan’s RB No. 10 mine, currently inactive, is an extremely wet underground coal mine. Consequently, mine floor conditions in October 2007 were unusually muddy. This matter concerns a combination of coal accumulations and mud, not well defined by the Secretary, along a series of four underground conveyor belts. The extracted material was transferred, in turn, from the No. 4 belt at the face to the No. 1 belt nearest the surface. The extracted material, consisted of approximately thirty percent coal and seventy percent rock and clay.

The material carried on the belts was extremely wet and muddy for several reasons. The primary reason was the pan on the continuous miner scooped mud from the mine floor and transferred the mud, along with the extracted material, to the belt haulage system. Water from dust suppression sprays at the face also progressively accumulated as the water was transferred from the head drive to the tailpiece of each belt. Thus, the material on, and the accumulations around, each belt became more diluted as the material was conveyed outby.

Consequently, although the accumulations were extensive in nature, they were predominantly a slurry mixture of coal and muddy clay, particularly as the material was carried outby from the No. 2 belt for transfer to the No. 1 belt. As a result, the combustible hazard posed by the cited accumulations was greater closer to the face and dissipated by way of dilution as the material was transported outby from belt to belt. For example, the issuing inspector considered the cited conditions along the No. 2 belt to be a “borderline” violation, and the accumulations along the No. 1 belt were so muddy that they could not be handled because they ran through the fingers. Accordingly, the 104(d) citation and three 104(d) orders in issue shall be affirmed, modified or vacated based upon the proximity of the cited conditions to the working face.

II. Findings of Fact

On October 2, 2007, Mine Safety and Health Administration (“MSHA”) Coal Mine Inspector Dannie Lewis inspected Manalapan’s RB No. 10 underground mine located in Pathfork, Kentucky. The mine had one production day shift that began at 6:00 a.m. and

ended at 4:00 p.m. (Tr. 320). There was no second shift after production ceased at 4:00 p.m. (Tr. 315). The third shift was a maintenance shift that operated from 9:00 p.m. until 5:00 a.m. (Tr. 320). Mining operations began in 2000 and continued until the mine was closed in 2008. (Tr. 222, 248). The coal seam height underground varied from approximately 5½ to 3½ feet. (Tr. 79-80). Coal was extracted from the working face by a continuous miner. (Tr. 54-55). The material extracted from the working face consisted of approximately seventy percent rock and clay and thirty percent coal. (Tr. 232). After extraction, the coal along with the extraneous material was loaded onto a series of conveyor belts designed to transport it to the surface.

In October 2007 there were four belts that conveyed the extracted material from the face to the surface totaling approximately 2,300 feet. (Resp. Ex. 6; Tr. 223). There were a total of approximately 400 top rollers and 200 bottom rollers on the four belts. (Tr. 223). A crawler system on wheels acted as a bridge that connected the belt on the continuous miner to the No. 4 "face" belt. (Tr. 36, 54-55, 323-25). The No. 3 belt, that received the extracted material from the No. 4 belt, dumped the material onto the No. 2 belt which, in turn, transferred the material to the No. 1 belt. The No. 1 belt transferred the coal outside the mine to a stacker belt on the surface. (Tr. 223).

At the time of the inspection, the RB No. 10 mine was extremely wet with pools of water that routinely collected at various locations. (Tr. 226-29). Water entered the mine through old works. (Tr. 228-29). In addition, water percolated through the mine floor. (Tr. 226-27). This resulted in substantial quantities of mud as the mine floor consisted of a soft shale known as "fireclay." (Tr. 230). Additional water accumulated from sprays at the working face. (Tr. 228, 335-36). Consequently, despite having water pumps at various locations, the water was never completely removed and the mine floor remained muddy at all times. (Tr. 316-17). The Secretary admits that it was difficult to control the water in the RB No. 10 mine. (Tr. 88-89).

The muddy mine floor adversely affected the consistency of the material on the belts. David Partin, Manalapan's operations manager, explained, without contradiction, that mud and water on the fireclay mine floor accumulated in the pan located beneath the continuous miner as the miner was trammed. (Tr. 229-31). This muddy material was transferred from the pan to the continuous miner belt system, and, ultimately to the haulage belts. (Tr. 231). Lewis conceded there was mud on the belt line. (Tr. 153). The wet and muddy conditions worsened from belt to belt as the material was transported outby. (Tr. 91, 144, 150, 337). This is because the mud from the mine floor, and water from dust suppression sprays at the working face, accumulated at the head drive and tailpiece of each belt as the extracted material was dumped at the transfer point. (Tr. 59, 74, 76, 77, 189, 228, 231, 323; Resp. Ex. 11).

At approximately 9:00 a.m. on the morning of October 2, 2007, Lewis began an inspection of the RB No. 10 mine. Initially, Lewis reviewed the preshift and onshift examination books. Before beginning his inspection, Lewis observed notations entered from August 30 through October 2, 2007, that, as a general matter, reflected wet and muddy conditions on a daily basis along the Nos. 1, 2, 3 and 4 belts. (Resp. Ex. 7). The books noted "working on" and "shoveling" as actions taken to correct the conditions. *Id.*

Lewis entered the mine. He was accompanied by Mine Superintendent Joseph Miniard and Timothy Carter, an MSHA inspector in training. (Tr. 51). The mine had been producing coal for approximately two to three hours prior to the beginning of the inspection. (Tr. 318). Lewis began his inspection by traveling with Miniard to the working face. (Tr. 317-18). After completing his inspection of the face, Lewis traveled outby the conveyor belt entry to inspect the belts. The inspection occurred prior to Miniard's onshift examination when coal had been carried on the belts for approximately two to three hours prior to Lewis' arrival on the section. (Tr. 318). At that time, four men were assigned to work on the beltline concentrating on the conveyor head drives where water and mud had accumulated. (Tr. 329).

Upon completing his examination of the belts, Lewis traveled to the surface whereupon he telephoned his supervisor Jim Langley at the Barbourville office. After consulting with Langley, Lewis issued 104(d)(1) Citation No. 7511467 (No. 4 Belt) as well as 104(d)(1) Order Nos. 7511472 (No. 3 Belt), 7511478 (No. 2 Belt), and 7511479 (No. 1 Belt) for violations of the mandatory safety standard in section 75.400, 30 C.F.R. § 75.400. Lewis designated the cited violations as significant and substantial and attributable to Manalapan's unwarrantable failure.^{2 3}

As justification for the unwarrantable failure for all four of the cited violations, Lewis noted that Manalapan had been cited for approximately 27 violations of section 75.400 during the preceding fifteen months. (Gov. Exs. 1-4). The MSHA Mine Data Retrieval records reflect that Manalapan was cited for 28 violations of section 75.400 during the 24 months preceding Lewis' October 2007 inspection. (Gov. Ex. 8). The records also reflect that 11 of the 28 previous violations were designated as non-significant and substantial. *Id.* Although the data retrieval records proffered by the Secretary do not contain the proposed civil penalty for each violation, the information on MSHA's web site reflects the assessed civil penalties ranged from \$60.00 to \$6,062.00. Only one of the previous 28 combustible material violations was attributable to Manalapan's unwarrantable failure. The penalty proposed by the Secretary for this violation was \$4,800.00.

Section 75.400, the cited mandatory standard, states:

Coal dust, including float dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electrical equipment therein.

² Generally speaking, a violation is S&S if it is reasonably likely that the hazard contributed to by the violation will result in an accident causing serious injury. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981).

³ A violation of a mandatory safety standard is unwarrantable when the actions of the mine operator that resulted in the violation constitute more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987).

III. Case Law and Statutory Framework

A. Significant and Substantial

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

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

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

Id. at 3-4; *see also Austin Power Inc., v. Sec’y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria). With respect to the third element of *Mathies*, a significant and substantial finding requires a determination that the violation contributes significantly and substantially to the cause and effect of a hazard. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (Aug. 1984) (emphasis in original).

Resolution of whether a particular violation of a mandatory standard is S&S in nature must be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Thus, consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

B. Unwarrantable Failure

The elements of unwarrantable conduct are well settled. The Commission has determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining*, 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-194 (Feb. 1991); *see also Buck Creek Coal*, 52 F.3d 133, 135-36 (7th Cir. 1995) (approving the Commission's unwarrantable failure test).

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

C. Statutory Civil Penalty Criteria

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

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

The Commission has noted that the *de novo* assessment of civil penalties by the administrative law judge does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Rather, the judge must qualitatively analyze each of the penalty criteria to determine the appropriate civil penalty to be assessed. *Cantera Green*, 22 FMSHRC 616, 625-26 (May 2000).

IV. Further Findings and Conclusions

A. 104(d)(1) Citation No. 7511467 (No. 4 Belt)

As previously noted, the first belt Lewis observed was the No. 4 belt that received the face material from the continuous miner via the crawler system. (Tr. 54, 58). The approximate dimensions of the No. 4 belt were 600 feet long, 4 to 5 feet wide, and, 44 inches above the ground. (Tr. 68, 70, 85, 327). The belt entry was 18 to 20 feet wide. (Tr. 67). Facing in an inby direction, the right rib was approximately 2½ to 3 feet to the right of the belt. (Tr. 67). The distance from the left rib to the belt varied between 6 and 10 feet. This area to the left of the belt served as a travelway. (Tr. 67, 68).

Lewis testified that the material on the No. 4 belt was the driest of the four belts. (Tr. 83, 87, 337). In this regard, Lewis estimated that sixty to seventy percent of the belt material was dry. (Tr. 59). Lewis explained that the wettest conditions on the No. 4 belt existed outby the face where the head drive of the No. 4 belt dumped onto the tailpiece of the No. 3 belt. (Tr. 59, 189, 323). As noted, the water on the belts accumulated at the transfer points between the head drives and tailpieces as the material was dumped outby from belt to belt as it was conveyed to the surface. (Tr. 59, 74, 76, 231; Resp. Ex. 6).

Lewis observed loose coal and float dust accumulations underneath, along the side, and on the structure of the No. 4 belt. (Tr. 55, 59). The accumulations extended from underneath the belt to approximately one foot on each side. The accumulations continued along the entire length of the belt. (Tr. 66; Gov. Ex. 1). Using a ruler, Lewis determined that the accumulations ranged from one to eight inches in depth. (Tr. 69, 74).

Lewis observed at least ten bottom rollers on the No. 4 belt turning in coal fines. (Tr. 55, 328). These fines contacted the bottom rollers, which are approximately two to six inches off the floor. (Tr. 55, 73). Lewis testified that a few of the rollers were so immersed in the coal fines that they could hardly be seen. (Tr. 73, 263). Lewis noted that there were locations where the accumulations were rubbing against the bottom belt drying the coal and causing it change to a reddish gray color. (Tr. 55, 59, 60, 131).

Miniard conceded that the No. 4 Belt had dry accumulations and he saw rollers turning in these accumulations. (Tr. 352). Specifically, Miniard described accumulations that had fallen off the No. 4 belt near the face where the bridge dumped the extracted material from the continuous miner onto the tailpiece. (Tr. 325). In terms of the magnitude of the spillage, Miniard admitted to four areas of accumulations that were six to eight inches in depth and approximately three feet in diameter. (Tr. 327). Brummett also admitted there were areas of coal spillage in the vicinity of the tailpiece of the No. 4 belt. (Tr. 258). With respect to accumulations in proximity to rollers, Miniard recalled "a couple of rollers" near the face that were turning in coal and a couple of rollers further outby that were turning in mud. (Tr. 328).

As a result of his observations Lewis issued 104(d)(1) Citation No. 7511467. This citation states:

Loose coal and float coal dust has been allowed to accumulate along side and underneath the #4 conveyor belt. When checked these coal accumulations are observed to be 1 to 8 inches in depth and extend throughout the entire length of this # 4 conveyor belt line. At least 10 bottom rollers are observed to be turning in the accumulations. Also the bottom belt is observed rubbing these accumulations in various locations along this belt. This condition is oblivious [sic] and has been allowed to exist for at least several shifts. These coal accumulations are observed to be black and gray in color. According to the mine access data base this standard has been cited 27 times at the mine in the previous

15 months. The mine operator has engaged in aggravated conduct by not taking corrective action to prevent accumulations of this severity. This violation is an unwarrantable failure to comply with the mandatory standard.

(Gov. Ex. 1).

1. Fact of Violation and S&S

Section 75.400 prohibits coal dust, including float coal dust, and loose coal from accumulating in active workings. This mandatory standard seeks to remove the hazard of combustible accumulations fueling or propagating an explosion. Although Miniard and Brummett admitted that there were areas of dry coal accumulations along the No. 4 belt, the Commission has determined that even wet coal accumulations are prohibited by section 75.400 because they can dry out in a mine fire and ignite. *Utah Power & Light Co.*, 12 FMSHRC 965, 968-69 (May 1990) citing *Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1120-21 (Aug. 1985). Moreover, the preshift and onshift books reflect that these accumulations had existed for at least several shifts. Consequently, it is clear that the nature and extent of the accumulations observed by Lewis along the No. 4 belt constitute a violation of section 75.400.

With respect to the issue of S&S, as previously noted, resolution of whether a particular violation of a mandatory standard is S&S must be made assuming continued normal mining operations. *U.S. Steel Mining*, 7 FMSHRC at 1130. Thus, the degree of hazard caused by the cited violation must be evaluated based on the time the violation existed prior to the issuance of the citation as well as the time it would have continued to exist if normal mining operations had continued.

