

JUNE 1999

COMMISSION DECISIONS AND ORDERS

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ADMINISTRATIVE LAW JUDGE ORDERS

06-10-99 Sproule Construction Company, Inc.	LAKE 99-24-M	Pg. 691
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JUNE 1999

Review was granted in the following cases during the month of June:

Jim Walter Resources, Inc. v. Secretary of Labor, MSHA, Docket Nos. SE 99-6-R, etc.
(Judge Feldman, May 12, 1999)

Reintjes of the South, Inc. v. Secretary of Labor, MSHA, Docket No. CENT 99-153-RM.
(Judge Weisberger, May 17, 1999 - published in this issue)

No cases were filed in which review was denied during the month of June:

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 1, 1999

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

v. :

JOHN MARTIN, employed by :
ROARING FORK AGGREGATES, INC. :

Docket No. WEST 99-144-M
A. C. No. 05-03802-05529A

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

ORDER

BY: Marks, Verheggen, and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 1, 1999, the Commission received from John Martin, an employee of Roaring Fork Aggregates, Inc. ("Roaring Fork"), a request to reopen a penalty assessment for a violation of section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose Martin's motion requesting relief under Fed. R. Civ. P. 60(b).

Under section 105(a) of the Mine Act, an individual charged with a violation under section 110(c) has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that he or she wishes to contest the proposed penalty. 30 U.S.C. § 815(a); *see also* 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a); 29 C.F.R. § 2700.27.

Martin submits that his failure to timely contest the section 110(c) penalties proposed

against him was due to his counsel's reliance on an erroneous statement made by a representative of the Department of Labor's Mine Safety and Health Administration ("MSHA"). Mot. at 2. The proposed penalties against Martin stem from a July 19, 1997 fatal accident, which also resulted in the issuance of three August 7, 1997 section 104(d)(1) orders against Roaring Fork. *Id.* at 1. The section 104(d)(1) orders are the subject of proceedings before Administrative Law Judge Richard Manning. *Id.* These proceedings were stayed to allow a section 110(c) investigation of Martin and Shane Porter, another employee of Roaring Fork, to proceed. *Id.* at 1-2. Counsel for Martin states that, on January 15, 1999, agents for the operator provided counsel with the notice of proposed assessment served upon Martin, but that the operator's agents did not inform counsel of the date the proposed penalty assessment had been received by Martin. *Id.* at 2. Counsel alleges that, during a January 28 telephone conversation, MSHA's Civil Penalty Compliance Office informed him that Martin received the proposed penalty assessment on January 13. *Id.* On February 25, counsel received written notice from MSHA's Civil Penalty Compliance Office that the proposed penalty assessment for Martin had been received on January 8, that the hearing request filed by Martin on February 10 was therefore untimely, and that the proposed penalty had become a final order of the Commission. *Id.*

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We also have observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The record indicates that Martin intended to contest the proposed penalty issued against him, and that, but for his counsel's reliance upon an MSHA representatives' erroneous statement, he likely would have contested the proposed penalty. In the circumstances presented here, Martin's late filing of a hearing request may be considered inadvertence or excusable neglect within the meaning of Rule 60(b)(1). *See National Lime & Stone*, 20 FMSHRC at 924-25 (reopening matter when operator's late filing of hearing request was due to mutual misunderstanding between counsel for operator and counsel for MSHA as to need to challenge penalty assessment prior to judge's approval of parties' settlement); *Stillwater*, 19 FMSHRC at 1022-23 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between recipient of assessment at mining facility and its attorneys, after indicating intent to contest related citation).

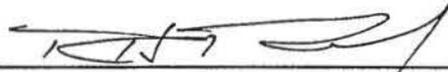
Accordingly, in the interest of justice, we reopen this penalty assessment that became a final order with respect to the section 110(c) penalties proposed against Martin in this case. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Marc Lincoln Marks, Commissioner



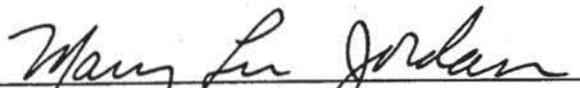
Theodore F. Verheggen, Commissioner

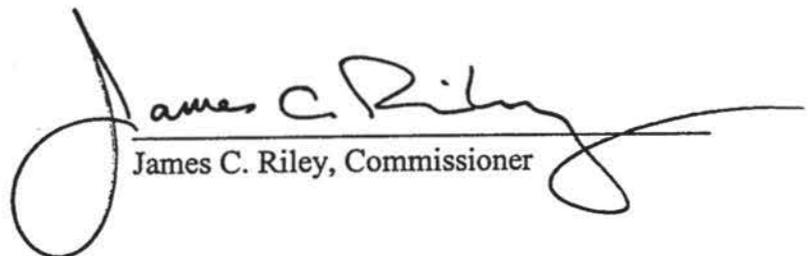


Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Riley, dissenting:

We would remand this case for the purpose of assessing the reliability of evidence presented by Martin as to why he did not request a hearing in a timely manner. Although we are mindful that the Secretary does not object to this motion, we would nonetheless remand to a judge for the initial evaluation of the evidence, which clearly is not within the province of a reviewing body. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 332 n.14 (Apr. 1998).


Mary Lu Jordan, Chairman


James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 1, 1999

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

v.

SHANE PORTER, employed by
ROARING FORK AGGREGATES, INC.

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Docket No. WEST 99-145-M
A. C. No. 05-03802-05531A

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

ORDER

BY: Marks, Verheggen, and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 1, 1999, the Commission received from Shane Porter, an employee of Roaring Fork Aggregates, Inc. ("Roaring Fork"), a request to reopen a penalty assessment for a violation of section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose Porter's motion requesting relief under Fed. R. Civ. P. 60(b).

Under section 105(a) of the Mine Act, an individual charged with a violation under section 110(c) has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that he or she wishes to contest the proposed penalty. 30 U.S.C. § 815(a); *see also* 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a); 29 C.F.R. § 2700.27.

Porter submits that his failure to timely contest the section 110(c) penalties proposed

against him was due to his counsel's reliance on an erroneous statement made by a representative of the Department of Labor's Mine Safety and Health Administration ("MSHA"). Mot. at 2. The proposed penalties against Porter stem from a July 19, 1997 fatal accident, which also resulted in the issuance of three August 7, 1997 section 104(d)(1) orders against Roaring Fork. *Id.* at 1. The section 104(d)(1) orders are the subject of proceedings before Administrative Law Judge Richard Manning. *Id.* These proceedings were stayed to allow a section 110(c) investigation of Porter and John Martin, another employee of Roaring Fork, to proceed. *Id.* at 1-2. Counsel for Porter states that, on January 15, 1999, agents for the operator provided counsel with the notice of proposed assessment served upon Porter, but that the operator's agents did not inform counsel of the date the proposed penalty assessment had been received by Porter. *Id.* at 2. Counsel alleges that, during a January 28 telephone conversation, MSHA's Civil Penalty Compliance Office informed him that Porter received the proposed penalty assessment on January 13. *Id.* On February 25, counsel received written notice from MSHA's Civil Penalty Compliance Office that the proposed penalty assessment for Porter had been received on January 8, that the hearing request filed by Porter on February 10 was therefore untimely, and that the proposed penalty had become a final order of the Commission. *Id.*

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We also have observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The record indicates that Porter intended to contest the proposed penalty issued against him, and that, but for his counsel's reliance upon an MSHA representatives' erroneous statement, he likely would have contested the proposed penalty. In the circumstances presented here, Porter's late filing of a hearing request may be considered inadvertence or excusable neglect within the meaning of Rule 60(b)(1). *See National Lime & Stone*, 20 FMSHRC at 924-25 (reopening matter when operator's late filing of hearing request was due to mutual misunderstanding between counsel for operator and counsel for MSHA as to need to challenge penalty assessment prior to judge's approval of parties' settlement); *Stillwater*, 19 FMSHRC at 1022-23 (granting operator's motion to reopen when operator failed to submit request for hearing to contest proposed penalty due to lack of coordination between recipient of assessment at mining facility and its attorneys, after indicating intent to contest related citation).

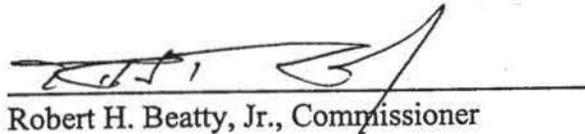
Accordingly, in the interest of justice, we reopen this penalty assessment that became a final order with respect to the section 110(c) penalties proposed against Porter in this case. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Marc Lincoln Marks, Commissioner



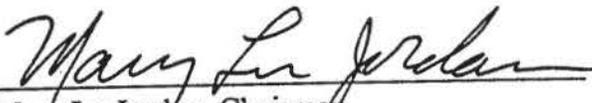
Theodore F. Verheggen, Commissioner



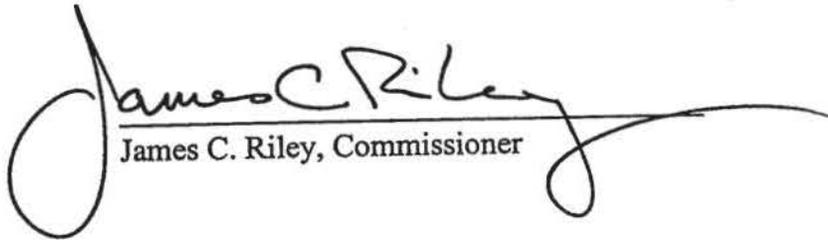
Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Riley, dissenting:

We would remand this case for the purpose of assessing the reliability of evidence presented by Porter as to why he did not request a hearing in a timely manner. Although we are mindful that the Secretary does not object to this motion, we would nonetheless remand to a judge for the initial evaluation of the evidence, which clearly is not within the province of a reviewing body. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 332 n.14 (Apr. 1998).



Mary Lu Jordan, Chairman



James C. Riley, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 1, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 97-164-RM
	:	through WEST 97-168-RM
NEWMONT GOLD COMPANY	:	WEST 97-293-M

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

ORDER

BY THE COMMISSION:

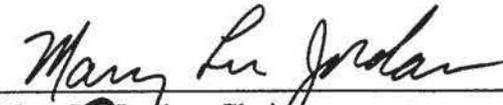
These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On November 20, 1997, and January 23, 1998, the Commission granted two separate petitions for discretionary review filed by the Secretary of Labor challenging the decisions of Administrative Law Judge August F. Cetti in which he vacated citations issued to Newmont Gold Company ("Newmont") and dismissed the contest proceedings, 19 FMSHRC 1640 (Oct. 1997) (ALJ), and subsequently dismissed the related civil penalty proceedings, 19 FMSHRC 1889 (Dec. 1997) (ALJ).

On May 12, 1999, the Secretary filed a motion to dismiss her appeals in these proceedings, stating that the parties had reached a settlement and that Newmont agrees to this motion. Mot. at 1. As part of the settlement agreement, which was attached to the motion, the Secretary agreed to withdraw her appeal of these proceedings. Settlement at 1. The motion specifies that each party will bear its own costs and fees in these proceedings. Mot. at 2. The terms of the settlement agreement do not disturb the holdings of the judge.

We conclude that the motion to dismiss and the settlement agreement effect a voluntary dismissal pursuant to Fed. R. App. P. 42(b).¹ See 29 C.F.R. § 2700.1(b) (providing that Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure shall apply "so far as

¹ Fed. R. App. P. 42(b) provides in part that "[a]n appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court."

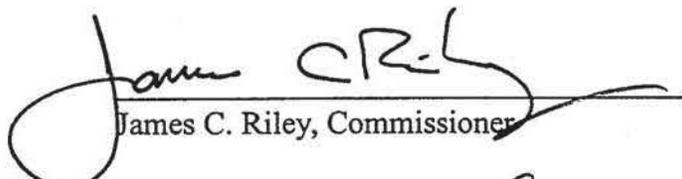
practicable” in absence of applicable Commission rules). Upon consideration of the motion to dismiss the appeals, we grant it. *See Bridger Coal Co.*, 17 FMSHRC 270 (Mar. 1995) (granting motion for voluntary dismissal of petition pursuant to Fed. R. App. P. 42(b)). Accordingly, the Commission’s directions for review in these matters are vacated and these proceedings are dismissed.