The essence of an S&S violation is whether it is reasonably likely that the hazard contributed to by the violation will result in an event in which there are serious or fatal injuries. The Commission, as well as Congress, has recognized that accumulations of combustible materials constitute hazardous conditions, as any combustible material, when placed in suspension, can propagate an explosion. *Enlow Fork*, 19 FMSHRC at 14, citing S. Rep. No. 411, 91st Cong., 1st Sess. 65 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 191 (1975). The Sago Mine and Upper Big Branch Mine tragedies in West Virginia are evidence of the tragic consequences of explosions in underground mines.

The accumulations observed by Lewis can ignite if the bearings on the No. 4 rollers malfunctioned. In addition, Lewis observed that a 480 volt cable near the No. 4 belt was a possible source of ignition because the cable did not have a stress clamp or bushing. (Tr. 109). The cited accumulations could also propagate an explosion if there was an ignition in another area of the mine. In either event, it is reasonably likely that a fire or explosion will result in serious or fatal injuries. Therefore, the cited violation of section 75.400 in 104(d)(1) Citation No. 7511467 is properly designated as S&S.

2. Unwarrantable Failure

As noted, an unwarrantable determination requires an analysis of the magnitude of a violative condition, the length of time that it has existed, whether the violation is obvious, whether the violation poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's compliance efforts made prior to the issuance of the citation or order. The obviousness and magnitude of the accumulations along the entire length of the No. 4 belt, the repeated reference to accumulations, albeit muddy, in the preshift and onshift books, and the history of Manalapan's previous accumulation violations, are aggravating factors. However, these and all other relevant factors must be viewed in the context of the factual circumstances of this case and all material facts and circumstances must be examined to determine if a mine operator's negligence is mitigated. *Consolidated Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

I am cognizant that the accumulations cited by Lewis were extensive. Miniard testified that it took a whole crew of men, fifteen or eighteen, to clean up the accumulations for the entire belt system. (Tr. 346-47, 365). Moreover, the abatement activities were conducted for two shifts. (Tr. 347-48). However, the analysis does not stop there. Although extensive in magnitude, this case presents the dilemma of distinguishing the nature and extent of combustible accumulations at each belt from the totality of accumulations that included significant accumulations of inert muddy material. In other words, while damp or wet coal is considered combustible, the concentration of coal in a puddle of water, or, in a muddy suspension, must be great enough to constitute a combustible hazard.

Thus, resolving the unwarrantable failure issue is a matter of degree. Namely, to what extent were the accumulations observed by Lewis at the No. 4 belt combustible in that they posed a high degree of danger that warranted a greater standard of care. Significantly, corroborating Lewis' testimony, both Miniard and Brummett concede that there were dry accumulations of coal near the tailpiece of the No. 4 belt. Moreover, Miniard admits that there were at least several bottom rollers turning in dry coal. With respect to wet coal accumulations, on balance, the evidence reflects that the significant concentrations of coal, even if wet, posed a high degree of danger because the coal deposits could dry out in a mine fire and ignite. *Utah Power & Light*, 12 FMSHRC at 968-69.

When viewed in the context of continuing mining operations, dry combustible accumulations in proximity to potential sources of ignition if rollers were to malfunction pose a high degree of danger. This conclusion is further supported by the propagation hazard posed by these accumulations that can easily be put in suspension by moving belts and rollers. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). Thus, on balance, the Secretary has satisfied her burden of demonstrating that the nature, extent and duration of the prohibited dry combustible coal accumulations, and the discrete wet accumulations of coal, along the No. 4 belt were attributable to at least a high degree of negligence evidencing an unwarrantable failure.

3. Civil Penalty

Manalapan is a large mine operator and it has not been contended that the imposition of the civil penalties proposed in this matter will effect its ability to continue in business. While the history of violations may be viewed as an aggravating factor, and the cited condition is serious in gravity, one must not lose sight of the extremely wet mining environment at Manalapan's RB No. 10 mine. In this regard, the liquid conditions on the belt, as well as on the mine floor, are a mitigating circumstance with respect to the maintenance difficulty of cleaning muddy conditions around belts caused by chronic spillover to the extremely wet mine floor below. Nevertheless, in the final analysis, Manalapan remains responsible for preventing combustible accumulations. The Secretary proposes a civil penalty of \$60,000.00. In recognition of the muddy conditions as a mitigating factor, **a civil penalty of \$20,000.00 shall be imposed for 104(d)(1) Citation No. 7511467.**

B. 104(d)(1) Order No. 7511472 (No. 3 Belt)

The head drive of the No. 4 belt dumps onto the tailpiece of the No. 3 belt. The No. 3 belt was approximately 400 feet long. (Tr. 86). After observing the No. 3 belt and consulting with his supervisor at the Barbourville office, Lewis issued 104(d)(1) Order No. 7511472 stating:

Loose coal and float coal dust has been allowed to accumulate along side and underneath the # 3 conveyor belt. *These accumulations* are observed to be 1 to 9 inches in depth and extending the entire length of the # 3 conveyor belt. At least 20 bottom rollers are observed turning in *these accumulations* and the bottom belt is observed rubbing *these accumulations* in various locations. According to the mine access data base this standard has been cited 27 times during the previous 15 months at this mine. This condition is obvious and has existed for at least several shifts. This violation is an unwarrantable failure to comply with a mandatory standard.

(Gov. Ex. 2). (Emphasis added).

1. Fact of Violation and S&S

The rub in this case is the term "these accumulations" noted by Lewis in the subject 104(d)(1) orders. Although the testimony supports significant discrete, dry accumulations along the No. 4 belt, the distinction between combustible accumulations and mud becomes progressively less clear with regard to the No. 3, No. 2 and No. 1 belts. This is because the testimony reflects that increasingly significant amounts of mud and water were transferred from the head drive of each belt to the tailpiece of the next belt as the material, which was only thirty percent coal, was being conveyed to the surface.

Although 104(d)(1) Order No. 7511472 implies that there was “[l]oose coal and float dust” extending along the entire length of the No. 3 belt, the record testimony is, at best, equivocal. Miniard characterized the conditions on and along the side of the No. 3 belt as wet and muddy. (Tr. 336). In this regard, Miniard testified that there were no dry areas along the belt and that the only material along the belt was the mud and water typical of this mine. (Tr. 336). Kevin Daniels, a Manalapan belt man, who cleaned up the accumulations to abate the subject citation and orders, corroborated Miniard’s testimony. (Tr. 406). Specifically, he characterized the conditions at the No. 3 belt as “wet, muddy and nasty.” (Tr. 406). He saw no dry coal along the belt. (Tr. 406). Daniels stated that the accumulations were so wet and muddy that they could not be shoveled. (Tr. 407). Photographs taken in this area clearly depict extensive areas of mud. (Gov. Ex. 6, photos 085 and 086).

On the other hand, Lewis’ testimony, which the Secretary must rely on to satisfy her burden of proof, was contradictory. Lewis initially admitted the No. 3 belt was “somewhat wetter” than the No. 4 belt. (Tr. 87). However, Lewis later was reticent to admit that the conditions at the No. 3 belt were wet and muddy. He initially admitted that the conditions were muddy, but denied that the conditions were wet. (Tr. 153). However, at his deposition Lewis stated there was a lot of water on the belt. (Tr. 152-54). Lewis initially denied the area along the No. 3 belt was wet and slippery. (Tr. 155). However, he ultimately conceded that there was enough water on the belt line to make walking difficult. (Tr. 155-56). Finally, Lewis admitted that the belt line was covered in mud, water and rock. (Tr. 153-56). Lewis opined that although the “No. 2 [belt] was borderline, No. 3 was not. No. 3 was combustible enough to cite.” (Tr. 150).

In sum, although the evidence and photographic exhibits reflect that numerous bottom rollers were turning in a liquid mixture, it is difficult to discern the concentration of combustible material contacting the rollers. What is clear is that the areas surrounding the belts became progressively wetter as the material was conveyed outby from the No. 4 belt to the No. 1 belt for conveyance to the surface. Section 75.400 requires a mine operator to promptly clean and remove combustible materials in active workings. The preshift and onshift books reflect that the material surrounding the bottom rollers was present for at least several shifts. Although this material was wetter than the material along the No. 4 belt, the testimony supports the conclusion that there were sufficient areas of combustible coal accumulations, even if they were wet or damp, to constitute a violation of section 75.400.

With respect to the S&S issue, the considerations regarding the S&S nature of the combustible accumulations discussed above with respect to the No. 4 belt are incorporated by reference. Having concluded that there was sufficient combustible materials to constitute a violation, despite the wet conditions, these accumulations could dry out in the event of a mine fire and provide additional fuel for the propagation of an explosion. *Utah Power & Light*, 12 FMSHRC at 968-69. In such an event, it is reasonably likely that serious or fatal injuries will occur. Consequently, the cited violation in 104(d)(1) Order No. 7511472 was properly designated as S&S.

2. Unwarrantable Failure

The testimony, preshift and onshift books reflect the accumulations along the No. 3 belt were present for several shifts, extensive, and contacting numerous rollers. However, it is significant that, although the examination books reflect the duration of the accumulations was at least several shifts, the accumulations are described as “wet and muddy” rather than accumulations of coal. (Gov. Ex 7). Thus, the extent to which these references refer to combustible accumulations is unclear in that the wet and muddy description accurately describes the mine conditions articulated by the witnesses.

What is clear is that the rollers were turning in a muddy mixture that should have been promptly cleaned to maintain proper operation of the rollers. Although the Secretary has been given the benefit of the doubt that this muddy composition contained sufficient combustible material to warrant a violation of section 75.400, combustible accumulation violations are not *per se* unwarrantable. Given the equivocal nature of Lewis’ testimony, the evidence is insufficient to demonstrate that this muddy mixture posed the requisite high degree of danger to justify unwarrantable failure findings in this case. In other words, the extremely muddy nature of the accumulations is a mitigating factor. Consequently, the failure to promptly remove these accumulations does not rise to the level of aggravated conduct.

In addition, the Secretary relies on the history of 27 violations as an aggravating factor. However, forty percent of these violations were designated as non-S&S in nature. Moreover, with respect to the issue of notice that greater belt cleanup efforts were required, not all of these accumulation violations concerned conveyor belts. For example, several violations concerned float coal dust on electrical boxes and coal dust on a roof bolting machine.⁴ This history of violations, alone, particularly in light of the cited predominantly wet and muddy accumulations due to adverse mining conditions, does not provide an adequate basis for an unwarrantable failure.

Although the negligence attributable to Manalapan is moderate to high, Manalapan’s conduct is not sufficiently aggravated or unjustified to warrant an unwarrantable failure. Accordingly, 104(d)(1) Order No. 7511472 shall be modified to a 104(a) citation.

⁴ I reach this conclusion from copies of citations issued for section 75.400 violations during the relevant 24 month period provided by the Secretary to Manalapan in response to an interrogatory request. Although not admitted as exhibits, these documents have probative value as they are official records of the Secretary.

3. Civil Penalty

As a general matter, application of the facts in this case to section 110(i) has been discussed above with respect to the No. 4 belt. The Secretary proposes a civil penalty of \$60,000.00. Given the modification of the 104(d)(1) order to a 104(a) citation reflecting that Manalapan's conduct was not unwarrantable, and, in view of the muddy conditions as a mitigating circumstance, **a civil penalty of \$12,000.00 shall be imposed for 104(a) Citation No. 7511472.**

C. 104(d)(1) Order No. 7511478 (No. 2 Belt)

The head drive of the No. 3 belt dumps onto the tailpiece of the No. 2 belt. The No. 2 belt was approximately 500 feet long. (Tr. 86). After observing the No. 2 belt and consulting with his supervisor at the Barbourville office, Lewis issued 104(d)(1) Order No. 7511478 stating:

Loose coal and float coal dust has been allowed to accumulate along side and underneath the # 2 conveyor belt. *These accumulations* are observed to be 1 to 12 inches in depth and extending the entire length of the # 2 conveyor belt. At least 10 bottom rollers are observed turning in *these accumulations* and the bottom belt is observed rubbing *these accumulations* in various locations. According to the mine access data base this standard has been cited 27 times during the previous 15 months at this mine. This condition is obvious and has existed for at least several shifts. This violation is an unwarrantable failure to comply with a mandatory standard.

(Gov. Ex. 3). (Emphasis added).

1. Fact of Violation and S&S

Once again the narrative in the 104(d)(1) order is not as it seems. Although 104(d)(1) Order No. 7511478 implies that there was "[l]oose coal and float dust" extending along the entire length of the No. 2 belt, Lewis admitted there were areas along the No. 2 belt that were "wet and muddy." (Tr. 144). The uncontradicted testimony is that the No. 2 belt was wetter than either the No. 4 or No. 3 belts. (Tr. 91, 144, 337). Despite using essentially the same language in the citation and orders to describe the conditions at the No. 2, No. 3 and No. 4 belts, at trial Lewis admitted the conditions along the No. 2 belt were so wet and muddy that they constituted a "borderline situation" as far as a violation was concerned. (Tr. 150-52).

The conclusion that the conditions along the No. 2 belt were wet and muddy is further supported by the testimony of Manalapan's witnesses. Miniard testified that there was no spillage or piles of coal along the No. 2 belt. (Tr. 337). Stephan Cantrell, a crawler operator who worked on the clean up to abate the citations, described the material along the belt as brown in color and "pure water and mud." (Tr. 387-88). Cantrell testified the consistency of the material on the mine floor was so liquid that it was removed by collecting the material in a bucket and dumping the contents onto the No. 2 belt. (Tr. 388). Cantrell's testimony was corroborated by Daniels who also cleaned up the No. 2 and No. 3 belts. Daniels testified that the material on the No. 2 belt was so runny that it could not be shoveled. (Tr. 409).

Consistent with the testimony of Cantrell and Daniels, Brummett testified he did not see any dry material along the No. 2 belt. (Tr. 265). Contemporaneous photographs of the area depict a wet, soupy mixture of mud and water. (Res. Ex. 9). Finally, even Lewis admitted that he had never seen a fire caused by the wet conditions he observed at the No. 2 belt. (Tr. 189).

The Secretary has the burden of proving all elements of a cited violation. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). I am cognizant of Manalapan's assertion that the concentration of coal accumulations was diluted as the conditions on and around the belts became progressively more wet and muddy. However, on balance, Lewis' testimony, as well as the entries in the preshift and onshift books, provide an adequate basis for concluding there was sufficient combustible accumulations, although extremely wet, to constitute a violation of section 75.400.

Having concluded a violation occurred, the focus shifts to the question of S&S. Lewis testified the violation was at best "borderline." Moreover, Lewis conceded that it was unlikely given the degree of wetness and mud, that the cited conditions could cause or contribute to a fire or explosion. Thus, the evidence reflects that the hazard posed by this condition is not likely to contribute to an event that will cause serious injury. Consequently, the S&S designation shall be deleted.

2. Unwarrantable Failure

Having concluded that the cited condition is not S&S in nature, the muddy conditions did not pose a high degree of danger that would warrant a higher degree of care. The Secretary's assertion that the violation is attributable to aggravated or unjustifiable conduct is inconsistent with Lewis' testimony of a "borderline" violation and his concession that the condition was unlikely to contribute to a fire. Rather, the evidence reflects no more than a moderate degree of negligence. Accordingly, the evidence does not support an unwarrantable failure. Consequently, 104(d)(1) Order No. 7511478 is modified to a 104(a) citation to reflect that the cited violation is non-S&S in nature and not attributable to an unwarrantable failure.

3. Civil Penalty

As noted, the penalty criteria in section 110(i) has been discussed above. The Secretary proposes a civil penalty of \$60,000.00. Given the modification of the 104(d)(1) order to reflect that the conditions along the No. 2 belt were neither S&S in nature nor attributable to Manalapan's unwarrantable failure, **a civil penalty of \$4,000.00 shall be assessed for 104(a) Citation No. 7511478.**

D. 104(d)(1) Order No. 7511479 (No. 1 Belt)

The head drive of the No. 2 belt dumps onto the tailpiece of the No. 1 belt. The No. 1 belt was approximately 400 feet long. (Tr. 91). After observing the No. 1 belt and consulting with his supervisor at the Barbourville office, Lewis issued 104(d)(1) Order No. 7511479. Once again, using the one size fits all approach, 104(d)(1) Order No. 7511479 states:

Loose coal and float coal dust has been allowed to accumulate along side and underneath the # 1 conveyor belt. *These accumulations* are observed to be 1 to 15 inches in depth and extending the entire length of the # 1 conveyor belt. At least 5 bottom rollers are observed turning in *these accumulations* and the bottom belt is observed rubbing *these accumulations* in various locations. According to the mine access data base this standard has been cited 27 times during the previous 15 months at this mine. This condition is obvious and has existed for at least several shifts. This violation is an unwarrantable failure to comply with a mandatory standard.

(Gov. Ex. 4). (Emphasis added).

1. Fact of Violation

Although the conditions around the No. 1 belt were the wettest, Lewis' narrative description of the alleged violative conditions at the No. 1 belt was essentially the same as his narrative descriptions for the areas surrounding the No. 2, No. 3 and No. 4 belts. Although 104(d)(1) Order No. 7511479 implies that there was "[l]oose coal and float dust" extending along the entire length of the No. 1 belt, at trial, Lewis conceded the cited accumulations were wet and soupy in nature. Moreover, Lewis admitted that the cited material was incapable of being handled because the material ran through the fingers. (Tr. 142-44).

On cross-examination, when pressed for why he cited the No. 1 belt given the degree of wetness and mud, Lewis, for the first time, asserted that there were "hundreds or thousands of blocks of coal" at the tailpiece that the belt was running in. (Tr. 134-35). Lewis described these blocks as the size of small stones that measured one inch by one inch. (Tr. 136). However, Lewis admitted these "blocks" of coal were not noted in 104(d)(1) Order No. 7511479, or, in his contemporaneous notes taken during the inspection. (Tr. 136-38; Gov. Ex. 5, p.11).

Miniard testified that Lewis did not express any concerns about the conditions around the tailpiece of the No. 1 belt. (Tr. 339). To rebut Lewis' recollection of "blocks" of coal at the tailpiece, both Miniard and Cantrell testified that the area around the tailpiece cannot be seen from the travelway. (Tr. 339, 387). The only way the tailpiece can be observed is by climbing over the belt. (Tr. 387). However, the No. 1 belt was operating at the time of Lewis' inspection. (Tr. 184-85). Finally, although Lewis expressed concern about these small blocks of coal catching fire, at the trial, Lewis admitted he did not know of any wet conditions comparable to those existing at the No. 1 belt ever causing a fire. (Tr. 142-44, 189).

Lewis' belated testimony regarding small blocks of coal at the tailpiece are not corroborated by his description of the alleged violative conditions in 104(d)(1) Order No. 7511479, or in his contemporaneous inspection notes. The absence of any relevant references in the order and notes supports Miniard's testimony that Lewis did not express any concern about the conditions at the tailpiece during the inspection. Thus, Lewis' testimony concerning hazardous combustible material at the tailpiece can be given very little weight.

Lewis' admissions that the wet and muddy accumulations along the No. 1 belt were so liquid that they were incapable of being handled, and, that the accumulations were unlikely to catch fire, undermine the Secretary's alleged section 75.400 violation. If the conditions at the No. 2 belt constituted no more than a "borderline" violation, the conditions at the No. 1 belt, where even more water and mud had spilled from the belt to the mine floor, did not rise to the level of a section 75.400 violation. Accordingly, 104(d)(1) Order No. 7511479 shall be vacated.

ORDER

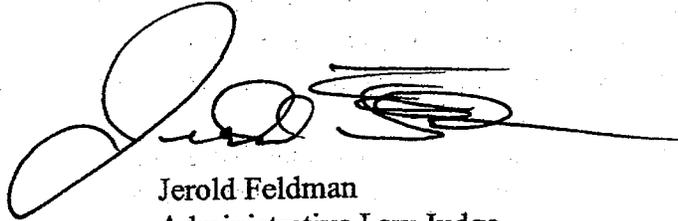
Consistent with this Decision, **IT IS ORDERED** that 104(d)(1) Citation No. 7511467 (No. 4 Belt) **IS AFFIRMED**.

IT IS FURTHER ORDERED that 104(d)(1) Order No. 7511472 (No. 3 Belt) **IS MODIFIED** to a 104(a) citation.

IT IS FURTHER ORDERED that 104(d)(1) Order No. 7511478 (No. 2 Belt) **IS MODIFIED** to a 104(a) citation, and, that the significant and substantial designation for the cited violative condition **IS DELETED**.

IT IS FURTHER ORDERED that 104(d)(1) Order No. 7511479 (No. 1 Belt) **IS VACATED**.

IT IS FURTHER ORDERED that Manalapan Mining Company, Inc., shall pay, **within 40 days of the date of this decision, a total civil penalty of \$36,000.00** in satisfaction of 104(d)(1) Citation No. 7511467 (No. 4 Belt), 104(a) Citation No. 7511472 (No. 3 Belt), and 104(a) Citation No. 7511478 (No. 2 Belt). Upon receipt of timely payment, **IT IS ORDERED** that the civil penalty proceeding in KENT 2008-737 **IS DISMISSED**.

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

Jerold Feldman
Administrative Law Judge

Distribution:

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/rps

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 7, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2010-128-M
Petitioner	:	A.C. No. 21-03404-201338 A
v.	:	
	:	
BILL SIMOLA, employed by	:	United Plant
UNITED TACONITE, LLC,	:	Mine ID 21-03404
Respondent	:	

ORDER GRANTING RESPONDENT’S MOTION FOR CERTIFICATION OF INTERLOCUTORY RULING

The captioned civil penalty proceeding concerns a 104(d) citation and a 104(d) order issued pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(c), to Bill Simola, as an agent of United Taconite, LLC (United Taconite). Section 110(c) of the Mine Act provides, in pertinent part:

Whenever a corporate operator violates a mandatory health or safety standard . . ., any director, officer, or agent of such corporation who knowingly authorized, ordered or carried out such violation, . . . shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d) of this section.

30 U.S.C. § 820(c) (emphasis added).

United Taconite is not a traditional corporation. Rather it is a limited liability company (LLC) that is organized under the laws of the state of Delaware. It is authorized to operate as a business entity based on a Certificate of Formation filed with the Office of the Delaware Secretary of State in the Division of Corporation. As a general proposition, a limited liability company is a business entity that is taxed as a partnership while benefitting from the personal liability protection afforded to the assets of corporate officers.

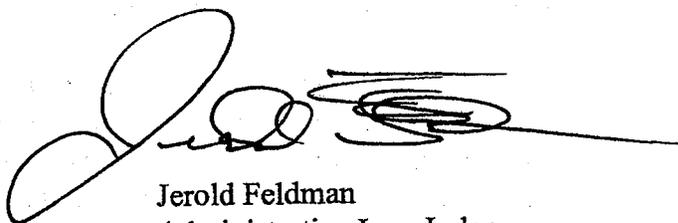
Simola moved to dismiss this proceeding on jurisdictional grounds asserting that an agent of a limited liability company is not subject to the personal liability provisions of section 110(c). The Secretary opposed Simola’s motion. Simola’s motion was denied on April 6, 2010.
32 FMSHRC ____.

On April 23, 2009 Simola filed a motion for certification of the April 6, 2010, interlocutory ruling. On May 5, 2010, the Secretary filed a motion in opposition to Simola's motion for interlocutory review. The Secretary asserts immediate review will not materially advance the final disposition of this proceeding.

Commission Rule 76(a)(1)(i) provides that, upon motion of a party, a judge shall certify his interlocutory ruling to the Commission if the ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(1)(i). Simola's motion for an interlocutory ruling involves a novel controlling question of law. Moreover, contrary to the Secretary's assertion, an expeditious resolution of this jurisdictional question may materially advance the final disposition of this matter. In this regard, interlocutory review may obviate the need for adjudication if it is determined that Simola is not subject to the personal liability provisions of section 110(c) of the Mine Act. Consequently, Simola's certification request shall be granted.

ORDER

In view of the above, Bill Simola's Motion for Certification under Commission Rule 76 **IS GRANTED**. Accordingly, **IT IS ORDERED** that the question of the applicability of the personal liability provisions of section 110(c) to an agent of a mine operator doing business as a limited liability company **IS CERTIFIED** for Commission review.



Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

Emelda Medrano, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn Street, Room 844, Chicago, IL 60604

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1340, 401 Liberty Ave., Pittsburgh, PA 15222

/rps

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 26, 2010

ORICA USA, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. YORK 2007-74-RM
v.	:	Citation No. 6046560; 06/04/2007
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine ID 30-00025 4QM
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2008-59-M
Petitioner	:	A.C. No.30-00025-125567
	:	
v.	:	
	:	
ORICA USA, INC.,	:	
Respondent	:	Mine: Pattersonville Plant #61

ORDER DENYING MOTION TO DISMISS OR FOR SUMMARY DECISION

Before: Judge Lesnick

Background and Procedural History

This case arises out of an accident causing injury that occurred on May 4, 2007, and the citation issued as a result of the accident. In the civil penalty case, the Secretary of Labor ("Secretary") is petitioning to assess Orica USA, Inc. ("Orica") a civil penalty of \$8,209 for an alleged violation of 30 C.F.R. §56.6306(f)(3), a mandatory safety standard requiring that access routes to a blast area be guarded or barricaded.¹ The alleged violation is set forth in Citation No. 6046560, which was issued on June 4, 2007, and contested by Orica. In addition to alleging the violation, the Secretary also alleges the violation was a significant and substantial ("S&S") contribution to a mine safety hazard and was the result of Orica's high negligence.

¹ 30 C.F.R. §56.6306(f) : before firing a blast --

(3) All access routes to the blast area shall be guarded or barricaded to prevent the passage of persons or vehicles.

Citation No. 6046560 states, in part, as follows:

On May 4, 2007, the blasting contractor set off a production shot in the quarry that resulted in flyrock traveling approximately 526 feet onto the New York State Thruway I-90, striking three vehicles and resulting in two injuries. The section of I-90 adjacent to the blast site was within the “blast area” and was not guarded or barricaded to prevent the passage of persons or vehicles. The blaster in charge of the shot engaged in aggravated conduct constituting more than ordinary negligence. He knew or had reason to know that conditions including loose rock and minimal stemming in drill holes at the blast site created a significant hazard of flyrock throughout the blast area. However, he did not correct these conditions, stop traffic from passing through the blast area, or modify the blast design to reduce the hazard.