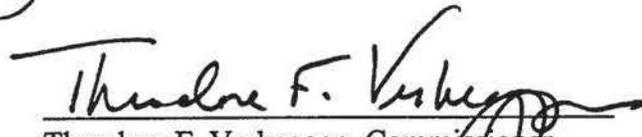
Mary Lu Jordan, Chairman



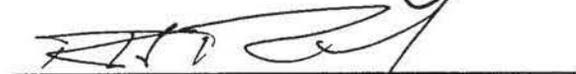
Marc Lincoln Marks, Commissioner



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner



Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 1, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 95-434-M
	:	WEST 95-467-M
NEWMONT GOLD COMPANY	:	

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

ORDER

BY THE COMMISSION:

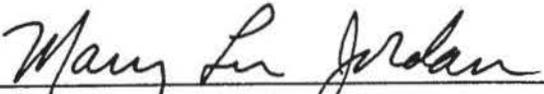
These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On December 8, 1997, the Commission granted a petition for discretionary review filed by Newmont Gold Company (“Newmont”) challenging the decision of Administrative Law Judge Richard W. Manning in which he affirmed citations and orders issued to Newmont and assessed a total of \$1,800 in civil penalties. 19 FMSHRC 1730 (Oct. 1997) (ALJ).

On May 12, 1999, Newmont filed a motion to dismiss its appeal in these proceedings, stating that the parties had reached a settlement and that the Secretary of Labor agrees to this motion. Mot. at 1. As part of the settlement agreement, which was attached to the motion, Newmont agreed to withdraw its appeal of these proceedings. Settlement at 1. The motion specifies that each party will bear its own costs and fees in these proceedings. Mot. at 2. The terms of the settlement agreement disturb neither the holdings of the judge nor the penalties he assessed.

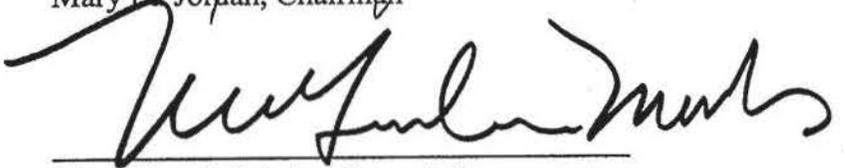
We conclude that the motion to dismiss and the settlement agreement effect a voluntary dismissal pursuant to Fed. R. App. P. 42(b).¹ See 29 C.F.R. § 2700.1(b) (providing that Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure shall apply “so far as

¹ Fed. R. App. P. 42(b) provides in part that “[a]n appeal may be dismissed on the appellant’s motion on terms agreed to by the parties or fixed by the court.”

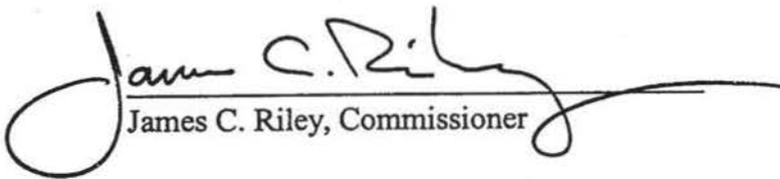
practicable" in absence of applicable Commission rules). Upon consideration of the motion to dismiss the appeal, we grant it. *See Bridger Coal Co.*, 17 FMSHRC 270 (Mar. 1995) (granting motion for voluntary dismissal of petition pursuant to Fed. R. App. P. 42(b)). Accordingly, the Commission's direction for review in these matters is vacated and Newmont's appeal is dismissed.



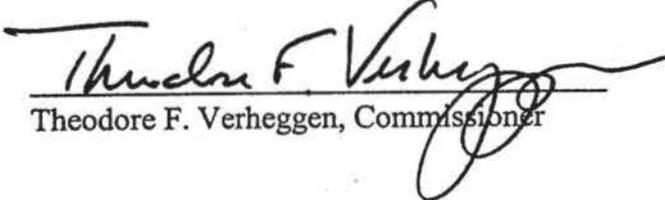
Mary Lu Jordan, Chairman



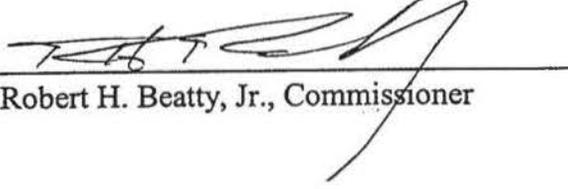
Marc Lincoln Marks, Commissioner



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner



Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 11, 1999

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

v.

HARVEY TRUCKING

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Docket No. WEVA 99-87
A.C. No. 46-08589-03502

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

ORDER

BY: Jordan, Chairman; Riley and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 25, 1997, the Commission received from Harvey Trucking 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). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Harvey Trucking.

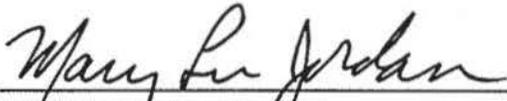
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

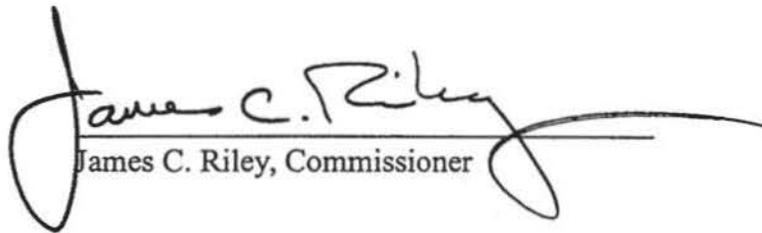
Harvey Trucking asserts that it first learned of the order against it when it "received a final order for \$2,000.00" Mot. Upon subsequent investigation, the operator was informed that two notices had been sent to the operator's address, but had been returned to sender after 10 days. *Id.* It is unclear from the record why service upon Harvey Trucking was unsuccessful, and why the operator did not receive the proposed penalty assessment. Harvey Trucking requests the

Commission to reopen this matter.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Gary Klinefelter*, 19 FMSHRC 827, 828 (May 1997) (remanding for determination of whether relief from final order warranted where unclear why subject of section 110(c) investigation did not receive proposed penalty); *Waste Coal Management, Inc.*, 14 FMSHRC 423, 423-24 (Mar. 1992) (remanding where default order sent by certified mail may not have been received by operator). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

On the basis of the present record, we are unable to evaluate the merits of Harvey Trucking's position.¹ In the interest of justice, we remand the matter for assignment to a judge to determine whether Harvey Trucking has met the criteria for relief under Rule 60(b). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


James C. Riley, Commissioner

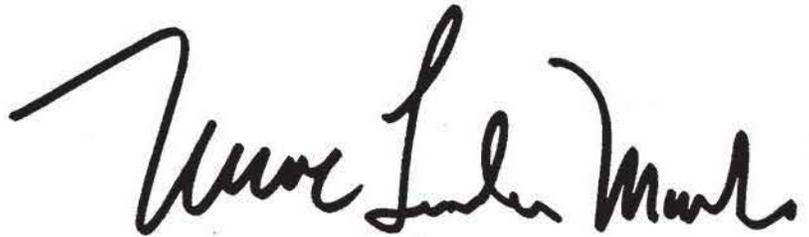

Robert H. Beatty, Jr., Commissioner

¹ Unlike our dissenting colleagues (slip op. at 4), we find this case to be distinguishable from *Roger Richardson*, 20 FMSHRC 1259, 1260 (Nov. 1998). In *Richardson*, the Commission concluded that an individual did not "receive" the Secretary's penalty proposal within the meaning of section 105(a) of the Act under circumstances in which the penalty proposal was sent to Richardson's former address and Richardson was not required to inform the Department of Labor, Mine Safety and Health Administration ("MSHA"), of his change of address under 30 C.F.R. § 41.12. *Id.* at 1260. In contrast, Harvey Trucking is required to inform MSHA of any change of address under section 41.12. The Commission has previously denied an operator's request to reopen a final order where the operator failed in that responsibility. *Pit*, 16 FMSHRC 2033, 2034 (Oct. 1994). Here, we are unable to evaluate from the record whether Harvey Trucking maintained its correct address with MSHA or whether MSHA mailed the Secretary's penalty proposal to the address submitted by Harvey Trucking pursuant to section 41.12.

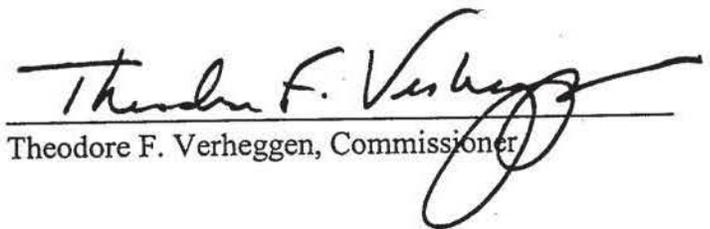
Commissioners Marks and Verheggen, dissenting:

Harvey Trucking has alleged that it never received any penalty proposals. An MSHA representative also apparently stated that two proposals were mailed to Harvey Trucking, but were both returned to MSHA. The Secretary has not disputed any of the facts set forth in Harvey Trucking's motion, and, in fact, does not oppose the motion.

We conclude that Harvey Trucking did not "receive" the Secretary's penalty proposal within the meaning of section 105(a) of the Mine Act and the Commission's Procedural Rules before he received the final order. *Roger Richardson*, 20 FMSHRC 1259, 1260 (Nov. 1998). Under these circumstances, remanding this matter to the judge for considering whether Harvey Trucking has met the criteria for relief under Rule 60(b) is not necessary. We would reopen the matter, and remand it for assignment to a judge so that the case could proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R., Part 2700.



Marc Lincoln Marks, Commissioner



Theodore F. Verheggen, Commissioner

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I.

Factual and Procedural Background

Kaczmarczyk began working for Reading in 1976 at its Maple Hill/Ellangowan coal mine in Pennsylvania. Tr. 12-13. As a result of injuring his back at work in 1989, he stopped working and was placed on workers' compensation. 20 FMSHRC at 398; S. Ex. 4 at 19, 37-44. In January 1992, he presented Reading with a report from Dr. Keith R. Kuhlengel, his personal physician and a neurosurgery specialist, stating that he was able to return to work on a trial basis. 20 FMSHRC at 398; S. Exs. 26 & 29. At Reading's request, a second physician, Dr. Robert Gunderson, also examined Kaczmarczyk and determined he was able to work. 20 FMSHRC at 398; S. Ex. 30. He returned to work in January 1992 as an electrician on Reading's light duty program.² 20 FMSHRC at 398.

From June to September 1995, Kaczmarczyk drove a haul truck and a water truck on an irregular basis. *Id.* at 399. In July and August 1995, he reported a number of health and safety problems to Reading concerning the company's trucks and pumphouse. *Id.* at 406-07. On September 13, 1995, Kaczmarczyk was told by Frank Derrick, Reading's general manager, to pick up garbage in an area that included an incline, but he refused because he believed it was unsafe. *Id.* at 407; Tr. 124-25, 218-19.

In late September 1995, Kaczmarczyk re-injured his back and was again placed on workers' compensation. 20 FMSHRC at 405 n.3, 411. On December 20, Dr. Kuhlengel issued a report that Kaczmarczyk could return to work provided his job did not involve bending, squatting, twisting, pushing, pulling, crawling, climbing, kneeling, or overhead work. *Id.* at 400. He also stated that Kaczmarczyk should not lift or carry over 10 pounds. *Id.* A copy of the report was given to Reading. Tr. 165-66. On June 5, 1996, Dr. Kuhlengel evaluated Kaczmarczyk and determined that he could return to work, but restricted him from lifting more than 10 pounds, doing overhead work, and bending, pushing, or pulling. 20 FMSHRC at 410-11; S. Ex. 12 at 2. A copy of the evaluation was sent to Reading. 20 FMSHRC at 410.

On June 24, Reading posted a water truck driver position and Kaczmarczyk applied for it. S. Ex. 8; Tr. 351-53. Under the Contract, such posted positions at Reading are awarded to the most senior and qualified employee who applies. 20 FMSHRC at 400-01; Tr. 435-36; S. Ex. 4 at 85. The position was awarded to a more senior driver and Kaczmarczyk did not dispute the award. Tr. 351-53. On September 25, Dr. Kuhlengel sent Reading a letter repeating the restrictions he recommended on June 5 but adding that Kaczmarczyk was able to drive a truck with an air seat. 20 FMSHRC at 400; S. Ex. 13.

² According to the collective bargaining agreement covering Reading's employees (the "Contract"), the light duty program involves work "in which occupations [sic] hazards, lifting of weight and exposure to extremes of temperature, dampness and dust are substantially less than those of the job held by the Miner at the time of his disabling accident" S. Ex. 4 at 37-38.

On October 8, 1996, Reading posted an opening for a temporary haul truck driver position and Kaczmarczyk applied for it. S. Ex. 25. On October 16, Reading awarded the position to another employee even though Kaczmarczyk was the most senior applicant. 20 FMSHRC at 401; Tr. 16. Later that day, pursuant to the Contract, Kaczmarczyk had a Step 1 grievance meeting with Reading to appeal its decision not to award him the haul truck job. Jt. Ex. 1; R. Ex. 3.

At a Step 2 grievance meeting on November 6, Kaczmarczyk told Reading that he had a doctor's authorization to work as a truck driver. 20 FMSHRC at 402. On November 11, Kaczmarczyk filed a complaint with MSHA claiming that Reading discriminated against him when it did not award him the haul truck position. Compl. at 6. On November 13, Dr. Kuhlengel issued a report stating that "[a]s long as the [truck driver] position is within the stated restrictions, [Kaczmarczyk] should be able to perform that job. His restrictions continue to be no overhead working as well as a 10-pound lifting restriction. He should not be bending, squatting, twisting, pulling, crawling, or climbing." S. Ex. 14 at 2. At a Step 3 grievance meeting on November 14, Kaczmarczyk and Jay Berger, a United Mine Workers of America representative, informed Reading that Dr. Kuhlengel had released Kaczmarczyk to drive a haul truck. 20 FMSHRC at 402. At the meeting, Kaczmarczyk asked Reading to prepare a job analysis of the haul truck position. *Id.* at 403.

On December 27, Derrick sent a letter to Berger stating that Kaczmarczyk was not awarded the position because of his medical restrictions. S. Ex. 21. Following a request for clarification from Kaczmarczyk (20 FMSHRC at 403), Dr. Kuhlengel sent a letter to him on January 19, 1997, stating that "you are able to drive a truck with an air seat. You would not be able to load and unload . . . a freight truck because that obviously would require pushing, pulling, carrying, climbing and twisting, which will aggravate your spinal condition." S. Ex. 15. Kaczmarczyk gave a copy of the letter to Reading. Tr. 376.

At Berger's request, Dr. Kuhlengel sent Berger a letter on February 10, stating that Kaczmarczyk's condition would not prevent him from climbing several steps to a truck cab. 20 FMSHRC at 403; S. Ex. 7. He added that Kaczmarczyk could check the truck's fluid levels and that he should keep "bending, squatting, twisting, pushing, pulling, crawling, climbing and kneeling . . . to less than 15 minutes total in an 8-hour day." S. Ex. 7.

At a Step 4 grievance meeting on February 11, Berger gave Derrick a copy of Dr. Kuhlengel's February 10 letter. 20 FMSHRC at 403; Tr. 392. On February 24, Reading sent a job analysis of the haul truck position (the "haul truck job analysis") to Dr. Kuhlengel, who issued a report on March 7 indicating that Kaczmarczyk's physical restrictions did not prevent him from working as a haul truck driver. 20 FMSHRC at 404. On that same day, Reading informed Kaczmarczyk by letter that he should make arrangements to return to work. *Id.*; R. Ex. 4.

On March 10, 1997, Reading called Kaczmarczyk to tell him to report to work as a haul truck driver. 20 FMSHRC at 404; Tr. 207. When he went to the mine a half hour after the call, he was told that the haul truck driver position no longer existed because of the completion of a new conveyor belt system on March 2. 20 FMSHRC at 404; Tr. 376. Upon learning that the haul truck driver position was not available, Kaczmarczyk requested a job analysis of the position of water truck driver, apparently with a view to bumping into that position. Tr. 182, 276, 380-81. On March 13, Reading completed its job analysis of the water truck position and sent it to CRA Managed Care, Inc. ("CRA"),³ which forwarded it to Dr. Kuhlengel on April 9. 20 FMSHRC at 401, 405. The job analysis indicated that the water truck position involved similar physical demands as the haul truck position but in addition required climbing eight times a shift, standing for a total of one hour, walking a total of one hour, and turning a water valve. *Id.* at 405; S. Ex. 20. Dr. Kuhlengel issued a report on May 16 stating that Kaczmarczyk was physically able to drive a water truck. 20 FMSHRC at 405. On May 19, Kaczmarczyk returned to work at Reading as a water truck driver. *Id.*

Kaczmarczyk's discrimination complaint concerning the haul truck position proceeded to hearing on November 18 and 19, 1997. During the hearing, the judge amended the complaint, at the Secretary's request and Reading's agreement, to include a second adverse action covering Reading's alleged delay in awarding Kaczmarczyk the position of water truck driver. Tr. 32-39.

The judge held that Reading did not discriminate against Kaczmarczyk in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). 20 FMSHRC at 411. He found that Kaczmarczyk engaged in protected activity when he reported health and safety problems to Reading during July and August 1995, and that Reading took adverse actions toward Kaczmarczyk when it rejected him for the temporary haul truck job and delayed awarding him the water truck job. *Id.* at 406-07. The judge found that the Secretary established a prima facie case of discrimination by showing some discriminatory intent by Reading when it took these adverse actions against Kaczmarczyk. *Id.* at 409-410. However, based on Kaczmarczyk's medical restrictions, the judge determined that Reading would have rejected him for the haul truck position in any event for the legitimate business reason that Kaczmarczyk could not meet the physical requirements of the job. *Id.* at 410-11. The judge also found that Reading had a legitimate business reason for obtaining a job analysis of the water truck position because the job was more physically demanding than the haul truck driver position. *Id.* at 411. Accordingly, the judge determined that Reading established its affirmative defense by proving it would have taken the adverse actions solely for legitimate business reasons related to Kaczmarczyk's inability to perform the physical demands of the jobs. *Id.*

³ CRA is Reading's contracted managed care consultant with respect to workers' compensation claims. Tr. 14.

II.

Disposition

The Secretary argues that the judge erred in finding that Reading did not violate section 105(c). S. PDR at 1-2.⁴ She asserts that he incorrectly applied a “not unreasonable” standard when analyzing Reading’s affirmative defense instead of determining whether Reading proved it would have acted as it did for nondiscriminatory reasons alone. *Id.* at 8-12. The Secretary argues that the judge failed to place the burden of persuasion on Reading to establish its affirmative defense. *Id.* at 12 n.3. She contends that the judge’s conclusion that Reading established its affirmative defense is not supported by substantial evidence. *Id.* at 20-27. She also argues that the judge failed to consider relevant evidence concerning Reading’s delay in completing the haul truck job analysis and its failure to pursue alternatives, such as contacting Kaczmarczyk’s doctor to clarify his restrictions. *Id.* at 12-19. The Secretary requests that the Commission reverse the judge’s decision and remand the case for determination of damages and assessment of an appropriate civil penalty. *Id.* at 27.

Reading responds that the judge applied the correct standard to its affirmative defense by determining that it would have carried out the adverse actions for nondiscriminatory reasons alone. R. Br. at 6-9. It argues that the judge compared Kaczmarczyk’s restrictions with the physical requirements of the haul truck job and concluded correctly that, at the time the job was posted, Kaczmarczyk could not meet the physical demands of the job. *Id.* at 13-16. Reading asserts that the judge correctly found that it did not discriminate against Kaczmarczyk by performing a job analysis of the water truck position because Kaczmarczyk requested the job analysis. *Id.* at 16-17. In addition, the operator contends that the judge considered all the relevant evidence in the record. *Id.* at 9-13. Reading requests that the Commission affirm the judge’s determination. *Id.* at 17.

A. Whether the Judge Applied the Correct Legal Standard

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in

⁴ Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), the Secretary and Kaczmarczyk designated the Secretary’s petition as their opening brief.

no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test). On these issues, the operator bears the ultimate burden of persuasion. *Pasula*, 2 FMSHRC at 2800.

Here, at issue is whether the judge, having found a prima facie case of discrimination by Reading, used the correct legal standard when examining Reading's affirmative defense. We conclude that he did. Concerning the haul truck position, the judge found that Reading had "a legitimate business concern . . . that Kaczmarczyk be physically capable of operating a haul truck." 20 FMSHRC at 410. Similarly, with respect to the water truck position, the judge found that Reading had a "legitimate concern" whether Kaczmarczyk could perform the job. *Id.* at 411. The judge concluded that Reading would have taken the adverse actions for legitimate nondiscriminatory business reasons alone. *Id.*

We do not agree with the Secretary's argument that the judge erred by basing his analysis on whether Reading's adverse actions were reasonable business decisions rather than on whether it would have acted as it did for nondiscriminatory reasons alone. Although the judge stated that Reading's business concerns were "not unreasonable," his conclusion that it would have taken the adverse actions solely for legitimate business reasons is faithful to *Pasula-Robinette*. *Id.* at 410-11.

We also do not agree with the Secretary's argument that the judge failed to shift the burden of persuasion to Reading in his analysis of its affirmative defense. S. PDR at 12 n.3. The judge's statements that "Reading has established its affirmative defense" and "Reading has established that the adverse actions complained of would have been taken . . . based solely upon" nondiscriminatory grounds show that he properly placed the burden of persuasion on Reading. 20 FMSHRC at 410-11.

B. Whether Substantial Evidence Supports the Judge's Finding that Reading Established an Affirmative Defense

1. Haul Truck Driver Position

In determining whether substantial evidence⁵ supports the judge's finding that Reading established an affirmative defense for failing to award Kaczmarczyk the haul truck job, we examine two subsidiary issues: first, whether the judge failed to consider evidence that Reading delayed the haul truck job analysis and failed to pursue other alternatives in order to avoid awarding the job to Kaczmarczyk; and second, whether there is sufficient evidence in the record to support the judge's finding that Reading prevailed on its affirmative defense. Contrary to the Secretary's assertions, the judge's decision indicates that he did consider the Secretary's arguments. He stated that he took into account the Secretary's claim "that the only motive was one of retaliation as set forth in pages 9-25 of [her] brief," which included her assertion that Reading purposefully delayed offering Kaczmarczyk the haul truck position and failed to pursue alternatives such as contacting his doctor. 20 FMSHRC at 410; S. Post-hearing Br. at 9-25. The judge noted the Secretary's position that pretext was shown by evidence that it took Reading four months to contact Dr. Kuhlengel following Kaczmarczyk and Berger's request to do so. 20 FMSHRC at 410. The delay in contacting Dr. Kuhlengel and the delay in creating a job analysis are closely related because Reading had to contact Dr. Kuhlengel in order to complete the job analysis. *Id.* at 404; Tr. 59-60.⁶ In terms of Reading's obligations to pursue alternatives, the judge found that Reading was not obligated by previous practice or the Contract to contact Kaczmarczyk's doctor or make referrals to other doctors.⁷ 20 FMSHRC at 402. Moreover, the

⁵ When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

⁶ In the "Findings of Fact" section of his decision, the judge described the events and dates surrounding Reading's rejection of Kaczmarczyk for the haul truck position, Kaczmarczyk's request to Reading for a job analysis of the position, and Reading's issuance of the job analysis. 20 FMSHRC at 400-04.