According to MSHA’s Investigation Report, Callanan Industries, Inc. (“Callanan”) owns the Pattersonville Plant #61, which is a surface crushed stone operation located in Pattersonville, New York. Callanan contracted with Orica to design, load, and detonate the blast. On May 4, 2007, the shot was laid out by Orica and drilled by Archibald Drilling. Flyrock from the blast traveled approximately 526 feet onto the New York State Thruway, I-90, striking three separate vehicles. A charter bus traveling west was struck by a rock measuring approximately 16-inches by 12-inches and weighing approximately 100 pounds. The flyrock passed through the roof of the bus and struck a teenage passenger. A passenger car traveling east was struck in the driver’s side windshield, striking the operator in the abdomen. A third vehicle received a broken windshield and dents to the hood.

On June 16, 2009, counsel for Orica filed a Motion to Dismiss or for Summary Decision. The Secretary filed her Opposition on October 2, 2009, and Orica thereafter filed its Reply to the Secretary’s opposition on October 23, 2009.²

Discussion

Dismissal is proper under FED.R.CIV.P. 12(b)(6) if the pleadings fail “to state a claim upon which relief can be granted.”³ Under Commission Rule 67(b), 29 C.F.R. § 2700.67(b), a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.

² By letter dated October 7, 2009, counsel for Orica notified the Chief Judge that it conferred with counsel for the Secretary of Labor and was authorized to represent that the Secretary consented to Orica filing a response to the Secretary’s opposition by October 23, 2009.

³ “On any procedural question not regulated by [the Commission’s] Procedural Rules...the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure ...” 29 C.F.R. §2700.1(b).

Regarding the Secretary, if a non-moving party fails to establish sufficient evidence of an essential element to its claim, on which it bears the burden of proof, there is no genuine issue of material fact and the moving party is entitled to summary decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). However, summary judgment should not be granted unless it is clearly shown that a trial is unnecessary. *Id.* The court is required, in reviewing all of the evidence on the record, to draw all reasonable inferences from the underlying facts in the light most favorable to the non-moving party. *Reves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135 (2000).

Based on my reasons outlined below, I conclude that the case is not entitled to dismissal and Orica is not entitled to summary decision as a matter of law.

Orica contends that MSHA does not have jurisdiction to issue the citation at issue because the New York State Thruway, on which the accident occurred, is not a “mine” as defined within the Federal Mine Safety and Health Act of 1977 (“Mine Act”). Orica argues that MSHA has no authority to issue a citation because the access route in question, the New York State Thruway, is “public” and not “private” in that it is owned in the name of the State of New York, and it is unlawful for a private person to shut down the Thruway. *See* Orica USA Inc.’s Motion to Dismiss or for Summary Decision (“Motion to Dismiss”), at 8. Orica also claims that the New York State Thruway is not “appurtenant” to the mine because it is not dedicated exclusively to the mine’s use, it lacks the property interest relationship, and it is neither annexed to nor legally belongs to the mine. *See* Motion to Dismiss at 9. Additionally, Orica argues that it did not receive “fair notice required by the Due Process Clause of the Fifth Amendment to the Constitution that it would be expected to guard or barricade the New York State Thruway.” *See* Motion to Dismiss at 10.

The Secretary responds that MSHA’s authority to issue the citation does not stem from the fact that the flyrock struck several vehicles on a “private way[] [or] road appurtenant to” the “area of land from which minerals are extracted,” but, rather, from the fact that Orica controlled the extent and contours of the “blast area” where flyrock from the blast would land. *See* Secretary of Labor’s Opposition to Respondent’s Motion to Dismiss or for Summary Decision (“Secretary’s Opposition”), at 2. Orica’s failure to take appropriate actions to prevent persons or vehicles from entering the area used as a mine while flyrock was present constituted a violation of the Mine Act. *See* Secretary’s Opposition at 3. The Secretary further responds that Orica did receive fair notice based on the fact that the Mine Act is sufficiently clear on its face. *See* Secretary’s Opposition at 11.

The Mine Act provides, in pertinent part, that a mine “means...an area of land from which minerals are extracted in nonliquid form...[and] private ways and roads appurtenant to such area ...” 30 U.S.C. §802(h)(1) (2008). Additionally, “[b]efore firing a blast...[a]ll access routes to the blast area shall be guarded or barricaded to prevent the passage of person or vehicles.” 30 C.F.R. §56.6306(f)(3). The term “blast area” is defined as “the area in which...flying material...may cause injury to persons” and is determined by considering various factors. *See* 30 C.F.R. §56.2.

Orica relies on *Secretary of Labor v. Natl. Cement Co. of California, Inc.*, 494 F.3d 1066 (2007), to interpret the meaning of “mine” with respect to roadways, and, ultimately, MSHA’s authority to issue the citation in this case. However, in that case, the mine was cited for failing to install berms or guardrails on an access road. *Id.* at 1071. The citation stemmed from the company’s failure to keep the mine in compliance with appropriate regulations regarding the access roadway conditions. *Id.* at 1066. The parties disagreed as to whether the road was a “mine” subject to MSHA’s jurisdiction. In the case at hand, Orica was cited for failure to keep the mine conditions in compliance with appropriate regulations regarding blasting. The reason for the citation stems from the conditions at the blast site, which was at the mine, and not from the property ownership or conditions at the site of injury where the flyrock landed. The land at the blast site was being used in the work of extracting minerals from their natural deposits and therefore, a mine within the definition as set forth in the Mine Act. *See* 30 U.S.C. §802(h)(1)(c) (2008). Because the blast site is a “mine,” MSHA jurisdiction is appropriate.

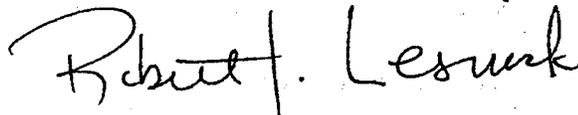
I agree with the Secretary’s reasonable interpretation that Orica is not absolved of its duty to protect people in the blast area from injury merely because the blast area extended beyond the legal property line of the Pattersonville mine. To only include flyrock injuries on roadways that are “private” and/or “appurtenant to” a mine would allow blasting operators to escape liability for violations of section 56.6306 that result in injuries simply because the injuries occur off of the mine property. Accordingly, I find that MSHA’s authority and jurisdiction are proper in this case.

I further find that Orica did receive fair notice as required by Due Process because, as discussed above, it is undisputed that the land at the blast site was being used to extract minerals and is a “mine” as defined in the Mine Act. Therefore, Orica could reasonably expect that MSHA would have jurisdiction over the activities, specifically, blasting, that occur at the mine. The language of section 56.6306 is clear and therefore, Orica had notice of the regulation’s blasting requirements.

For all the foregoing reasons, I find that Orica is not entitled to summary decision as a matter of law. Accordingly, the Motion to Dismiss is denied. Moreover, because all of the material facts pertaining to the factors considered in determining the boundaries of the blasting area and whether Orica considered and employed these factors have not been deemed admitted, nor discussed, there are genuine factual issues left to be resolved.

ORDER

Therefore, Orica’s Motion to Dismiss or for Summary Decision is **DENIED**.



Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 7, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-327
Petitioner,	:	A.C. No. 12-02010-143641
	:	
v.	:	Docket No. LAKE 2008-590
	:	A.C. No. 12-02010-157123-01
	:	
	:	Docket No. LAKE 2009-224
	:	A.C. No. 12-02010-171751-02
	:	
BLACK BEAUTY COAL COMPANY,	:	Mine: Air Quality #1
Respondent	:	

**ORDER GRANTING THE SECRETARY'S UNOPPOSED MOTION FOR
CERTIFICATION FOR INTERLOCUTORY REVIEW,
ORDER GRANTING THE SECRETARY'S UNOPPOSED MOTION FOR
CONTINUANCE OF HEARING,
AND ORDER STAYING PROCEEDINGS**

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., (the "Act"). On February 1, 2010, the Secretary filed Motions to Approve Settlement and Dismiss Proceedings in Docket Nos. LAKE 2008-327 and LAKE 2008-590. On March 16, 2010, I issued two orders denying the Secretary's request to settle the respective dockets based upon the lack of adequate information necessary to address the six penalty criteria and because the drastically reduced penalties proposed by the Secretary would not adequately effectuate the deterrent purpose underlying the act. Subsequently, the Secretary filed a Motion for Reconsideration, as well as an Amended Motion for Reconsideration, for each of the two dockets. On May 7, 2010, I issued an order denying the Motion for Reconsideration and Amended Motion for Reconsideration in both dockets and restated that the proposed settlement motions contained insufficient evidence to determine what penalty should be appropriately assessed. In addition, on April 19, 2010, the Secretary filed a Motion to Approve Settlement and Dismiss Proceedings in Docket No. LAKE 2009-224. I subsequently denied the Secretary's settlement motion on the basis that there was not enough evidence to justify the penalties as proposed for settlement; in this case a reduction in penalty by more than 80% of the original

proposal. On May 26, 2010, the Secretary filed an Unopposed Motion for Certification for Interlocutory Review and for Continuance of Hearing ("Sec'y First Mot.") for all three dockets. The three captioned dockets are currently set for hearing on June 16, 2010 on the issue of the appropriate penalty to be assessed in each case. For reasons set forth below, I **GRANT** the Secretary's Motion for Certification for Interlocutory Review. Further I **GRANT** the Secretary's Motion for Continuance of Hearing and **STAY** these matters until further notice.

The Commission's Procedural Rules state that "[i]nterlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission." 29 C.F.R. § 2700.76(a). Interlocutory review "cannot be granted unless . . . [t]he Judge has certified, upon . . . the motion of a party, that [her] interlocutory ruling involves a controlling question of law and that in [her] opinion immediate review will materially advance the final disposition of the proceeding." *Id.* at § 2700.76(a)(1)(i).

The Secretary, with little elaboration, alleges that the denial of the settlement motions involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. I agree that there is little, if any, legal authority regarding the denial of a settlement agreement, and particularly authority that relates to the requirements an administrative law judge may impose on parties in reviewing a proposed settlement, and therefore a controlling question of law is raised. I further find that an immediate review will materially advance the final disposition of the proceeding.

The Secretary makes the same argument for certification in all three dockets and asserts the following three controlling questions of law:

- (i) [W]hether, in a settlement context just as in an enforcement context, the Secretary has unreviewable prosecutorial discretion to modify: (a) a citation from "significant and substantial" ("S&S") to non-S&S, and (b) a Section 104(d) citation or order to a Section 104(a) citation or order;
- (ii) whether, in considering a proposed settlement agreement under Section 110(k), an ALJ may require the Secretary to submit factual findings and documentation addressing the six factors listed in Section 110(i) for assessing a penalty, even though Section 110(i) expressly states that the Secretary "shall not be required to make findings of fact" concerning those six factors; and
- (iii) whether the ALJ impermissibly relied on her finding that the proposed settlement would encourage operators to contest future citations, orders, and penalty assessments.

Sec'y First Mot. 2; Sec'y Second Mot. 2. Further, the Secretary asserts that Commission review of the three controlling questions of law will materially advance the disposition of these proceedings by rendering the scheduled hearing unnecessary if the Commission were to reverse my denial of the settlement motions in the respective dockets. *Id.*

I agree that there is a controlling question of law, but I do not agree to the questions as posed by the Secretary. Instead, the issue before me is whether or not the Secretary must provide sufficient facts and information to justify the proposed penalty in the context of a settlement and in terms of the six statutory criteria found at section 110(i) of the Act. Since the Mine Act requires the Commission to assess all penalties and in doing so, consider the six criteria, it follows that the Commission must have the information needed to make the assessment. The Secretary argues that she is not required to submit such information to the Commission and therefore appeals the order issued requiring the submission of facts that relate to the penalty criteria. Whether the Secretary must provide information is a controlling question of law in resolving the many cases that are proposed for settlement and is an important matter to resolve before going forward in the three cases at issue here.

Next, I disagree with the Secretary's assertion that, in two of the settlement denials, I impermissibly relied upon a finding that the proposed settlements would encourage operators to contest future violations and the associated proposed penalties. The argument goes beyond the notion of future contests and instead relates to the deterrent purposes of the Act. Pursuant to *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), discretion in assessing penalties is bounded by not only the factors set forth in section 110(i), but also by the "deterrent purposes underlying the Act's penalty assessment scheme." The question of whether an administrative law judge may extend the six penalty criteria to a discussion of deterrence is a controlling issue in these settlement proposals.

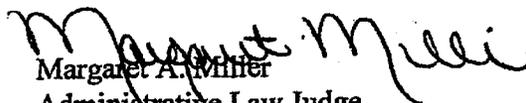
The Secretary is charged with enforcement of the Mine Act. For that reason, I understand the importance to her in resolving these controlling questions of law. Based upon my review of Commission precedent, these cases present issues of first impression. I find that these are controlling questions of law which, if granted review, will materially advance the final disposition of these cases. Should the Commission grant review and reverse my denial of the settlement motions, the June 16, 2010 hearing would likely become unnecessary and the cases could be easily disposed of without the expenditure of further resources from either party. If, on the other hand, the Commission does not reverse the denial, the hearings on the issue of the evidence required to support a penalty assessment in a settlement will be guided by the Commission's ruling on the matter.

At the heart of this certification order is the authority of Commission Administrative Law Judges to address proposed settlements. Given that the just over two weeks remain before the scheduled June 16th hearing, I find it is appropriate to continue the hearing and stay these matters pending the resolution of this issue before the Commission. The operator has not taken a position on the settlement agreements and has expressed no opposition to this motion.