⁷ We disagree with our dissenting colleague's argument that Reading's affirmative defense should be rejected on the ground that, contrary to established practice, Reading did not require Kaczmarczyk to obtain a second medical opinion regarding his ability to perform the haul

judge went on to state: "I have considered all of these arguments, as well as the balance of the Secretary's arguments as set forth in the post hearing brief. For the reasons that follows [sic], I conclude that Reading has established its affirmative defense, and I reject the Secretary's arguments." 20 FMSHRC at 410.

Commission Procedural Rule 69(a) requires that a Commission judge's decision "shall include all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." 29 C.F.R. § 2700.69(a). We thus have held that a judge must analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994). However, the Commission has also stated that "[i]t is within a judge's discretion to sift through the testimony presented and to base his decision on that which he deems to be credible, relevant and dispositive of the issues before him." *Damron v. Reynolds Metal Co.*, 13 FMSHRC 535, 542 (Apr. 1991). The judge explicitly, albeit summarily, considered the Secretary's arguments and rejected them. He then set forth his rationale for holding that Reading established an affirmative defense, relying on Kaczmarczyk's physical restrictions and the physical requirements of the jobs. 20 FMSHRC at 410-11. By explaining in detail his analysis of other evidence that led him to find that Reading established its affirmative defense, the judge complied with Rule 69(a).

truck driver duties. Slip op. at 15-16; Tr. 465. The dissent claims that this treatment compares unfavorably to the "past procedure of having Kaczmarczyk independently evaluated." Slip op. at 16. In fact, the record reveals only two other distinguishable instances when Kaczmarczyk provided medical releases, and does not establish the existence of any definitive procedure regarding the necessity for obtaining second opinions. One incident involved Kaczmarczyk's presentation of a medical release for an electrician's job in 1992, before he engaged in protected activities, but it is unclear whether the medical restrictions in that release were relevant to the job. S. Ex. 29. A second opinion was obtained. S. Ex. 30. The other incident involved Kaczmarczyk's request to perform overtime work in 1995, after he had engaged in protected activity, when he provided Reading with a doctor's report stating that he could work overtime. S. Ex. 26. Reading then asked for a second medical opinion — to *confirm* that he could work overtime. S. Ex. 10. In contrast, when he applied for the haul truck position in 1996, the first doctor's report did not state that he could perform that job — instead, it included relevant restrictions. Consequently, there was nothing for a second doctor to confirm. Thus, Kaczmarczyk's situation in 1996 was simply not comparable to that of 1995.

The dissent also contends that Reading's affirmative defense was suspect because, contrary to established practice, Derrick did not consult with Rick Muntone, one of Reading's accountants (Tr. 260-61), and Dave Wolfe, Reading's safety director (Tr. 133-34), about Kaczmarczyk's application for the haul truck position. Slip op. at 15-16. However, the record is not clear on this issue because Derrick testified that he did consult with Muntone and Wolfe, but Muntone testified that he was not consulted by Derrick. Tr. 150-51; 263-64. The judge made no finding as to whether or not Derrick did consult with co-workers regarding Kaczmarczyk's application.

Next, we turn to the Secretary's argument that substantial evidence does not support the judge's conclusion that Reading established its affirmative defense. We find that substantial evidence supports the judge's determination that Reading would have rejected Kaczmarczyk for the haul truck position based solely on the nondiscriminatory reason that he could not meet the physical requirements of the job.⁸

The judge correctly found that Kaczmarczyk was subject to bending restrictions when he was rejected for the haul truck position. The judge noted that Dr. Kuhlengel's reports of December 20, 1995, June 5, 1996, and September 25, 1996, stated that Kaczmarczyk was restricted from bending. 20 FMSHRC at 410-11. He also noted that the haul truck job analysis included bending and he accepted Derrick's testimony that the job required it. *Id.* at 401, 410-11. The judge also found that "[a] miner must bend to perform the preshift inspection and to check fluids on the haul trucks." *Id.* at 401. He gave little weight to Kaczmarczyk's testimony that fluid checks do not require bending, as Kaczmarczyk had not performed such checks. *Id.* He also discredited Kaczmarczyk's claim that only mechanics and not drivers performed pre-inspections and fluid checks on the haul trucks.⁹ *Id.*

A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). We find no basis for overturning the judge's refusal to grant much significance to Kaczmarczyk's testimony that the fluid checks did not require bending and that only mechanics performed the pre-inspections and fluid checks on the haul trucks. We find that Kaczmarczyk's bending restrictions and the haul truck job's

⁸ We disagree with our dissenting colleague's assertion (slip op. at 13) that we have overlooked evidence of Kaczmarczyk's past safety activity and the fact that the Commission determined, in a different case, that Reading discriminated against Kaczmarczyk in violation of section 105(c) because of his protected safety activity. *See Secretary of Labor on behalf of Kaczmarczyk v. Reading Anthracite Co.*, 17 FMSHRC 784, 785 (May 1995) (ALJ). These matters were appropriately considered by the judge when he found a prima facie case of discrimination by Reading (20 FMSHRC at 406-10), which Reading does not challenge on review. The issue on review, however, is whether substantial evidence supports the judge's conclusion that Reading established an affirmative defense by showing that it would have acted as it did notwithstanding Kaczmarczyk's protected activities.

⁹ Derrick and Berger's testimony and the haul truck job analysis indicate that the position involved pre-shift inspections and fluid checks. Tr. 120-21, 138-41; S. Ex. 19.

bending requirements support the judge's finding that Reading would have rejected Kaczmarczyk for the legitimate business reason that he could not meet the physical requirements of the job.

The judge's conclusion that Reading established its affirmative defense is further supported by the record evidence on overhead work and lifting. The judge noted that the June 5, 1996 medical report stated that Kaczmarczyk was restricted from doing overhead work and lifting and that the haul truck job analysis indicated that the position required lifting above the shoulder level.¹⁰ 20 FMSHRC at 410-11; S. Ex. 19 at 2. Based in part on the evidence concerning overhead work and lifting, the judge found that it was reasonable for Reading to conclude in October 1996 that Kaczmarczyk could not perform the duties of the haul truck job. 20 FMSHRC at 410-11.

In addition, the judge found that the June 5 and September 25, 1996 medical reports about Kaczmarczyk listed pushing and pulling restrictions. *Id.* at 400, 410-11. Although he failed to note that the haul truck job analysis included pushing and pulling requirements (*see* S. Ex. 19 at 1-3), those requirements provide further support for the judge's finding that Reading would have rejected Kaczmarczyk for the haul truck position for the legitimate business reason that he could not meet the physical requirements of the job.¹¹

In sum, we find that Kaczmarczyk's restrictions on bending, overhead work, lifting, pushing, and pulling provide substantial evidence to support the judge's finding that Reading established its affirmative defense that it would have taken the same action concerning the haul truck position based solely on legitimate business reasons.

¹⁰ The haul truck job analysis rated the requirement to reach above the shoulder as 20% of the haul truck job. S. Ex. 19 at 2. The job analysis stated that the position required lifting a 15 pound bucket of antifreeze above the shoulders but that such lifting could be avoided by using a rope to pull the bucket onto the truck. *Id.* at 2, 3.

¹¹ The Secretary argues that the judge erred in finding that Kaczmarczyk was subject to climbing and squatting restrictions when he was rejected for the haul truck position. S. PDR at 20-22. The record evidence as a whole is not conclusive on this issue. When Kaczmarczyk was rejected for the haul truck position in October 1996, his two latest medical reports (the June 5 and September 25, 1996 reports) did not mention climbing or squatting restrictions. S. Exs. 12, 13. However, an earlier December 20, 1995 report and two reports after his transfer (the November 13, 1996 and January 19, 1997 reports) contained climbing and squatting restrictions. S. Exs. 11, 14, 15. Even if the judge erred concerning Kaczmarczyk's climbing and squatting restrictions, these errors would be harmless because the record provides other evidence, i.e., Kaczmarczyk's bending, overhead work, lifting, pushing, and pulling restrictions, that supports the judge's finding that Reading would have rejected Kaczmarczyk for the haul truck position for the legitimate business reason that he could not meet the physical requirements of the job.

2. Water Truck Driver Position

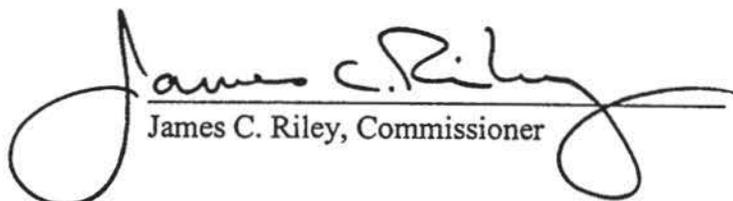
When Reading carried out a job analysis of the water truck position in March 1997, Kaczmarczyk's latest medical report, dated February 10, 1997, stated that he could drive a truck and climb up to a truck cab, but that "bending, squatting, twisting, pushing, pulling, crawling, climbing and kneeling should be restricted to less than 15 minutes total in an 8-hour day." S. Ex. 7. The water truck job involved greater physical demands than the haul truck job, such as more climbing, walking, and standing, and turning a water valve. 20 FMSHRC at 411; Tr. 273, 339-46. Thus, we find that substantial evidence supports the judge's conclusion that, given Kaczmarczyk's numerous medical restrictions and the increased physical demands of the water truck job, it was not unreasonable for Reading to carry out the job analysis to determine if he could perform the water truck job. 20 FMSHRC at 411. Moreover, as Reading notes, Kaczmarczyk himself requested the analysis. R. Br. at 16. We also find that substantial evidence supports the judge's rejection of the Secretary's argument that Reading discriminated against Kaczmarczyk by delaying the job analysis. 20 FMSHRC at 411; S. PDR at 25-27. Reading completed the job analysis and sent it to CRA on March 13, 1997, just a few days after Kaczmarczyk showed an interest in the position. 20 FMSHRC at 405. CRA then sent it to Dr. Kuhlengel on April 9, 1997, who approved and returned it to Reading on May 16, 1997. *Id.* Kaczmarczyk returned to work as a water truck driver on May 19, 1997. *Id.* Thus, the record evidence indicates that the two month delay in finalizing the job analysis was due to delays by CRA and Dr. Kuhlengel, not Reading. Accordingly, we affirm, on substantial evidence grounds, the judge's decision that Reading established its affirmative defense to the discrimination claim regarding the delay in awarding Kaczmarczyk the water truck position.

III.

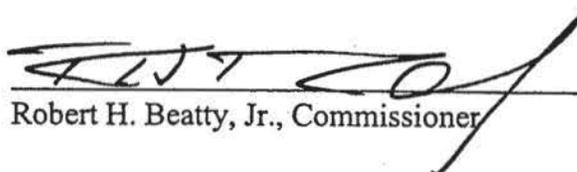
Conclusion

For the foregoing reasons, we affirm the judge's determination that Reading did not violate section 105(c).


Mary Lu Jordan, Chairman


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner


Robert H. Beatty, Jr., Commissioner

Commissioner Marks, dissenting:

This case turns upon the issue of whether Reading successfully established an affirmative defense to the judge's adjudication of a prima facie case of discrimination. Because I conclude that the record compels the conclusion that Reading did not establish such an affirmative defense, I dissent.

The majority has overlooked a very significant fact in this case, that is — the record establishes that, by the time William Kaczmarczyk tried to obtain the truck driver positions at issue, he had a history of safety activism which was met with antagonism by the management at the Reading mine. In 1993, Kaczmarczyk was the treasurer of Local 7226 of the United Mine Workers of America (UMWA). *Secretary of Labor on behalf of Kaczmarczyk v. Reading Anthracite Co.*, 17 FMSHRC 784, 785 (May 1995) (ALJ, Amchan). He was also a mine committeeman and the safetyman for his local union, which represented Reading's employees. *Id.* On May 24, 1995, a Commission administrative law judge, in a different case not at issue here, determined that Reading discriminated against Kaczmarczyk in violation of section 105(c) of the Mine Act because of his activities as a walkaround representative for an MSHA inspection. *Id.* at 784, 797. The judge there permanently reinstated Kaczmarczyk (*id.* at 798) and Kaczmarczyk drove haul and water trucks for Reading on an irregular basis. 20 FMSHRC at 399. Just months after he was reinstated, between July and September 1995, Kaczmarczyk made a number of safety complaints, to which the parties stipulated and the judge in this case found were protected activities under the Mine Act. *Id.* at 406-07. Kaczmarczyk's extensive protected activity serves as an integral backdrop for his current discrimination complaint against Reading.

This case involves Kaczmarczyk's attempt to return to active duty work at Reading in October of 1996, after he injured his back in September of 1995. *Id.* at 400-01, 405 n.3. Here, the judge determined that the Secretary established a prima facie case of discrimination when it awarded the haul truck driver position to a less senior miner than Kaczmarczyk. *Id.* at 409-10. In particular, the judge found that Reading had "animus toward the protected activities" of Kaczmarczyk, as exhibited by the personal statements made by the General Manager of Reading, Frank Derrick, to Kaczmarczyk. *Id.* at 409; Tr. 124-25. Upon a finding of prima facie case of discrimination, it became incumbent upon the operator to establish an affirmative defense. *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). In *Secretary of Labor on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521 (Aug. 1990), the Commission explained:

[A]n operator proves an affirmative defense pursuant to the *Pasula-Robinette* test if it shows that (1) it was also motivated by the miner's unprotected activities, and (2) would have taken the adverse action in any event for the unprotected activities alone. The operator must prove that it would have disciplined the miner

anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee As a corollary to these principles, it follows that an operator does not establish a *Pasula-Robinette* affirmative defense if a work rule or policy that the miner is alleged to have violated, was applied discriminatorily to the miner or in a manner deliberately calculated to render his compliance difficult or impossible. In such cases, the claimed "independent" basis for discipline is actually an extension of the operator's discriminatory conduct. Further, pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices.

12 FMSHRC at 1534 (citations and internal quotations omitted).

There is one disturbing and undisputed fact in this case that sheds significant doubt on Reading's asserted justifications for its delay in awarding a haul truck driver position to Kaczmarczyk. On March 10, 1997, approximately five months after Kaczmarczyk bid on the truck job, Reading called Kaczmarczyk and asked him to report to work. 20 FMSHRC at 404. He arrived a half hour later and was told that there was no position available. *Id.* Why would the company call him into work and then provide him with no position? Neither the Judge nor the majority answers this compelling question or even discusses its relevance. Because of this alarming fact, I am led to the conclusion that Reading's asserted business justification was nothing more than a pretext for discriminating against a miner with a history of safety activism at the mine.

The Secretary asserts that Reading waited to resolve Kaczmarczyk's dispute until the position was effectively eliminated. I cannot help but agree. General Manager Derrick testified that he was aware that the new conveyor system, that was to replace the haul truck drivers, would be operational by March of 1997. *Id.*; Tr. 211. Therefore, all Reading needed to do to keep Kaczmarczyk out of active duty was to delay the grievance procedure until after the position was no longer available. From a review of the record, that is exactly what happened.

On September 25, 1996, Kaczmarczyk's doctor, Dr. Kuhlengel, sent a letter to Reading permitting Kaczmarczyk to drive a truck with an air seat and repeating the restrictions he recommended in an earlier letter sent on June 5, 1996.¹ 20 FMSHRC at 400; S. Ex. 13.

¹ On June 5, 1996, Kaczmarczyk's doctor, Dr. Kuhlengel evaluated Kaczmarczyk and determined that he could return to work, but restricted him from lifting more than 10 pounds, doing overhead work, and bending, pushing, or pulling. 20 FMSHRC at 410. A copy of the evaluation was sent to Reading. *Id.*

Kaczmarczyk gave the letter to Reading. 20 FMSHRC at 400. On October 8, 1996, Reading posted an opening for a temporary haul truck driver position and Kaczmarczyk applied for it. S. Ex. 25. On October 16, Reading awarded the position to another employee even though Kaczmarczyk was the most senior applicant. 20 FMSHRC at 401; Tr, 16. Under the Contract, such posted positions at Reading are awarded to the most senior and qualified employee who applies. 20 FMSHRC at 400-01.

After learning that he was not awarded the position, on October 16, 1996, Kaczmarczyk had a Step 1 grievance meeting with Reading to appeal its decision not to award him the haul truck job. Jt. Ex. 1; R. Ex. 3. Step 2 and Step 3 grievance meetings were held on November 6 and November 14, at which Kaczmarczyk claimed that he was permitted to drive a truck as authorized by Dr. Kuhlengel. 20 FMSHRC at 402. At the November 14 meeting, Kaczmarczyk and Jay Berger, a UMWA representative, asked Reading to prepare a job analysis of the haul truck position. *Id.* at 402-03. No response was forthcoming from the company and, on December 4, union representative Berger sent a letter to Derrick, informing him that Kaczmarczyk had a release from his doctor and asking for the reasons why he had been denied the truck driver position. S. Ex. 5. On December 27, six weeks after the Step 3 meeting, Derrick sent a letter in reply to Berger stating that Kaczmarczyk's medical restrictions were the reason for denying him the position. S. Ex. 21. At the Step 4 grievance meeting, on February 11, 1997, Berger gave Derrick a copy of Dr. Kuhlengel's letter that clarified that he could perform other duties associated with truck driving, such as checking truck fluid levels and climbing several steps into the cab. 20 FMSHRC at 403; S. Ex. 7. A job analysis was finally ordered and it was confirmed on March 7 that Kaczmarczyk's physical restrictions did not prevent him from working as a haul truck driver. 20 FMSHRC at 404.

The problem is that by the time Kaczmarczyk was awarded the position, there was no position to be had and the operator forced Kaczmarczyk to start the process all over again resulting in additional delay. Incredibly the judge misses the obvious point — that Reading's delay and offer of a non-existent job was motivated by its discriminatory intention to keep Kaczmarczyk, who Derrick called the "downfall of Reading," (*id.* at 409), out of a job. When enacting the Mine Act, Congress explained that the anti-discrimination provision was intended to protect miners "against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits . . . , but also against the more *subtle* forms of interference." S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 ("*Legis. Hist.*") (emphasis added). Extending a miner an offer of a non-existent job qualifies as the type of subtle discrimination the Mine Act was intended to reach!

In addition to this unexplained empty job offer on March 10, Reading's affirmative defense is further undercut by the evidence that Kaczmarczyk received disparate treatment when he was denied the truck driver position in October of 1996. Although the judge determined that there was "no evidence that Reading was obligated to contact . . . another physician," (20

FMSHRC at 402), the judge seems to have overlooked that, when Kaczmarczyk attempted to re-enter the work force in the past and presented a doctor's release that also contained restrictions, Reading sent him for an independent evaluation from another physician. S. Exs. 26, 27, 29 & 30. However, in October 1996, the company did not follow its past procedure of having Kaczmarczyk independently evaluated.² Further disparate treatment was shown in the way Reading handled the decision to deny Kaczmarczyk the truck driver position. General Manager Derrick testified that normally he would confer with Rick Muntone, who worked with worker's compensation, and safety director Dave Wolfe when considering the bid of an employee with medical restrictions. Tr. 133-34. However, the record revealed that no such conference occurred when it came to Kaczmarczyk's bid for truck driver. Tr. 150-51, 263-64. As the Commission has recognized, pretext may be found, for example where the asserted justification is weak, implausible, or out of line with the operator's normal business practices.³ *Price and Vacha*, 12 FMSHRC at 1534. Given that Kaczmarczyk's rejection was out of line with normal business practice, I am further led to the conclusion that Reading's asserted business justifications were not the sole motivating factor in its decision not to award Kaczmarczyk the truck driver position.⁴

Further, the medical restrictions on which the judge relied are also suspect. I agree with Secretary that the judge erred in finding that Kaczmarczyk was subject to climbing and squatting restrictions when he was rejected for the haul truck position on October 16. S. PDR at 20-22. The judge incorrectly stated that Dr. Kuhlengel's September 25, 1996 report contained "the same restrictions as . . . his report of June 5, 1996, [including] . . . no bending, climbing, or squatting . . ." 20 FMSHRC at 411. The June 5 and September 25 reports, which were the two most

² The majority unsuccessfully attempts to distinguish the company's practice of seeking a second opinion in two prior instances on the grounds that Kaczmarczyk had received releases in the past. Slip op. at 7-8 n.7. The majority overlooks that Dr. Kuhlengel's September 25, 1996 letter stated: "he is able to drive a truck with an air seat." S. Ex. 13. Thus, Kaczmarczyk had a release from his doctor to drive the haul truck.

³ Even though this case turns on whether Reading proved a successful affirmative defense, the judge failed to even meaningfully address the evidence that Reading's rejection of Kaczmarczyk's bid was out of line with its normal business procedures. The majority also recognizes this. Slip op. at 8 n.7. Indeed, the judge's opinion is so seriously deficient in its evaluation of the affirmative defense that it should not be permitted to stand. See *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994) (vacating the judge's conclusion when he failed to make appropriate findings and explain the reasons for his decision).

⁴ In addition, the judge failed to consider other evidence of disparate treatment, which is crucial in evaluating an affirmative defense. The Secretary attempted to put on evidence that Reading performed a job analysis for a truck driver position for a similarly situated Reading employee, at the same time that Kaczmarczyk was trying to be truck driver. However, the judge incorrectly did not see any relevance to the exhibit and refused its admittance. Tr. 191-92.

recent medical reports at the time of Kaczmarczyk's rejection for the position, *contained no restrictions regarding climbing and squatting*. S. Ex. 12, 13. That leaves the restrictions — no bending, no overhead work and no lifting of over 10 pounds — upon which the judge relied. However, as these were minor aspects of the jobs, the restrictions should not have justified outright refusal of the haul truck position. Instead, if Reading had doubts about Kaczmarczyk's capabilities to perform the job, the company should have ordered an immediate job analysis or had Kaczmarczyk independently evaluated as it had done in the past.

As to bending in order to perform pre-shift evaluations, the judge acknowledged "as a result of a grievance, mechanics still service and start the haul trucks." 20 FMSHRC at 401. What the judge failed to realize from this fact is that, even if drivers sometimes checked the fluids, as he found, it was a minor portion of the job. Derrick admitted that mechanics performed the truck servicing jobs, but added "but that doesn't mean that the workers can't do it." Tr. 460-61; *see also* Tr. 120 (Berger testifying that bending to check fluids is an insignificant part of the job). Although the drivers may have sometimes performed the fluid checks, it is hard to imagine that the company would have outright denied Kaczmarczyk the truck driving job because of his bending restriction when, practically speaking, it was an insignificant part of the job. As to lifting and overhead work, the only item that required above the shoulder work was lifting a bucket of anti-freeze once daily. S. Ex. 19 at 2. Dr. Kuhlengel's September 1996 release letter permitted Kaczmarczyk to lift 10 pounds. Thus, as Derrick conceded, Kaczmarczyk could have managed lifting 20 pounds of anti-freeze by simply making two trips of the bucket. Tr. 145-46. The job analysis also stated that above shoulder lifting was not necessary and could be avoided by using a rope to pull the bucket onto the truck. S. Ex. 19 at 2, 3. Because bending and lifting were such small parts of the job and Kaczmarczyk was not subject to climbing and squatting restrictions,⁵ I am led to the conclusion again that Reading's asserted reliance on Kaczmarczyk's medical restrictions was a mere pretext to keep him from returning to work, and was not the sole motivating factor in its denial of the haul truck position.