ORDER

For the foregoing reasons, the Secretary's Unopposed Motions for Certification for Interlocutory Review are **GRANTED** for the three above captioned matters. Accordingly, it is **ORDERED** that the question of what requirements if any, an administrative law judge may

impose upon the Secretary to demonstrate the six penalty criteria as they relate to a modified penalty in a settlement context is **CERTIFIED** for review. Related to that question, is whether an administrative law judge may consider the “deterrent purposes” that underlay the penalty scheme in reviewing a settlement proposal. Further, the Secretary’s Motions for Continuance of Hearing are **GRANTED** and these matters are **STAYED** pending further notice.


Margaret A. Miller
Administrative Law Judge

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June 13, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2009-1445
Petitioner	:	A.C. No. 46-09086-184529
v.	:	
	:	
BRODY MINING, LLC.,	:	Brody Mine No. 1
Respondent	:	

ORDER ON RESPONDENT'S MOTION FOR CERTIFICATION OF INTERLOCUTORY RULING

Before the Court is Respondent, Brody Mining, LLC's, Motion for Certification of Interlocutory Ruling. ("Motion")¹ Respondent maintains that interlocutory review of the Order Accepting Late Filing and Order Denying Motion to Dismiss, issued by Chief Administrative Law Judge Robert J. Lesnick on April 9, 2010, is appropriate on the grounds that a controlling question of law is involved *and* that immediate review will materially advance the final disposition of this civil penalty proceeding. For the reasons which follow, Respondent's Motion is DENIED.

Interlocutory review is addressed at 29 C.F.R. Section 2700.76 of the Procedural Rules ("Rules") for the Federal Mine Safety and Health Review Commission. ("Commission"). That Section notes that interlocutory review is not a matter of right, but rather one within the sound discretion of the Commission. There are different routes for a motion for interlocutory review to arrive before the Commission so that it may decide in its discretion whether such review is warranted. The presiding judge may certify on his own initiation that the twin criteria (i.e. controlling question of law and immediate review would materially advance final disposition)

¹Respondent took two avenues, nearly simultaneously, to seek review of the same issue raised in its Motion for Interlocutory Ruling. It did so by filing a Petition for Discretionary Review of the same issue on May 12, 2010. Its Motion for Interlocutory Ruling was filed on May 11th but was not received by the Commission until May 17th. (Petitions for Discretionary Review have an effective date of filing upon *receipt*, whereas filing of a motion for interlocutory review, among other subjects, is deemed effective upon mailing.) Therefore, the two efforts to obtain review were essentially taken at the same time.

exist or the judge may agree with a party's motion, asserting the appropriateness of such review. 29 C.F.R. Section 2700.76(a)(1)(i). Neither obtains here, as the Court is not acting on its own motion and does not subscribe to Respondent's contention that the criteria are met.²

Procedurally, Respondent had sought to have the civil penalty assessment dismissed on account of the Secretary's late filing, filing a motion seeking such relief on December 18, 2009. The Secretary opposed the motion, asserting that the high rate of contests and staffing shortage explained the delay in her filing.³ The Chief Administrative Law Judge then issued his ruling, on April 9, 2010, denying the motion. Respondent cites the Chief Judge's observation in that Order that the preference is to resolve such cases on the merits rather than on procedural shortcomings and that the 45 day filing requirement was not intended to be a procedural straitjacket. Not mentioned by the Respondent, but noted by the Chief Judge, is "the unprecedented number of cases currently before the Commission, as well as the unprecedented number of penalty petitions pending before the Secretary . . ." Order at 2. In light of those facts, the Chief Judge described "strict adherence to the 45-day time line [as] unrealistic." *Id.*

Reduced to its essence, Respondent contends now that as the Secretary of Labor failed to file its petition for assessment of civil penalty within 45 days of receipt of its contest of those penalties, per Section 2700.28(a) of the Rules, and did not otherwise justify its failure to meet that filing time period, but instead did not file its petition until 135 days had elapsed beyond the due date, "Brody suffered prejudice because it was unable to resolve the citations at issue . . . so as to expose itself to a potential pattern of violation notice." Motion at 2.

Respondent elaborates on its contention that this matter should be dismissed, arguing that the Chief Judge failed to consider whether adequate cause for the 135 day delay was established and did not consider the "prejudice alleged by Brody [Mining]." *Id.* at 4.

Upon consideration, the Court concludes that there is no controlling question of law involved here. The notion that a 135 day delay can perforce prejudice Respondent is hollow. Similarly, the claim Respondent has exposed itself to a potential pattern of violation notice is speculative, at best. A host of cases have recognized both that Section 105(a) of the Mine Act "does not establish a limitations period within which the Secretary must issue penalty proposals." *Paiute Aggregates Inc.*, 24 FMSHRC 950, 951 (October 2002), citing (among other cases) *Steele Branch Mining*, 18 FMSHRC 6, (Jan. 1996) and *Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2092-93 (October 1993), *aff'd* 57 F.3d 982 (10th Cir. 1995). Further, it is noted that in

²Unfortunately, the Secretary of Labor has not provided any response to Respondent's Motion. As a significant period of time had elapsed since the Motion was filed, and therefore, barring an extension, the time for filing of an opposition had elapsed, the Court decided to issue its ruling without the benefit of the Secretary's input.

³Indirectly, the Secretary demonstrated its staffing shortage as its opposition to Respondent's motion was itself out of time.

Steele Branch the Commission took "official notice" that the Secretary had an unusually high case load and determined that provided adequate reason for the delay. Certainly the high case load explanation, fully warranted in the past, is even more compelling today. Official notice of this fact is appropriate and the Court, as has Congress, takes such notice of the enormous caseload which exists today.

Finally, the Court notes that in the civil penalty proceeding which may ensue, the Respondent will not be precluded from contending that the delay worked to its prejudice in the defense to the 19 violations alleged, nor will it be precluded from establishing that some or all of the violations alleged to be "significant and substantial" were not in fact of that character.

Accordingly, for the foregoing reasons, Respondent's Motion for Certification of Interlocutory Ruling is DENIED.⁴

William B. Moran

William B. Moran
Administrative Law Judge

⁴Per 29 C.F.R. Section 2700.76(a)(1)(ii), Respondent must file with the Commission a petition for interlocutory review within 30 days of the Court's denial of such motion for certification.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 15, 2010

SECRETARY OF LABOR	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION (MSHA), on	:	
behalf of JOSE A. CHAPARRO ,	:	Docket No. SE 2010-295-DM
Complainant,	:	
	:	
v.	:	
	:	
COMUNIDAD AGRICOLA	:	Mine ID 54-00350
BIANCHI, INC.,	:	CAB Aggregates
Respondent	:	

DENIAL OF MOTION TO ISSUE ORDER TO SHOW CAUSE

In December 2009, the Secretary of Labor, appearing on behalf of Jose A. Chaparro, filed an application to reinstate Mr. Chaparro to the position he held with Comunidad Agricola Bianchi, Inc. (CAB), as of the date the Secretary alleged Mr. Chaparro was illegally laid off. Following a hearing, I granted the application and issued a decision and order reinstating Mr. Chaparro to “the position he held on August 14, 2009, or to an equivalent position, at the same rate of pay and with the same benefits to which he was then entitled.” 32 FMSHRC 206, 211 (February 2010). Although the order and decision settled the issues raised in the application, I retained jurisdiction over the reinstatement. Subsequently, the Secretary filed a complaint of discrimination on Mr. Chaparro’s behalf (SE 2010-434-DM). Counsels and I agreed that a hearing on the merits of the discrimination complaint would begin on August 10, 2010.

On April 30, 2010, the Secretary filed a motion in the temporary reinstatement case (Docket No. SE 295-DM) requesting that I issue an order requiring CAB to show cause why Mr. Chaparro had not been reinstated consistent with the February 22, 2010 Order. The Secretary pointed out that at the reinstatement hearing, Mr. Chaparro testified that he worked in heavy equipment maintenance and that his duties were “[c]heck[ing] the oil on the machinery, oil and filter changes, greasing the machinery” and “washing [the equipment] with the . . . pressure washer.” (Mot. 2, citing Tr. 16.) The Secretary also pointed out that the company administrator, Reynat Jimenez, testified that Mr. Chaparro’s duties included being “in charge of cleaning floors, the workshop, the tools, maintaining all the heavy equipment, cleaning the green areas, collecting used oil, washing heavy equipment, and everything related to maintenance at . . . CAB.” (Tr.

74.) Reynat Jimenez also testified that Chaparro had to provide maintenance to a sand screener, a piece of equipment that was not in the shop, but rather “in the field” and to a drag line, another piece of equipment that was “in the field.” (Tr. 96.)

The Secretary asserted that although CAB had reinstated Mr. Chaparro, his duties were inconsistent with those described at the hearing. (Mot. 2.) The Secretary attached to the motion a signed declaration of MSHA Inspector Isaac E. Villahermosa in which the inspector declared that upon receiving a complaint (presumably from Mr. Chaparro), the inspector visited CAB’s facility in April 2010. The inspector stated that he found:

- a) CAB had reinstated Mr. Chaparro to a position other than that which he held on August 14, 2009 or its equivalent.
- b) Mr. Chaparro’s duties and responsibilities as of April 28, 2010 differed from those he performed on August 14, 2009, and were performed under arduous conditions.
- c) As of April 28, 2010 CAB was selectively enforcing work rules against Mr. Chaparro.

Villahermosa Decl. 2.

Following receipt of the motion, counsels and I conferred via a conferenced telephone call, and counsel for CAB expressed his opinion that the duties to which Mr. Chaparro was assigned were not outside his prior maintenance duties. He also requested additional time to respond to the motion, a request that was granted with the concurrence of counsels for the Secretary.

Counsel for CAB responded on May 10. He noted that the motion “does not state the specific actions that . . . [CAB] has taken or failed to take in relation to the . . . order.” (Reply 2.) He went on to state that the mine is small in terms of manpower, and in terms of product (sand) sold and delivered to clients’ trucks. Mr. Chaparro is one of five employees who work at the mine: three heavy equipment operators, one chief mechanic and Mr. Chaparro who works in general maintenance, which “includes the mechanic shop and the surroundings.” (Reply 3.) According to counsel, Mr. Chaparro “is doing what he had done during the 45 days that he worked with . . . [CAB] before he was notified his employment [was] terminated” and that he “is only doing the functions that he was doing prior to August 14, 2010.” *Id.* Further, “even though all other employees have to do their primary works [*sic.*] every employee, works where he is needed, [and] if the heavy equipment operators have to work in the mechanic shop because the mechanic did [not] show up for work, if he has the knowledge that employee will perform those duties.” *Id.* at 3-4. CAB maintains that in fact, “Mr. Chaparro is doing less work than the other employees and only performing the duties that were stated or testified in the hearing of this case on February 2, 2010.” *Id.* at 4.

CAB attached to its response sworn statements from Frankie Rosado Perez, a CAB

mechanic and machine operator, Israel Gonzalez Tirado, an apparent employee of CAB, Jose Heriberto Rodriguez Valentin, a heavy equipment operator, Hipolito Polanco Ramirez, a loader operator and Reynat Jimenez, the administrator of CAB. In general the statements maintain that none of the persons have seen Mr. Chaparro abused or treated with disrespect. In addition, Reynat Jimenez states that “usually [Mr. Chaparro] stays cleaning in the shop, that [the shop is] in a covered area[,] while the other employees work in the sun”, but that “[i]f he is required to leave the shop it would be an exception, and the work required should be done in a couple of hours.” (Jimenez Sworn Statement 2.) Reynat Jimenez goes on to state that if Mr. Chaparro is not available to work, other employees must perform his duties. *Id.*

CAB also supplemented its response by submitted a sworn statement from Manuel Menendez-Marin, the president of CAB. Mr. Menendez-Marin stated that low production due to dramatically declining sales has resulted in “everyone lending a hand to the other employee if he or she cannot work or for some reason, the others have to help.” (Menendez-Marin Sworn Statement 1-2.) He further stated that Mr. Chaparro “isn’t the only employee in the mine, there are five other employees who have to cover for those who do not show up for work or are doing other tasks. Mr. Chaparro[’s] primary job is maintenance of the [machines] and green areas. He usually works in the shop [and] all others employees work under the sun. When he is required to perform work in other areas it’s for a short time.” *Id.* at 3.

On the same day the Commission received Menendez-Marin’s sworn statement, Counsel for the Secretary objected to the statements and complained that they did not address “the Secretary’s underlying allegations . . . that Mr. Chaparro has been reinstated to work exclusively on tasks that are different and more arduous than those which he performed prior to reinstatement” and that because the statements were written in English and the persons making the statements were primarily or solely conversant in Spanish, the statements should be given no weight. (Sec’y Letter in Response to Resp’t Reply to Mot. for Order to Show Cause (May 11, 2010).)

RULING ON MOTION

The Secretary asks that I issue an order requiring CAB to show why Mr. Chaparro has not been reinstated consistent with the terms of my order of February 22, 2010, (Motion for Order to Show Cause at 3), which required that he be reinstated “to the position he held on August 14, 2009, or to an equivalent position, at the same rate of pay and with the same hours and benefits to which he was then entitled.” 23 FMSHRC at 211. The Secretary is not asserting CAB has failed to reinstate Mr. Chaparro. He is back at work and CAB has complied with that part of the order. Rather, the Secretary is asserting Mr. Chaparro has not returned to the same or to an equivalent position because he has not been given the same duties he held previously. *See Villahermosa Decl.* at 2.

As noted above, the record at the reinstatement proceeding revealed that Mr. Chaparro’s position on August 14, 2009, was that of a maintenance worker. I conclude from the statements

submitted by CAB that he has been reinstated to that position. It is really the specific duties to which he has been assigned that are the subject of the motion. The problem with the motion is that it asks the Commission to venture into an area and to make judgements on an issue the Commission is particularly ill equipped to decide at this point in this proceeding – the validity of specific work assignments given to Mr. Chaparro in his capacity as a maintenance worker for CAB.

It is true that the company has lost some of its freedom to direct its work force consistent with its business needs, in that it has been required to reinstate Mr. Chaparro and to return him to the same position he held as of August 14, 2009. However, the company has met this requirement. The question of whether or not the duties he is assigned are consistent with the position to which he has been returned must be tested not only against the duties he held prior to August 14, 2009, but also against the current duties required of all maintenance workers, because the company has not lost its freedom to direct its workforce consistent with its needs as they have evolved since Chaparro's reinstatement.

The Secretary essentially maintains that the duties are different and are performed under arduous conditions. CAB essentially maintains that Chaparro is continuing to work as he did prior to August 14, 2009, with the caveat that if he is required to do other duties, they are those required of other maintenance workers given the evolving state of its business and workforce. The Commission's judges cannot act as uber-managers of a company by substituting their business judgements for those of a company's managers with regard to every work assignment given to an employee. The company has been ordered to reinstate Mr. Chaparro to the same or to an equivalent position, and it has done so. If in fact the duties Mr. Chaparro has been required to undertake are more arduous and less desirable than those assigned other maintenance workers, and if they have been given because Mr. Chaparro engaged in activity protected under the Act, they may, as the Secretary points out, give rise to a claim of discrimination. *See Secy's Letter (May 11, 2010)*. They do not, however, serve as a basis for issuing an order requiring the company to show cause why it is not complying with a previously issued order.

For these reasons, the Motion for an Order to Show Cause **IS DENIED**.


David Barbour
Administrative Law Judge

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June 15, 2010

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-1440
Petitioner,	:	A.C. No. 46-04236-184740
	:	
v.	:	
	:	
MAPLE COAL COMPANY,	:	Maple Eagle No. 1 Mine
Respondent	:	

ORDER ACCEPTING LATE FILING
ORDER DENYING MOTION TO DISMISS

The Secretary of Labor, Mine Safety and Health Administration (“Secretary”) filed her penalty petition on November 17, 2009.¹ On December 14, 2009, Respondent Maple Coal Company (“Maple Coal”) filed its motion to dismiss for the Secretary’s failure to timely file the penalty petition, accompanied by its answer. Maple Coal alleges that it was prejudiced by the delay.

On January 29, 2010, the Secretary filed an Opposition to Respondent’s Motion to Dismiss and Request for Acceptance of Petition Out-of-Time, in which it is alleged that the high rate of contests, coupled with limited staff, accounted for the delay.

On February 6, 2010, Maple Coal filed a Reply to the Secretary’s Opposition, in which it further outlined its passionate arguments in favor of dismissal.

Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“Mine Act”), states that a mine operator wishing to contest a citation or an order or a notification of proposed assessment of penalty must notify the Secretary of Labor (“Secretary”) of its desire to do so within 30 days of receipt of the citation or order or proposed assessment, at which time the Secretary immediately shall notify the Commission, and the Commission shall afford an opportunity for hearing. Commission Rule 28(a) provides that “within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty.” 29 C.F.R. § 2700.28(a).

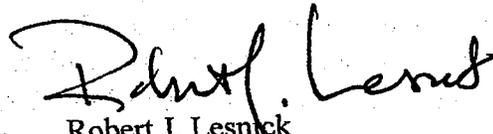
¹In future proceedings, the Secretary should also file a Motion to File the Petition Out of Time in accordance with 29 C.F.R. § 2700.9.

Maple Coal filed its notice of contest in the above-captioned docket on May 13, 2009. Accordingly, under Section 2700.28(a), the Secretary's petition for assessment of civil penalty should have been filed by June 29, 2009.

While I take cognizance of the Maple Coal's passionate arguments, case law demonstrates the Commission's preference toward resolving cases on the merits rather than based on procedural defects. See *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986) and *Coal Prep. Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). It is well-settled that the late filing of a civil penalty petition is not jurisdictional. See *Salt Lake County Road Dept.*, 3 FMSHRC 1714, 1716 (July 1981). While the Secretary should adhere to the 45-day time limit, the Commission has made clear that neither the term "immediately" contained in Section 105(d) of the Mine Act nor the time limit should be construed as a "procedural strait jacket[]." *Id.* at 1716.

Furthermore, given the unprecedented number of cases currently before the Commission, as well as the unprecedented number of penalty petitions pending before the Secretary, strict adherence to the 45-day time line is unrealistic. See *Solar Energy*, 31 FMSHRC 729, 730 (June 2009) (ALJ Feldman).

In light of all of the foregoing, it is **ORDERED** that the Secretary's late-filed penalty petition is **ACCEPTED**. Accordingly, Maple Coal's motion to dismiss is **DENIED**.


Robert J. Lesnick
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 28, 2010

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2009-89-M
Petitioner,	:	A.C. No. 28-00547-174965-DDH
	:	
v.	:	
	:	
DJB WELDING CORPORATION,	:	
Respondent.	:	Mine: Jackson Plant

ORDER DENYING RESPONDENT’S MOTION FOR SUMMARY DECISION

This case is before me upon a petition for assessment of civil penalty filed on April 28, 2009 by the Secretary of Labor (“Secretary”) against DJB Welding Corporation (“the Respondent”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Mine Act” or “the Act”), 30 U.S.C. § 815(d). The Secretary issued eleven citations alleging violations of health and safety standards pursuant to the Secretary’s regulations applicable to surface metal and nonmetal mines. See 30 C.F.R. pt. 56. The Respondent, appearing *pro se*, contests the validity of the citations, alleging that an inspector for the Mine Safety and Health Administration (“MSHA”) denied the Respondent’s right to accompany the inspector during the physical inspection of the mine pursuant to section 103(f) of the Mine Act, 30 U.S.C. § 813(f).

During a conference call with both counsel for the Secretary and the Respondent’s representative, I determined, and the parties agreed, that there was no genuine issue of material fact surrounding the alleged denial of Respondent’s “walkaround rights” under section 103(f) of the Act. As this issue can be resolved as a matter of law, on February 2, 2010, I ordered Respondent to submit a written brief setting forth the undisputed material facts and an explanation as to why the Respondent believes that his rights under section 103(f) of the Act were violated. The Respondent complied and raised other issues, in addition to the alleged violation of section 103(f), in his brief to support dismissal of this case. I construe the Respondent’s brief to be the equivalent of a motion for summary decision. The Secretary filed a response in opposition to the Respondent’s brief. For the reasons discussed below, I find that no genuine issue of material fact exists and that the Respondent is not entitled to summary decision as a matter of law. The Respondent was given an opportunity to exercise his walkaround rights in accordance with section 103(f) of the Act. Accordingly, the citations will not be vacated and this matter will be set for a hearing on the merits.

FINDINGS OF FACT

On October 15, 2008, Ralph Bennett, a mine inspector employed by MSHA, went to Clayton Sand Company's Jackson plant site to inspect the mining operation and contractors working on the site. (Bennett Decl. ¶ 1-2.) The Respondent is a contractor registered with MSHA and has worked for Clayton Sand Company at the Jackson plant site since 1975. (Resp't Aff. ¶ 1-2.) The inspector informed Thomas Jameson, the plant manager, that he intended to inspect any contractors working on the mine site. (Bennett Decl. ¶ 3.) On the day of the inspection, Daniel Black, the owner of DJB Welding Corporation, was not at the Jackson site. (See Resp't Aff. ¶ 4.) Black was in New York City for a doctor's appointment with his oncologist, approximately 65 miles away from the mine site. (Resp't Aff. ¶ 4, 6.) Jameson told Inspector Bennett that Black was unavailable and that Black's employees had left the mine site earlier that morning to perform work at another site. (Bennett Decl. ¶ 4.) Bennett instructed Jameson to contact Black to see if he wanted to designate one of his workers to accompany Bennett during the inspection of DJB's work area, the Nord Building. (Bennett Decl. ¶ 7.) Jameson called Black and told him that an MSHA inspector was at the Jackson site and needed DJB's contractor identification number. (Resp't Aff. ¶ 4.) Black told Jameson that he was still at his doctor's appointment and was unable to return to the Jackson plant until 6:00 a.m. the following day. (Resp't Aff. ¶ 9.)

Bennett waited until the end of his inspection of the mining operation before he commenced his inspection of the Nord Building used by the Respondent. (Bennett Decl. ¶ 9.) Again, Inspector Bennett asked Jameson when Black would be back on site. (Jameson Aff. ¶ 4.) Jameson called Black and informed him that the inspection of the Nord Building had begun and that Inspector Bennett was searching the parked welding truck that belonged to the Respondent. (Resp't Aff. ¶ 5.) Black reiterated that he would not be on site until 6:00 a.m. the next day. *Id.* At that time, Jameson informed Inspector Bennett that he was unsure whether any of the Respondent's employees were returning to the site to accompany Bennett on his inspection. (Bennett Decl. ¶ 11.) Consequently, Jameson accompanied Bennett during the inspection of the Nord Building. *Id.* Jameson told Inspector Bennett that the Respondent operated and controlled the equipment and activities within the Nord Building. (Bennett Decl. ¶ 14.) Jameson assured Bennett that only Black's employees used the Nord Building and, as such, he had no knowledge of any hazardous conditions. (Bennett Decl. ¶ 13-14.) During the course of the inspection, Bennett issued eleven citations against the Respondent. (See Sec'y Ex. A.) The Respondent asserts that five of the citations issued were for violations discovered in buildings or on equipment that it neither owns nor controls. (Resp't Aff. ¶ 7.) Respondent contests the validity of all citations issued and urges the court to vacate all eleven citations based on the alleged denial of walkaround rights under section 103(f) of the Act. (See Resp't Br. at 5-7.)

GENERAL PRINCIPLES OF LAW

Section 103(f) of the Mine Act states in pertinent part:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an *opportunity* to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine.

30 U.S.C. § 813(f) (emphasis added). The Act defines an “operator” as “any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.” 30 U.S.C. § 802(d). The right of a mine operator to accompany an inspector has been “consistently recognized by the Commission and the courts.” *Sec’y of Labor v. Consolidation Coal Co.*, 16 FMSHRC 713, 719 (Apr. 1994).

DISCUSSION

The Respondent contends that Inspector Bennett abused his discretion by arbitrarily denying the Respondent his right to accompany Bennett during his inspection pursuant to section 103(f) of the Act. The Respondent argues that he had no notice of the inspection, and because he was 65 miles away from the mine site, there was no feasible way he could have exercised his walkaround rights on October 15, 2008. The Respondent further argues that it was unreasonable for Bennett to proceed with the inspection because Bennett was going to be at the site the next day and could have easily delayed the inspection until the following morning when Black would be present to accompany Bennett on the inspection of the Nord Building.

Advance notice of an inspection is not required under the Act and is unwarranted by public policy and safety concerns

The Respondent misconstrues the law concerning whether an inspector is required to give notice to a mine operator prior to an inspection. Section 103(a) of the Act explicitly confers upon MSHA inspectors the right to enter any mine without any advance notice of an inspection. 30 U.S.C. § 813(a). Furthermore, the Supreme Court of the United States has also recognized that section 103(a) of the Act grants MSHA inspectors the right to conduct warrantless inspections of any mine to ensure compliance with mandatory health and safety standards. *See Donovan v. Dewey*, 452 U.S. 594, 596 (1986). I recognize the vital role that unannounced inspections play in overseeing the mining regulatory scheme. If mine operators had advance notice of an inspection, they could easily conceal any hazardous conditions prior to the arrival of the inspector. This would certainly circumvent the purpose of section 103 of the Act and render inspections meaningless. In *Topper Coal Company*, the Commission concluded that a mine operator violated section 103(a)’s prohibition against advance notice when the operator warned two underground miners that MSHA inspectors were coming. *Sec’y of Labor v. Topper Coal*

Co., 20 FMSHRC 344, 348-49 (Apr. 1998). When the inspectors went underground, they found the two miners cleaning up accumulations of coal around the conveyor belt. *Id.* at 346. This is precisely the type of behavior that section 103(a) seeks to prevent.

Although it is undisputed here that neither the Respondent nor any of his employees were on the mine site that day, had the inspector agreed to delay the inspection it is possible they could have made efforts to clean up any violations before the inspector arrived on site the following day. I find that Respondent's request to delay the inspection to the following day was made in good faith. Nevertheless, exceptions cannot be carved out from a statutory mandate that explicitly states "no advance notice of an inspection shall be provided to any person." 30 U.S.C. § 813(a). Moreover, I understand Black's plea that it would have been simple for the inspector to delay the inspection as Bennett was already planning on returning to the site the next morning. However, the question is not whether it was burdensome to postpone the inspection. Regardless of the circumstances, an inspector is prohibited from providing a mine operator with advance notice of an inspection. Had Inspector Bennett agreed to delay the inspection until the next morning, it could be interpreted as advance notice and be a potential violation of section 103(a) of the Act. *See, e.g., Topper Coal Co., 20 FMSHRC at 348-49.* In sum, I conclude that the public interest of promoting safety at mines outweighs the inconvenience of unannounced inspections.