Given the unexplained March 10 "job" offer, the evidence of disparate treatment, and the weakness of the actual medical restrictions, I am unable to conclude that substantial evidence supports the judge's finding that Reading established an affirmative defense when it denied Kaczmarczyk the haul truck job. Instead, the record compels the conclusion that Reading's asserted justifications were out of line with their business practices and nothing more than a pretext. For this reason, I would reverse the judge's dismissal of the discrimination violation with respect to the haul truck position.

⁵ In affirming the judge's decision that Reading had legitimate business reasons for denying Kaczmarczyk the haul truck driver position, the majority also relies on pushing and pulling restrictions that were listed in Dr. Kuhlengel's 1996 letters. Slip op. at 10. However, the judge never found that pushing or pulling were required components of the haul truck job. 20 FMSHRC at 410. Therefore, those two restrictions are irrelevant to the inquiry of whether Reading had a legitimate basis for denying Kaczmarczyk the truck driver job.

Reading's discriminatory treatment of Kaczmarczyk carried over to the water truck position. On March 7, 1997, Reading received the completed job analysis from Dr. Kuhlengel in which he stated that Kaczmarczyk's physical restrictions did not prevent him from working as a haul truck driver. 20 FMSHRC at 404; S. Ex. 19. It was undisputed that the water truck was only a modified haul truck. 20 FMSHRC at 411; Tr. 188, 271 (testimony of Derrick and Muntone). Furthermore, the reasons that Reading offered, and the judge relied on, to justify a further delay and a second job analysis do not withstand scrutiny when one examines the March 7 job analysis that Reading had in hand. The judge found that operation of the water truck, in contrast to the haul truck, "required climbing eight times a shift, standing a total of [one] hour, and walking a total of an hour." 20 FMSHRC at 411. The March 7 job analysis permitted these activities. S. Ex. 19. The March 7 job analysis provided for climbing 20 percent of the time and standing and walking up to half an hour at any one time without providing a total time restriction in a day. *Id.* Dr. Kuhlengel approved Kaczmarczyk for all of these activities. *Id.* Furthermore, Kaczmarczyk was not restricted from walking and standing in any of the doctor's letters or reports given to Reading in 1996 and 1997. S. Exs. 7, 12, 13, 14, 15. In addition, Dr. Kuhlengel had specifically explained that climbing the steps into a truck cab was permissible in his February 10, 1997 letter. S. Ex. 7.⁶ Therefore, substantial evidence does not support the judge's finding that it was reasonable for Derrick to conclude that Kaczmarczyk's restrictions would have prevented him from driving the water truck.

Further, I reject the majority's reasoning that Kaczmarczyk's request of the job analysis for the water truck job somehow legitimizes the company's decision to order a second job analysis. Slip op. at 11. On March 10, Reading pulled the rug from under Kaczmarczyk's feet by ordering him back to work and, on the very same day, informing him that no positions were available. As the Secretary asserts, Kaczmarczyk had no choice but to ask for a job analysis for any and all available positions, as that seemed the only way that Reading was ever going to consider him for a job. S. Reply Br. at 3. Given the similarities of the two truck driver positions, I conclude that Reading should have arranged for Kaczmarczyk to be a water truck driver in March, not in May after a second job analysis.

Indeed, the record can only support the conclusion that ordering the second job analysis on March 12, when Reading already had a March 7 analysis for basically the same position, was a pretext to further delay Kaczmarczyk's return to active duty. Jt. Ex. 1. I therefore conclude that Reading failed to establish an affirmative defense that it was solely motivated by its asserted medical reasons when it delayed awarding Kaczmarczyk the water truck position.

⁶ In concluding that the water truck job involved allegedly greater physical demands, the majority relies on the act of turning a water valve. Slip op. at 11. The judge however ruled that, with the exception of climbing, standing and walking, "[a]ll other physical demands of these job[s] were the same." 20 FMSHRC at 411. Moreover, the March 7 job analysis covered simple grasping to the right and left, which included the act of turning the water valve. S. Exs. 19, 20. In that analysis, Dr. Kuhlengel approved Kaczmarczyk's continuous participation in activities that required grasping to the right and left. S. Ex. 19.

Congress, when enacting the Mine Act, was “cognizant 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. 95-181, at 35, *Legis. Hist.* at 623. Kaczmarczyk had a history of upholding safety rights under the Mine Act at Reading’s mine. I conclude that Reading would not have refused Kaczmarczyk the haul truck job, stonewalled him through the grievance procedure, offered him a non-existent job and, to add insult to injury, further delayed in awarding him a water truck position, if not for Kaczmarczyk’s safety history and protected activities.⁷

Accordingly, I would reverse the judge’s dismissal of the discrimination complaint, and remand solely for consideration of damages and penalty.



Marc Lincoln Marks, Commissioner

⁷ Unlike the majority’s assertion (slip op. at 9 n.8), the affirmative defense issue is very much tied to the extensiveness of Kaczmarczyk’s protected activities. Much of the evidence pertinent to the affirmative defense, e.g., the non-existent job offer and Kaczmarczyk’s disparate treatment, was simply not evaluated by the judge. After analyzing this overlooked evidence, one cannot help but conclude that Kaczmarczyk’s treatment was inextricably linked to his significant protected activities, and that Reading failed to show that it would have taken the adverse action in any event for unprotected reasons alone.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 21, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. PENN 99-201
	:	A.C. No. 36-05466-04136
CYPRUS EMERALD	:	
RESOURCES CORPORATION	:	

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

ORDER

BY: Jordan, Chairman; Riley, and Verheggen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 18, 1999, the Commission received from Cyprus Emerald Resources Corporation ("Cyprus") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Cyprus.

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

In its motion, Cyprus maintains that it failed to timely file a request for a hearing ("green card") for the proposed penalty associated with Citation No. 7013288 because the proposed penalty was accidentally paid. Mot. at 1-2. The operator submits that it timely filed a notice of contest of the citation, and that the contest proceeding was stayed pending initiation of the associated civil penalty proceeding. *Id.* at 2. Cyprus states that, on March 1, 1999, the proposed assessment for the citation was issued along with other proposed penalties for citations that Cyprus did not intend to contest and that, on March 29, the subject penalty was mistakenly paid.

Id. It states that, on April 30, 1999, the administrative law judge assigned to the contest proceeding issued a show cause order “which suggested that [Cyprus] should move to reopen the penalty assessment if it desired to continue its contest of the citation.” *Id.* at 3. It contends that its payment constitutes “mistake” under Fed. R. Civ. P. 60(b), and requests that the Commission reopen the proposed penalty assessment. *Id.* at 3-4. Cyprus attached to its motion, among other documents, the affidavit of Cyprus’s Safety Manager, which provides that payment of the penalty was a mistake. Ex. 1.

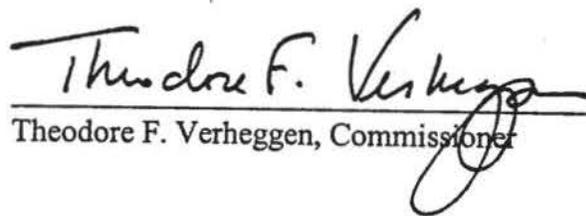
We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-90 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

It appears from the record that Cyprus intended to contest the penalty related to Citation No. 7013288 and that, but for an oversight by the operator, it would likely have returned the green card and contested the proposed penalty assessment. While Cyprus does not deny receiving the proposed assessment, its failure to submit the green card and payment of the proposed assessment can be reasonably found to qualify as “inadvertence” or “mistake” within the meaning of Rule 60(b)(1). *See Stillwater Mining Co.*, 19 FMSHRC 1021, 1023 (June 1997) (holding that failure by Secretary to send the proposed penalty assessment to operator’s counsel and payment by operator amounted to mistake sufficient to reopen penalty).

Accordingly, in the interest of justice, we grant Cyprus's unopposed request for relief and reopen the penalty assessment that became a final order with respect to Citation No. 7013288. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

Commissioner Marks and Commissioner Beatty, dissenting:

On the basis of the present record, we are unable to evaluate the merits of Cyprus's position and would remand the matter for assignment to a judge to determine whether Cyprus has met the criteria for relief under Rule 60(b). *See Tug Valley Coal Processing*, 16 FMSHRC 216, 217 (Feb. 1994) (remanding to judge to determine whether payment of proposed penalty assessment amounted to mistake sufficient to reopen the penalty).



Marc Lincoln Marks, Commissioner



Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 21, 1999

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

v.

GOOD CONSTRUCTION

:
:
:
:
:
:
:

Docket No. WEST 99-263-M
A.C. No. 45-03086-05511

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

ORDER

BY: Jordan, Chairman; Riley, and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 4, 1999, the Commission received from Good Construction 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). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Good Construction.

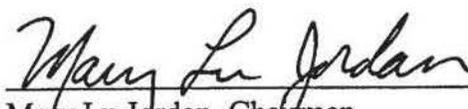
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

In its request, Good Construction maintains that it failed to timely file a request for a hearing ("green card") for the proposed penalty associated with Citation No. 7962496 because it never received the green card. Mot. at 2. The operator submits that the subject citation was one of five citations that it contested, and that the contest proceedings were stayed pending initiation of associated civil penalty proceedings. *Id.* at 1. Good Construction states that civil penalty proceedings were initiated involving four of the citations. *Id.* It explains that, in response to an

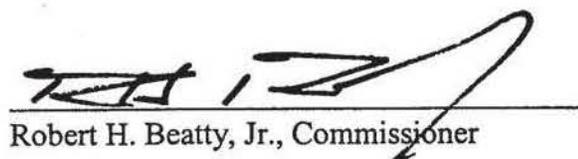
order issued by Administrative Law Judge Richard Manning requesting the status of the proposed penalty assessment relating to the fifth citation, the Secretary responded that she had not yet issued a proposed penalty. *Id.*; Exs. 4, 5. The operator states that, in response to a subsequent order by the judge, Good Construction requested a hearing on the contest proceedings and on the civil penalty proceedings related to the four citations. Mot. at 2; Exs. 6, 7. The operator submits that, on December 7, 1998, a proposed assessment for the fifth citation was mailed to it, but that Good Construction never received it. Mot. at 2. It states that, after it was informed on February 24, 1999 that it was delinquent in paying the penalty, it subsequently corresponded and telephoned the Department of Labor's Mine Safety and Health Administration ("MSHA") regarding the matter. *Id.* Among other documents, the operator attached to its motion a memorandum from MSHA, stating that the penalty petition had been delivered to Good Construction on many occasions, but that it was never claimed by the operator. Ex. 10.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-90 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

On the basis of the present record, we are unable to evaluate the merits of Good Construction's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether Good Construction has met the criteria for relief under Rule 60(b). See *Gary Klinefelter*, 19 FMSHRC 827, 828 (May 1997) (remanding for determination of whether relief from final order warranted where unclear why individual did not receive proposed penalty); *Waste Coal Management, Inc.*, 14 FMSHRC 423, 423-24 (Mar. 1992) (remanding where default order sent by certified mail may not have been received by operator). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


James C. Riley, Commissioner

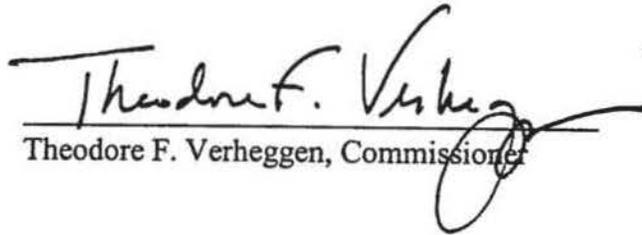

Robert H. Beatty, Jr., Commissioner

Commissioners Marks and Verheggen, dissenting:

Good Construction has alleged that it never received the penalty proposal associated with Citation No. 7962496. Mot. at 2. The Secretary of Labor has not disputed any of the facts set forth in Good Construction's motion, and, in fact, does not oppose the motion. On the basis of the present record, we would grant Good Construction's request for relief. *See Harvey Trucking*, 21 FMSHRC __, slip op. at 4, No. WEVA 99-87 (June 11, 1999) (Commissioners Marks and Verheggen, dissenting).