The Supreme Court has authorized warrantless inspections of mines as constitutional under the Fourth Amendment

The Respondent also asserts that his Fourth Amendment rights were violated when Inspector Bennett searched the contents of Respondent's welding truck without notice or permission. The Supreme Court created an exception to the warrant requirement for certain industries that are pervasively regulated by the federal government. *See, e.g., New York v. Burger, 482 U.S. 691, 707 (1987)* (authorizing warrantless inspections of automobile junkyards as constitutionally permissible); *Donovan v. Dewey, 452 U.S. at 605 (1981)* (finding the mining industry to be a closely regulated business that allows warrantless inspections by federal mine inspectors); *United States v. Biswell, 406 U.S. 311, 315-16 (1972)* (holding that inspections of firearms dealers without warrants are reasonable under the Fourth Amendment); *Colonnade Catering Corp. v. United States, 397 U.S. 72, 76 (1970)* (finding warrantless inspections of liquor licensees to be constitutional). As noted above, in *Donovan*, the Supreme Court specifically held that section 103(a) of the Mine Act authorizes warrantless inspections of mines without violating the Fourth Amendment. *Donovan, 452 U.S. at 605.* Because of the dangerous nature of mining, the field has a long history of being heavily regulated by the government to ensure compliance with health and safety standards. *Id.* at 603. Consequently, all mine owners and operators must be aware and even expect continuous and frequent inspections without a warrant or probable cause. *Id.*

Furthermore, section 103(a) confers upon MSHA inspectors a right of entry to, through, or upon any coal or other mine for the purpose of conducting an inspection. 30 U.S.C. § 813(a). The "right of entry" encompasses more than merely giving an inspector the right to physically

enter the mine. "It includes the right to use any investigatory technique reasonably related to the discovery of violations, so long as it is employed within reasonable limits and in a reasonable manner." *Sec'y of Labor v. Cougar Coal Co.*, 17 FMSHRC 628 (Apr. 1995) (ALJ) (citing *Donovan v. Enter. Foundry Inc.*, 751 F.2d 30, 36 (1st Cir. 1984)). Here, the Respondent's welding truck was a work vehicle and could have potentially presented hazardous safety conditions on the Jackson plant site. Therefore, I find that Inspector Bennett's search of the Respondent's parked welding truck was an acceptable investigatory technique that was reasonably related to the discovery of violations of health and safety standards.

In light of SCP Investments

The Respondent relies on the Commission's recent decision in *SCP Investments* to support the claim that its walkaround rights were denied and, as such, that all citations should be vacated. *Sec'y of Labor v. SCP Invs., LLC*, 31 FMSHRC 821 (Aug. 2009). In *SCP Investments*, a businessman purchased a rock crushing quarry with no prior background or experience in mining. *Id.* at 823. This owner-operator was unfamiliar with MSHA and was unaware of the legal requirements of the Act. *Id.* Approximately three months after the owner's purchase, a federal mine inspector arrived at the quarry to inspect its operations. *Id.* The inspector quickly learned that the quarry had no MSHA identification number and asked the owner whether his employees were properly trained in accordance with MSHA's training regulations for new miners. *Id.* at 823-24. The owner replied that he had no knowledge of any training requirements. *Id.* at 824. The inspector immediately escorted the owner off the premises and directed him to remove his employees from the premises. *Id.* The inspector then informed the mine owner that he was going to inspect the quarry. *Id.* The owner asked the inspector if he could accompany him during the inspection, but the inspector refused because the owner had not completed twenty-four (24) hours of new miner training, *id.*, required by regulations set forth in the Act, *see* 30 C.F.R. §§ 46.5(a), 46.11.

The Commission concluded that the owner's walkaround rights under section 103(f) were arbitrarily denied. *Id.* at 827. The Commission found that section 46.5 which requires new miner training, and section 46.11 which requires site-specific hazard training for any non-miners present at the mine site, were not sufficient justifications to exclude the mine owner from being present during the inspection. *Id.* at 829-31. As noted by the Commission, section 46.5 is a requirement new miners must fulfill prior to working in a mine and is unrelated to inspections of mines. *Id.* at 830; 30 C.F.R. § 46.5(a). The Commission further noted it previously held that non-miners, with no mining training or experience, may be appointed as representatives of miners and permitted to participate in an inspection under section 103(f) of the Act. *Id.*; *see Emery Mining Corp. v. Sec'y of Labor*, 10 FMSHRC 276 (Mar. 1988), *aff'd in pertinent part and rev'd on other grounds sub. nom. Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447 (10th Cir. 1990). Next, the Commission addressed the fact that site-specific hazard training under section 46.11(f) is not required for non-miners who are accompanied by an "experienced miner" who is familiar with the hazards of the mine site. *Id.* at 830; 30 C.F.R. § 46.11(f). The Commission reasoned that the inspector qualified as an "experienced miner" who was aware of

the hazards and safety issues of the mine. *Id.* Thus, the owner should have been allowed to accompany the inspector during his inspection of the quarry.

Nevertheless, the Commission remanded the case because it concluded that the judge erred in using the denial of walkaround rights as a basis to vacate the citations issued by the inspector.¹ *Id.* at 834. On remand, the judge explained that the citations were originally vacated based on the inspector's abuse of discretion, not solely on the fact that the owner was denied his walkaround rights. *Sec'y of Labor v. SCP Invs., LLC*, 32 FMSHRC 119, 2010 WL 390288, *1 (Jan. 5, 2010) (ALJ). Judge Feldman went on to clarify his original position stated in his initial decision:

Section 103(f) does not mandate that an inspector must be accompanied by a mine operator during an inspection. Thus, I am cognizant that the failure of a mine operator to accompany an inspector is not a jurisdictional bar to the issuance of citations for violations of the Secretary's mandatory safety standards observed during the inspection. However, section 103(f) provides the "opportunity" for the mine operator to exercise its right to be present during an inspection. This right cannot arbitrarily be denied.

Sec'y of Labor v. SCP Invs., LLC, 30 FMSHRC 544, 548 n.3 (June 2008) (ALJ) (internal citations omitted). The facts of the case at hand are distinguishable from the factual scenario presented in *SCP Investments*.

Ultimate Findings and Conclusions

I recognize the right of a mine operator to be present and accompany an inspector as a fundamental right. However, this fundamental right under section 103(f) is not the right to be present for every inspection. Rather, it is the right to be given an *opportunity* to be present during an inspection. I determine that Black was given an adequate opportunity to exercise his walkaround rights pursuant to section 103(f) of the Act. DJB Welding is a small contractor run by Black. I understand the hardship involved and acknowledge it would have been nearly impossible for Black to leave his doctor's office in New York City and travel over ninety minutes to the Jackson mine site in time to accompany Bennett on the inspection. Even so, Black could have designated one of his employees to accompany Bennett as a representative of DJB Welding. While the Act prohibits advance notice of inspections, Black knew he would be off-site that day and was also aware that random mine inspections could occur at any time. Unlike the mine owner in *SCP Investments* who was unaware of MSHA's legal requirements, Black has been a contractor registered with MSHA since 1975. Moreover, Black has been subject to periodic

¹ The last sentence of section 103(f) specifically states that enforcement actions, which are otherwise valid, cannot be vacated as a result of the inspector's failure to comply with the requirements of section 103(f) of the Act. *SCP Invs.*, 31 FMSHRC at 834. "Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." 30 U.S.C. § 813(f).

safety inspections at the Jackson mine site for over thirty-five years. In Black's own affidavit, he admitted to being "inspected by MSHA many times over the years." (Resp't Aff. ¶ 2.) Therefore, it is reasonable to expect such an experienced contractor to plan accordingly for such events, knowing that he would be unavailable on that day if an inspector arrived.

More importantly, there is a crucial distinction between a mine operator's unavailability or decision not to participate, and an MSHA inspector's outright refusal to allow an operator to participate. The Commission itself, in *SCP Investments*, discussed the substantive difference when it explained that an operator's absence from an inspection is generally inconsequential, yet an arbitrary refusal of a ready and willing operator to accompany an inspector is a statutory violation of the operator's walkaround rights under 103(f) of the Act. *See SCP Invs.*, 31 FMSHRC at 827, 829, 830-31, 838. This distinction is what yields a different outcome here than the one reached in *SCP Investments*. In the case before me, Respondent was not denied an opportunity to exercise his 103(f) walkaround rights. In fact, Inspector Bennett made more than one request of Jameson to call Respondent. This call was not meant to ensure that the contractor would be present; rather, it was to ensure that Respondent had an *opportunity* to be present either in person or through a designated representative. Indeed, no evidence was presented (and none supports the argument) that, had the Respondent been present at the Jackson site, Bennett would have refused to allow the Respondent to accompany Bennett on the inspection, as the inspector had in *SCP Investments*.

In fact, I find that the opposite conclusion can be drawn from the facts. Inspector Bennett waited until the end of his inspection of the mining operation before commencing the inspection of the building used by the Respondent. Inspector Bennett made reasonable efforts to give the Respondent an opportunity to accompany Bennett or send a representative to accompany him on the inspection of the Nord Building. In the end, Jameson, as plant manager of the Jackson site, did accompany Bennett on the inspection of the Nord building used by the Respondent. Thus, I conclude that the Respondent was given an adequate *opportunity* to exercise his right to accompany Bennett during the inspection of the Nord Building on October 15, 2008. The Respondent's inability to be present at the time of inspection, and his failure to designate a representative to participate in the inspection does not constitute a violation of the Respondent's walkaround rights and does not warrant vacating the citations issued.

An abuse of discretion must be present to vacate citations

Assuming arguendo that the Respondent's walkaround rights under section 103(f) were violated, vacating the citations issued during the inspection is not an automatic remedy. There is an additional step of analysis necessary to determine whether such a harsh sanction is appropriate. The Commission discussed this principle, which is further illustrated by the legislative history surrounding section 103(f) of the Act. The Senate Committee explained that section 103(f) requires "that representatives of the operator and miners be permitted to accompany inspectors in order to assist in conducting a full inspection. It is not intended, however, that the absence of such participation vitiate any citations and penalties issued as a result of an inspection." *SCP Invs.*, 31 FMSHRC 821, 831 (citing S. Rep No. 95-181, at 28

(1977), reprinted in S. Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 616 (1978). The next step is to determine whether the denial of walkaround rights was an abuse of discretion. The Commission has previously found that “an abuse of discretion has occurred when there is no evidence to support the decision or if the decision is based on an improper understanding of the law.” *Sec’y of Labor v. Energy West Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996) (internal citation omitted). If a violation of walkaround rights occurred because of an abuse of discretion, then such a finding provides a sufficient basis for vacating the citations.

The Respondent alleges that Inspector Bennett abused his discretion in denying Respondent his walkaround rights because of Inspector Bennett’s bias against contractors. The Respondent attempts to bolster this assertion by furnishing evidence that Bennett commenced the inspection of another contractor working on the Jackson site without waiting the two hours necessary for the contractor’s representative to return to the site. The Respondent asserts that Bennett was at the mine site to specifically target contractors and further alleges that Inspector Bennett made disparaging comments about the Respondent, characterizing him as a “fly-by-night” contractor to his employer and several others.

Although the facts support a finding that Bennett was concerned about contractors’ non-compliance with MSHA safety regulations, he does not recall making any disparaging remarks concerning Respondent’s reputation. (See Bennett Decl. ¶ 16-19.) This dispute is not material to the disposition of this matter. However, federal inspectors should refrain from making any judgments or comments about the character of an operator or contractor without personal knowledge of such things, and any complaints about an inspector’s conduct should be raised with the District Manager. Moreover, the facts before me indicate that the Respondent is a qualified and experienced contractor who has a history of compliance with MSHA regulations and has maintained a strong business relationship with the same employer for over thirty-five years. (See Resp’t Aff. ¶ 1-3.)

While it is true that an MSHA inspector must make every reasonable effort to give a mine operator an opportunity to exercise his or her walkaround rights, it is also true that inspectors are given broad discretion to handle the different scenarios that may arise in the course of an inspection. *Id.* An inspector’s decision not to delay an inspection or wait for a representative is not a *per se* abuse of such discretion. The Interpretive Bulletin clarifying the scope of section 103(f) of the Act states:

While every reasonable effort will be made in a given situation, to provide opportunity for full participation in an inspection by a representative of miners, it must be borne in mind that the inspection itself always takes precedence. . . . The inspector cannot allow inordinate delays in commencing or conducting an inspection because of the unavailability of or confusion surrounding the identification or selection of a representative of miners.

43 Fed. Reg. 17,546, 17,546 (Apr. 25 1978).

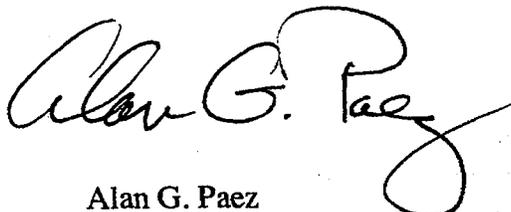
Inspector Bennett was not obligated to delay the inspection or even to wait longer than the inspector found reasonable for a representative to arrive. In *F.R. Carroll, Inc.*, an MSHA inspector arrived to inspect a sand and gravel facility. *Sec'y of Labor v. F.R. Carroll, Inc.*, 26 FMSHRC 97, 98 (Feb. 2004) (ALJ). The mine operator told the inspector that he had scheduled appointments that morning and was unable to accompany the inspector during the site inspection. *Id.* at 99. The operator asked the inspector if he could delay the inspection until 1:00 p.m. (five hours later) because he was too busy to walkaround with the inspector. *Id.* Judge Feldman found the operator's request to delay the inspection by five hours unreasonable. *Id.* at 102. Judge Feldman further explained that if the operator was "too busy" to accompany the inspector, then it was his responsibility to designate another representative available to accompany the inspector. *Id.* I find Judge Feldman's rationale in *F.R. Carroll* instructive. Consequently, I conclude that Bennett's decision to proceed with the inspection was a reasonable course of action and not an abuse of discretion.

Lastly, the Respondent argues that the citations should be vacated because five of the eleven citations were issued for violations discovered in buildings or on equipment that was neither owned nor controlled by the Respondent. The Respondent incorrectly assumes that an MSHA inspector can only cite either the owner or the contractor, but not both. This is simply not true. Even assuming that the Respondent was available on October 15, 2008 to accompany Inspector Bennett through the inspection of the Nord Building, if a question of ownership was disputed, Bennett would have had the authority to issue the same citations to both the owner and the contractor. "Since passage of the Mine Act, 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 violations by the independent contractor." *Sec'y of Labor v. Twentymile Coal Co.*, 27 FMSHRC 260, 263 (citing *Republic Steel Corp.*, 1 FMSHRC 5, 9-11, n.13 (Apr. 1979); *Bituminous Coal Operators' Ass'n, Inc. v. Sec'y of Interior*, 547 F.2d 240, 246-47 (4th Cir. 1977)). Furthermore, I agree with the Secretary's counsel that any disputes regarding ownership can be resolved during a hearing and that the Respondent's ability to raise any affirmative defenses is not impaired by his absence during the inspection.

For all the reasons explained above, I conclude that the Respondent was not arbitrarily denied an opportunity to accompany Inspector Bennett on the inspection of the Nord Building in accordance with section 103(f) of the Mine Act. Therefore, the Respondent is not entitled to judgment as a matter of law.

ORDER

In light of the foregoing, **IT IS ORDERED** that the Respondent's motion for summary decision **IS DENIED**. This case will be scheduled for a hearing on the merits of the citations issued.



Alan G. Paez
Administrative Law Judge

Distribution: (Via Facsimile & U.S. Mail)

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/aw

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 30, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. WEST 2008-1582-M
	:	A.C. No. 50-01850-159018LWI
	:	
ALASKA MECHANICAL, INCORPORATED, Repondent	:	
	:	
	:	
ALASKA MECHANICAL, INCORPORATED, Contestant	:	CONTEST PROCEEDINGS
	:	
v.	:	Docket No. WEST 2008-152-RM
	:	Citation No. 6398234; 10/04/2007
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 2008-153-RM
	:	Citation No. 6398235; 10/04/2007
	:	
	:	Mine ID 50-01850 LWI
	:	Nome Operations

ORDER DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Lesnick

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act" or "Mine Act"). The Secretary of Labor ("Secretary") and Alaska Mechanical, Incorporated ("AMI") filed a joint motion to approve settlement dated March 12, 2010. The case involves two violations issued by the Secretary under section 104 of the Act following an accident at AMI's Nome Operations that, on July 19, 2007, claimed the lives of two miners when a manlift they were operating tipped over.

The Secretary proposed that a total penalty \$115,000 be assessed against AMI. After entering into settlement negotiations, the parties now move for approval of their settlement agreement in which AMI agrees to pay a total penalty of \$80,000. For Citation No. 6398235 alleging a violation of 30 C.F.R. § 56.14205, AMI agrees to pay the full proposed penalty of \$60,000. For Citation No. 6398234 alleging a violation of 30 C.F.R. § 48.27a, AMI agrees to pay a penalty of \$20,000, which is \$35,000 less than the Secretary's initial proposed penalty of \$55,000, a decrease in amount of approximately 64 percent.

The authority of Commission judges to review settlement agreements filed by the Secretary and mine operators is found at section 110(k) of the Act, which provides in relevant part: "No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). The Commission has held that section 110(k) "directs the Commission and its judges to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act's objectives." *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981).

In *Knox County*, the Commission further explained the role of its judges in reviewing settlements:

The judges' front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion. While the scope of this discretion may elude detailed description, it is not unlimited and at least some of its outer boundaries are clear.

. . . [We] reject the notion . . . that Commission judges are bound to endorse all proposed settlements of contested penalties. However, settlements are not in disfavor under the Mine Act, and a judge is not free to reject them arbitrarily. . . . Rejections, as well as approvals, should be based on principled reasons. Therefore, we [have] held that if a judge's settlement approval or rejection is "fully supported" by the record before him, is consistent with the statutory penalty criteria,^[1] and is not otherwise improper, it will not be disturbed.

¹ Under section 110(i), the Commission and its ALJs "shall consider" the following six penalty criteria in assessing any penalty, and by extension, any settlement agreement under which an operator agrees to pay a civil penalty: "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." 30 U.S.C. § 820(i). In its *Knox County* decision, the Commission noted that its Procedural Rule 31 implementing section 110(k) "was revised in 1980 to delete the requirement . . . that the judge 'consider' and 'discuss' the six statutory penalty criteria in orders approving settlements" in order to enhance the "flexibility of

In reviewing such cases, abuses of discretion or plain errors are not immune from reversal.

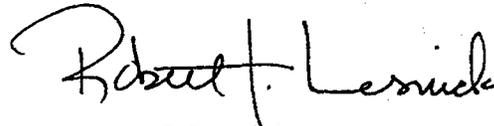
Id. at 2479-80. The Commission went on to vacate the judge's rejection of the settlement motion in *Knox County* because it was not "fully supported" by the record and was inconsistent with the penalty criteria. *Id.* at 2481.

Here, the parties represent that the penalty amounts upon which they agreed "take into account those factors required to be considered by Section 110(i)," and that findings set forth by the Secretary in her petition for assessment of civil penalty as to gravity and negligence "are supportable." Mot. at 2. The Secretary's petition alleges that the violation cited in Citation No. 6398234 resulted from "moderate" negligence, and that the violation cited in Citation No. 6398235 resulted from "high" negligence. Pet. at [10]. The petition alleges the gravity of both violations was "serious," and "contributed to the cause of a fatal machinery accident." *Id.* The parties state that AMI's history of previous violations "is as set forth in . . . the Petition." Mot. at 2. Finally, the parties state that the company "exercised good faith in abating the cited conditions," and that the agreed to penalty would not affect AMI's ability to remain in business. *Id.* at 2-3. Neither of these representations is inconsistent with the Secretary's petition. Aside from several other general representations, the parties fail to identify and explain any particular facts that would support a reduction of the penalty for Citation No. 6398234 by well more than half.

In other words, the parties have said that although the Secretary's penalty petition is fully supportable, they have concluded that the significantly reduced penalty AMI has agreed to pay is "fair and reasonable and serve[s] the enforcement goals of the Act," and is "in the public interest and will further the intent and purpose of the Act," simply because they say so. Justice William O. Douglas once had occasion to cite Humpty Dumpty's pronouncement to Alice in *Through the Looking-Glass* that "When I use a word . . . , it means just what I choose it to mean – neither more nor less." *Zschernig v. Miller*, 389 U.S. 429, 435 n.6 (1968). Here, the Secretary has no such authority, and when she says that a penalty is "fair" and "reasonable" and "in the public interest," the Mine Act and Commission precedent requires her and other parties to a settlement to provide more than mere empty words to justify their agreement. Otherwise, section 110(k) would be meaningless, and the authority of Commission judges to review settlements would be reduced to providing the proverbial rubber stamp.

the judges to approve the settlements," though also noting that the rule "does not sanction settlement decisions inconsistent with the statutory penalty criteria." 3 FMSHRC at 2480 n.3. Rule 31 further states that a settlement motion "shall include . . . [f]acts in support of the penalty agreed to by the parties." 29 C.F.R. § 2700.31.

I therefore conclude that the reduced penalty agreed to by the parties for Citation No. 6398234 lacks the factual basis necessary for me to determine whether the penalty would adequately effectuate the deterrent purpose underlying the Act's penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). The motion to approve settlement is **DENIED**.



Robert J. Lesnick
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

June 2, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2007-460
	:	A.C. No. 46-08436-100698
Petitioner	:	
	:	Docket No. WEVA 2007-470
	:	A.C. No. 46-08436-093158
	:	
	:	Docket No. WEVA 2008-889
	:	A.C. No. 46-08436-143554-02
	:	
v.	:	Docket No. WEVA 2008-890
	:	A.C. No. 46-08436-143554-03
	:	
	:	Docket No. WEVA 2008-891
	:	A.C. No. 46-08436-143554-04
	:	
	:	Docket No. WEVA 2008-892
	:	A.C. No. 46-08436-143554-05
PERFORMANCE COAL COMPANY,	:	
Respondent	:	Mine: Upper Big Branch - South

SCHEDULING ORDER

Respondent requested a hearing on the citation(s)/order(s) contained in this docket(s) and the proposed penalty in accordance with the provisions of section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* (Mine Act) and 29 C.F.R. 2700.50 *et seq.* A hearing is scheduled for **August 30, 2010** at 8:30 a.m., in Charleston, West Virginia at a location to be determined. A prehearing conference was held in Washington D.C. on May 20, 2010 and the prehearing and scheduling requirements were discussed at that time, and had also been set forth in an earlier notice of hearing. The motion to stay this docket filed by the Secretary was also addressed at the prehearing conference and has been denied.

The case(s) will be heard pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), and the issues include, but are not limited to, whether Respondent committed the violation(s) as alleged in the citation(s)/order(s) and the appropriate penalty to be assessed. Any person planning to attend this hearing who requires special

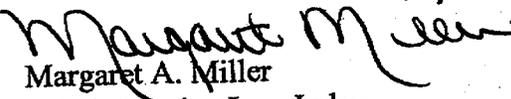
accessibility features and/or any auxiliary aids, such as sign language interpreters, must inform the commission in advance of these needs. This provision is subject to the limitations of 29 C.F.R. 2706.150(a) and 160(d).

These dockets are set for a trailing docket call and each party should be prepared to proceed at 8:30 a.m. on the day listed herein. If the case is not heard during the week of August 9, 2010, it will automatically move to the next date, September 21, 2010. No case will be rescheduled and all cases will be heard in the order of the dates of the citations/orders, commencing with the docket containing the earliest date. If there are cases that should be heard together or in a certain order, the parties must notify the Court of that fact at the prehearing conference. Every effort will be made to accommodate the witnesses for each docket. Absent good cause shown, no hearing will be continued, and no hearing will be cancelled unless a written settlement motion is filed with the Court.

On or before **July 30, 2010**, the parties shall provide to one another a list of persons with knowledge of each violation and a brief summary of the information they possess and provide copies of all documents created by or in the possession either of the Secretary of the respondent, including photographs, diagrams, maps, pre-shift, on-shift or foundation records, witness statements that are not privileged under the Commission Rule 61, supervisor's or examiner's notes, compilations or summaries of the notes taken by inspectors or respondent's personnel, production reports, walk-around reports, rebuttal forms that are maintained by respondent, and other no-privileged documents whether in hard copy or electronically stored. The Respondent has indicated that an MSHA investigation team has taken the books from the mine, but the operator retained a copy of each and those shall be provided for the one week period prior to and the day of the date of each citation. Each party shall prepare and provide a list of all documents in their possession or control that may be relevant to the inspection but is being withheld, along with an explanation for withholding the document. Any discovery beyond the disclosures will be limited. As required by Commission Rule 2700.10(c), the parties will confer in good faith before the filing of any motion with the Court. The parties are encouraged to schedule a conference call and resolve issues without the necessity of filing a formal motion.

The parties shall provide to one another, on or before **July 30, 2010**, the name, address and telephone number of any expert witness who may be called to testify, along with information about the expert's background and any reports generated by the expert. Each party is limited to one expert for each issue contained in the docket, i.e. one roof control expert, one ventilation expert etc. The parties may take depositions by agreement but the depositions are limited to expert witnesses and fact witnesses regarding any finding of unwarrantable failure, failure to abate, imminent danger, or other matter outside of a 104(a) citation with moderate negligence. The parties may discuss settlement at any time and as many times as they deem appropriate, not only for purposes of settling but for purposes of narrowing the issues for trial. The parties are encouraged to narrow the issues for trial and provide a list of specific matters to be decided at hearing. The parties may be notified that certain matters will be decided on the record and will be given the opportunity to present case law or prehearing statements prior to or at the hearing.

If the cases do not settle on or before **August 20, 2010**, the parties, by that date, shall send to each other and to me, a list of witnesses who may testify (subject to the limitations contained in 29 C.F.R 2700.62, a miner witness), along with their address and position and a brief synopsis of their testimony, a list of expert witnesses and their area of expertise and expected testimony, a list of exhibits which may be introduced, and matters to which the parties can stipulate at hearing. Petitioner shall label exhibits numerically and Respondent, alphabetically.


Margaret A. Miller
Administrative Law Judge

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