A large, stylized handwritten signature in black ink, appearing to read "Marc Lincoln Marks".

Marc Lincoln Marks, Commissioner

A handwritten signature in black ink, appearing to read "Theodore F. Verheggen".

Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 21, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 99-90
	:	A.C. No. 46-08702-03507
UNIQUE MINING, INC.	:	

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

ORDER

BY: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 14, 1999, the Commission received from Unique Mining, Inc. ("Unique") a request to reopen four penalty assessments, totaling \$200,000, that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Unique.

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

In its motion, Unique contends that its failure to timely file a hearing request to contest the proposed penalties ("green card") was due to a misfiling by its accounting firm. Mot. at 2. Unique explains that the proposed penalties were related to one citation (Citation No. 7160503) and three orders (Order Nos. 7160505, 4203791, and 4203792) issued to it pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). *Id.* at 1. Unique states that it timely filed notices of contest of the underlying citation and orders, and that the contest proceedings were stayed pending the initiation of the associated civil penalty proceedings. *Id.* It submits that on May 3,

1999, the Department of Labor's Mine Safety and Health Administration ("MSHA") contacted Unique's counsel, and informed her that the proposed penalties had not been paid or contested. *Id.* at 2. Unique contacted its accounting firm, which is responsible for picking up and sorting Unique's mail. *Id.* at 1-2. Unique states that its accounting firm discovered that the proposed penalties had not been entered into its computer system and that the missing green card had mistakenly been attached to an unrelated green card and, therefore, was not visible. *Id.* at 2. Attached to the motion are affidavits by the office manager of Unique's accounting firm and Unique's president, and a copy of the subject green card. Exs. A, B, C.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-90 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *RB Coal Co.*, 17 FMSHRC 1110, 1111 (July 1995).

Here, the record indicates that Unique intended to contest the penalties associated with Citation No. 7160503 and Order Nos. 7160505, 4203791, and 4203792 and that, but for the misfiling by its accounting firm, it would have timely submitted the hearing request and contested the proposed penalty assessments. In these circumstances, Unique's failure to timely file a hearing request reasonably may be found to qualify as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See Kenamerican Resources, Inc.*, 20 FMSHRC 199, 200-01 (Mar. 1998) (reopening proceedings when green card was not timely filed due to operator's internal processing error).

Accordingly, in the interest of justice, we grant Unique's unopposed request for relief and reopen the penalty assessments that became final orders with respect to Citation No. 7160503 and Order Nos. 7160505, 4203791, and 4203792. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Mary Lu Jordan, Chairman



Marc Lincoln Marks, Commissioner



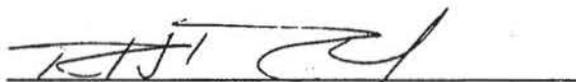
James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner

Commissioner Beatty, dissenting:

On the basis of the present record, I am unable to evaluate the merits of Unique's position and would remand the matter for assignment to a judge to determine whether Unique has met the criteria for relief under Rule 60(b). *See Benton County Stone, Inc.*, 21 FMSHRC 5, 7 (Jan. 1999) (remanding final order when operator misfiled green card).



Robert H. Beatty, Jr., Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 7, 1999

L & T FABRICATION & CONSTRUCTION,	:	EQUAL ACCESS TO JUSTICE
INCORPORATED,	:	PROCEEDINGS
Applicant	:	
v.	:	Docket No. EAJ 99-1
	:	
SECRETARY OF LABOR,	:	Formerly WEST 98-243
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Before: Judge Hodgdon

This case is before me on an Application for Award of Fees and Expenses under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, 29 CFR § 2704.100 *et seq.* L & T Fabrication & Construction, Inc., filed the application against the Secretary's Mine Safety and Health Administration (MSHA) based on the decision of the judge in *L & T Fabrication & Construction, Inc.*, 21 FMSRHC 71 (January 1999) assessing a penalty of \$20,000.00 for a violation for which MSHA had proposed a penalty of \$40,000.00. The applicant contends that the penalty proposed by MSHA was substantially in excess of the penalty assessed by the judge and was unreasonable when compared to the judge's decision. For the reasons set forth below, the application is denied.

Section 504(a)(4), 5 U.S.C. § 504(a)(4), provides that:

If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand of the agency is substantially in excess of the decision of the adjudicative officer and is unreasonable when compared to such decision, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this paragraph shall be paid only as a consequence of appropriations provided in advance.

Section 504(b)(1)(B) defines "party," for the purposes of this case, as a "corporation . . . the net worth of which did not exceed \$7,000,000 at the time the adversary adjudication was initiated."

There is no doubt that L & T qualifies as a "party" under this definition, as its net worth clearly did not exceed \$7,000,000. Therefore, I conclude that the company is eligible to be awarded costs and attorney's fees. However, I find that L & T is not entitled to them.

Section 2704.105(b) of the Commission's EAJA Rules, 29 C.F.R. § 2704.105(b), provides that: "The burden of proof is on the applicant to establish that the Secretary's demand was substantially in excess of the Commission's decision; the Secretary may avoid an award by establishing that the demand was not unreasonable when compared to that decision." L & T has failed to demonstrate that the proposed penalty was substantially in excess of the penalty finally adjudged.

The facts and circumstances of the case are that on August 6, 1997, one of L & T's employees was permanently paralyzed from the neck down as the result of being struck on the head by a 60 to 90 pound section of handrail which fell off of a deck 18.5 feet above him. At the hearing the company did not contest that it violated section 77.203 of the Secretary's mandatory health and safety standards, 30 C.F.R. § 77.203,¹ that the violation was "significant and substantial" and that the violation was caused by its high negligence and "unwarrantable failure" to comply with the regulation.² The operator had previously been cited for the same violation on May 21, 1997. The main thrust of the company's efforts at the hearing was to show that the penalty would adversely affect its ability to remain in business. It did not prevail on this issue. *L & T Fabrication* at 74.

As both parties have noted in their briefs, there do not appear to be any cases on this section of the EAJA, which was added by Congress in 1996.³ In the *Joint Managers Statement*

¹ Section 77.203 provides: "Where overhead repairs are being made at surface installations and equipment or material is taken into such overhead work areas, adequate protection shall be provided for all persons working or passing below the overhead work areas in which such equipment or material is being used."

² The "significant and substantial" and "unwarrantable failure" language is taken from section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 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" and which was "caused by an unwarrantable failure . . . to comply with . . . mandatory health or safety standards . . ."

³ Pub.L. 104-121, Title II, § 231, Mar. 29, 1996, 110 Stat. 862.

of *Legislative History and Congressional Intent*, the managers said, with regard to section 504(a)(4), that:

This bill amends the EAJA to create a new avenue for small entities to recover their attorneys fees where the government makes excessive demands in enforcing compliance with a statutory or regulatory requirement, either in an adversary adjudication or judicial review of the agency's enforcement action, or in a civil enforcement action. In these situations, the test for recovering attorneys fees is whether the agency or government demand that led to the administrative or civil action is substantially in excess of the final outcome of the case so as to be unreasonable when compared to the final outcome (whether a fine, injunctive relief or damages) under the facts and circumstances of the case.

....

This test should not be a simple mathematical comparison. The Committee intends for it to be applied in such a way that it identifies and corrects situations where the agency's demand is so far in excess of the true value of the case, as demonstrated by the final outcome, that it appears the agency's assessment or enforcement action did not represent a reasonable effort to match the penalty to the actual facts and circumstances of the case.

142 Cong. Rec. S3242, S3244 (March 29, 1996) (*Joint Statement*).⁴

L & T argues that the fifty percent reduction in the penalty proposed by MSHA meets the substantially in excess test. However, as Congress has indicated, the test is not a simple mathematical comparison. Furthermore, I do not find, as a general proposition, that a fifty percent reduction demonstrates that the original penalty was excessive. In most cases that would not establish that the agency's demand was so far in excess of the true value of the case as to be unreasonable. Clearly, a greater discrepancy is required. Senator Bumpers expressed the type of disparity required for an applicant to be successful under this section when he stated that "if the Government sought \$1 million to settle the case, and the judge or the jury awarded, for example, \$1,000 or \$5,000, the defendant should be able to recover his fees." 142 Cong. Rec. S2156 (March 15, 1996) (Statement of Sen. Bumpers). Thus, I do not find that the penalty proposed by the Secretary was excessive.

⁴ In introducing this statement, Senator Bond stated: "Since there will not be a conference report on the act, this statement and a companion statement in the House should serve as the best legislative history of the legislation as finally enacted." *Joint Statement* at S3242.

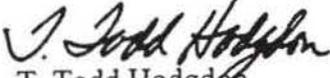
I also do not find that the penalty proposed by the Secretary was unreasonable when compared with the penalty adjudged. As was stated in the decision, the gravity of the violation and L & T's negligence justified a penalty of \$40,000.00. *L & T Fabrication* at 74. The fact that I gave greater weight to some of the other penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), than the Secretary did, does not demonstrate that the Secretary was unreasonable. There is no evidence that the Secretary did not consider all of the penalty criteria in arriving at a penalty; if fact, the *Narrative Findings of Special Assessment* accompanying the citation indicates that she did.

Moreover, it is well established that "[w]hen a civil penalty is filed and Commission jurisdiction attaches, the judge assesses a penalty *de novo*, based upon the statutory penalty criteria and the record evidence developed in the course of the adjudication" and he is not bound by the Secretary's proposal. *Wallace Brothers, Inc.*, 18 FMSHRC 481, 484 (April 1996). Consequently, the fact that the penalty was reduced after hearing does not establish that the Secretary's assessment was unreasonable, only that the judge viewed it differently based on the hearing evidence.

Finally, there is no evidence in this case that the Secretary proposed a \$40,000.00 penalty for this violation in an attempt to pressure L & T into a quick settlement.⁵ Indeed, in its application, L & T complains that the lowest the Secretary would go when discussing settlement of the case was \$32,000.00.

ORDER

I conclude that the penalty proposed by the Secretary was neither substantially in excess of the penalty adjudged in the decision on the case, nor unreasonable when compared with that decision. Accordingly, L & T's Application for Award of Fees and Expenses is **DENIED**.


T. Todd Hodgdon
Administrative Law Judge

⁵ One of the reasons given for amending the EAJA was so "government attorneys with the advantages and resources of the federal government behind them in dealing with small entities [would] adjust their actions accordingly and not routinely issue original penalties or other demands at the high end of the scale merely as a way of pressuring small entities to agree to quick settlements." *Joint Statement* at S2344.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 9, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-111
Petitioner	:	A. C. No. 46-01318-04348
v.	:	
	:	Robinson Run No. 95 Mine
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Melonie J. McCall, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Petitioner;
Elizabeth Chamberlin, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Bulluck

This proceeding is before me upon a Petition for Assessment of Penalty filed by the Secretary of Labor, through the Mine Safety and Health Administration ("MSHA"), against Consolidation Coal Company ("Consol"), pursuant to section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815.

A hearing was held in Morgantown, West Virginia.¹ The post-hearing briefs are of record. For the reasons set forth below, the order contested in the instant proceeding, as modified to a 104(a) citation, shall be AFFIRMED.

I. Stipulations

The parties stipulated to the following facts:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this civil penalty proceeding and this contest

¹Due to the court reporter's loss of portions of the testimony of Inspector Thomas and Jesse Skinner, the parties stipulated to a synopsis of Skinner's testimony, which was incorporated into the record on March 9, 1999, as Transcript Attachment A.

proceeding pursuant to section 105 of the Federal Mine Safety and Health Act of 1977.

2. Consolidation Coal Company is the owner and operator of the Robinson Run No. 95 Mine.
3. Operations at Robinson Run No. 95 Mine are subject to the jurisdiction of the Act.
4. The maximum penalty which could be assessed for this violation pursuant to 30 U.S.C. section 820(a) will not affect the ability of the Consolidation Coal Company to remain in business.
5. A true copy of Order No. 4888994 was served on Consolidation Coal Company or its agent, as required by the Act.
6. Order No. 4888994 is authentic and may be admitted into evidence for the purpose of establishing its issuance and not for the purpose of establishing the accuracy of any statements asserted therein.
7. MSHA Inspector Charles J. Thomas was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Order No. 4888994.
8. Order No. 4888994 has not been the subject of previous review proceedings.
9. The alleged violative conditions were abated by the operator in good faith.
10. The conversation in which Inspector Charles Thomas instructed foreman Kevin Carter to count the posts on the 12-D section took place during the day shift of January 15, 1998.

II. Factual Background

On the day shift of January 15, 1998, while conducting a Triple A inspection of Robinson Run No. 95, MSHA Inspector Charles Thomas inspected the 12-D section. Mining on 12-D had been ongoing for about four months, since October 1997 (Tr. 36, 56). While checking safety devices on the section, Inspector Thomas noticed the absence of a centrally located supply of supplementary roof support, which occasioned a conversation between the inspector and the day shift foreman, Kevin Carter.² The essence of the conversation established that posts were

²It is customary at Robinson Run No. 95 for working sections to maintain supplementary roof support supplies on a sled or tool car at the power center and track entry (Tr. 16-17, 104, Attachment A).

scattered along the supply track, and that 20 should be made readily available on the section, in case of an emergency (Tr. 14, 96, 113-14). Carter assured Inspector Thomas that he would "take care of it," and the inspector did not count the posts along the track that day (Tr. 14-15, 71, 96). When Inspector Thomas left the mine, Dave McCullough, the safety representative who had accompanied him during the inspection, was aware of the inspector's concern, and the inspector alerted safety director Robert Church that attention to supplementary roof support was required on the 12-D section (Tr. 15).

Sometime toward the end of his shift on January 15th, Carter counted 11 posts and cap pieces on the section along the supply track, had the utility man, Charlie Davis, gather them together alongside the supply car at the end of the track, and called general mine foreman Tom Harrison for a delivery of additional posts and related roof support materials (Tr. 96-97, 100-01, 120, 131-32, 136-37). Around 3:30 or 4:00 that afternoon, Harrison ordered the posts from the supply yard at the Robinson Run portal, some ten miles from the Oakdale portal where the 12-D section is located, anticipating that the supply crew would load and deliver the additional materials on the next day, during their working shift (Tr. 132-36).

Subsequently, Inspector Thomas, continuing his Triple A inspection of Robinson Run No. 95 during the midnight shift on January 17th, found outby foreman Frank Slovinsky substituting for the foreman regularly assigned to 12-D (Tr. 15, 28). When Slovinsky was unable to identify the location of the emergency posts for Inspector Thomas, Slovinsky and the inspector searched the section's tool car, down the belt, track and return entries, and found a total of 11 posts, some cap pieces and wedges along the supply track outby the mantrip station, approximately five to eight blocks from the tailpiece; a saw could not be located on the section (Tr. 15, 25-28). Consequently, Inspector Thomas issued 104(d)(2) Order No. 4888994 at 3:30 that morning, charging a violation of 30 C.F.R. § 75.214, describing the violation as follows:

No supply of supplementary roof support material was available at a readily accessible location within four crosscuts of the 12D (MMU 072-0) working section. This section has been in coal production since October of 1997 and no supply of supplementary roof support has been stored within four crosscuts of the face. To abate the order post[s] were obtained on mainline haulage between 12D-5 North and 11D-5 North, a distance of over 2500 feet. Also a timber saw was obtained off or outby the mouth of this section

(Ex. P-1; Tr. 40).

The order was abated between 3:30 and 5:00 that morning, when miners Jesse Skinner and Danny Harbert, driven by foreman Slovinsky in a personnel carrier (jeep), rounded up nine additional posts from the crosscuts along the supply and the main tracks, and ultimately stored 20 posts, a saw, cap pieces and wedges at the No. 11 crosscut (Tr. 26-27, 67-68, 79-80, Attachment A).

III. Findings of Fact and Conclusions of Law

A. Fact of Violation

30 C.F.R. § 75.214 requires the following:

(a) A supply of supplementary roof support materials and the tools and equipment necessary to install the materials shall be available at a readily accessible location on each working section or within four crosscuts of each working section.

(b) The quantity of support materials and tools and equipment maintained available in accordance with this section shall be sufficient to support the roof if adverse roof conditions are encountered, or in the event of an accident involving a fall.

Robinson Run No. 95's approved roof control plan specifies the quantity and type of supplementary roof support material that shall be maintained in accordance with section 75.214:

The quantity of supplementary roof support material required by C.F.R. 30, 75.214(b) shall consist of a minimum of twenty (20) posts of proper length with sufficient cap pieces and wedges

(Ex. P-2; Tr. 20-21). It is clear from the evidence that Consol had failed to maintain a supply of 20 posts and associated installation tools and materials at a readily accessible location on the 21-D working section, or within four crosscuts of the loading point, at the time the order was issued, and Consol acknowledges the violation (Tr. 86-87; Resp. Br. at 6). However, Consol disputes that the violation was "significant and substantial," the result of Consol's "unwarrantable failure" to comply with the standard, and that Consol was highly negligent in violating the standard.

B. Significant and Substantial

Section 104(d) of the Mine Act designates a violation "significant and substantial" ("S&S") when it is "of such a 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 the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the 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'g* 9 FMSHRC 2015, 2021 (December 1987) (*approving Mathies criteria*). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (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).

Inspector Thomas determined that the violation was S&S. He testified that the strata above the Pittsburgh coal seam running through Robinson Run No. 95 is unconsolidated slate which, exposed during continuous miner or longwall advance and retreat, becomes bad top (Tr. 28). He opined that, in the event of a roof fall between roof bolts, it is reasonably likely that a miner would suffer lacerations, contusions, broken bones, trauma or, in the case of a major roof fall, death (Tr. 28). The importance of having supplementary roof support at the ready, he asserted, is to stop or contain the fall, and to create a safe pathway for rescuers to reach and assist the injured miner, as quickly as possible (Tr. 23, 29, 31). The inspector emphasized that 14 coal miners had been killed due to roof fall in 1998, and four roof falls had occurred in West Virginia in January 1998, alone (Tr. 23, 28). He also noted some of the telltale signs of roof fall -- ribs showing weight, roof sloughage and cracking -- but concluded that roof conditions can change rapidly and that one cannot predict when a fall will occur (Tr. 28-29, 32).

The evidence, evaluated in terms of continued mining operations, indicates that the roof conditions on the 12-D section were good and that a roof fall was unlikely (Tr. 43-44, 100, 138). However, as the Secretary points out, section 75.214 contemplates unforeseen or emergency circumstances requiring swift attention, irrespective of existing roof conditions. As such, while Consol was able to establish that alternative roof support materials were available in different locations throughout the section, locating and gathering these materials is time consuming and left to happenstance at best, contrary to the standard's purpose of insuring a consolidated, readily accessible store of emergency supplies. This point is illustrated by the fact that it took 1½ hours to locate and gather the nine additional posts and related materials to abate the order. The standard does not bar use of other roof support materials, depending on the circumstances, but does insure that a supply, ready for immediate use, exists at all times. I find it reasonably likely that, in the event of an unforeseen emergency, failure to maintain the supply of supplementary roof support materials, tools and equipment in the manner required by regulation, would escalate the injuries of a roof bolter or other miner to the extent of delayed rescue, and/or result in serious injury to rescuers who might enter an area of bad top. Therefore, I conclude that the violation was S&S.

C. Unwarrantable Failure

"Unwarrantable failure" is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 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 (February 1991).

Inspector Thomas testified that he attributed the violation to Consol's unwarrantable failure to comply with section 75.214 because Robinson Run No. 95 had been previously cited for the same violation in October 1997, foreman Slovinsky lacked knowledge of the whereabouts of emergency supplies on 12-D, two miners had reported to the inspector that the section had never maintained emergency supplies in a readily accessible location and, despite focusing management's attention on the condition during the day shift of January 15th, Consol had not remedied the situation by the time he had returned on the midnight shift of January 17th (Tr. 32, 35-36, 39, 41, 57, 62, 75, 83; Exs. P-3, P-4).

The record makes clear that Consol was aware of the requirements of the standard, and that the company was notified on January 15th that remedial measures for compliance were necessary. Consol has established, through the Pre-Shift Mine Examiner's Report of December 15, 1997, and foreman Carter's credible testimony, that emergency posts had been available on the 12-D section, contrary to the information upon which Inspector Thomas relied (Ex. R-1; Tr. 93-95). The evidence also establishes that foreman Carter and general mine foreman Harrison acted promptly on January 15th in assessing the deficiency and ordering additional supplies (Tr. 96-97, 132-37). While Harrison testified credibly to the probability that the supply crew had already left the supply yard by the time he had ordered the additional posts on the afternoon of January 15th, Consol has advanced no explanation for the lack of delivery during the supply crew's next working shift -- the day shift on January 16th. Carter testified credibly that lack of delivery on that shift did not cause him concern, but that no delivery on the next day shift, January 17th, would have merited his attention (Tr. 124-27). However, Inspector Thomas issued the order prior to that shift. Based upon Inspector Thomas's attention to 12-D's supplementary roof support on January 15th, I find that Consol assumed the risk of being cited by failing to ensure delivery to the section during the supply crew's first available shift, i.e., the day shift of January 16th. I do not find Consol's lack of follow-up, to the time of the second inspection on the midnight shift of January 17th, to constitute intentional misconduct, recklessness or serious lack of reasonable care that would amount to more than ordinary negligence. Accordingly, I find that the Secretary has not proven that the violation was the result of Consol's unwarrantable failure.

IV. Penalty

While the Secretary has proposed a civil penalty of \$5,000.00, 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 Co.*, 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F. 2d 1147 (7th Cir. 1984).

Consol is a large operator, previously cited for violation of the same standard in October 1997, with an overall history of violations that is not an aggravating factor in assessing an appropriate penalty (Ex. P-6). As stipulated by the parties, the proposed penalty will not affect Consol's ability to remain in business.

The remaining criteria involve consideration of the gravity of the violation and the negligence of Consol in causing it. I find the gravity of the violation to be serious, since time is of the essence in providing safe passage for rescue of miners who have been injured by unforeseen adverse roof conditions. Considering that supplementary roof support materials had been maintained on the 12-D section prior to the instant inspection, and crediting Carter and Harrison's efforts to come into compliance with the standard, I ascribe moderate, rather than high negligence to Consol. Therefore, having considered Consol's large size, insignificant history of prior violations, seriousness of the violation, moderate degree of negligence, good faith abatement and no other mitigating factors, I find that a penalty of \$2,000.00 is appropriate.

ORDER

Accordingly, it is **ORDERED** that Order No. 4888994 is **MODIFIED** from a 104(d)(2) order to a 104(a) citation, 30 U.S.C. § 814(a), by deleting the "unwarrantable failure" designation and reducing the level of negligence to "moderate," that the citation is **AFFIRMED**, as modified, and that Consol pay a penalty of \$2,000.00 within 30 days of the date of this decision.


Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

Melonie J. McCall, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR

WASHINGTON, D.C. 20006-3868

June 10, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-268-M
Petitioner	:	A. C. No. 29-01882-05502 LUO
	:	
v.	:	
BOWEN INDUSTRIES	:	
INCORPORATED,	:	Ivanhoe Concentrator
Respondent	:	

DECISION APPROVING SETTLEMENT

ORDER TO AMEND

ORDER TO MODIFY

ORDER OF DISMISSAL

Before: Judge Merlin

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On April 26, 1999, an order was issued disapproving the joint settlement motion because the motion was signed and filed by an individual who described herself as a law clerk. I also held that the reasons offered in the settlement were inadequate to justify the proposed settlement.

On May 25, 1999, the parties filed a second settlement motion which was signed by an attorney in the Office of the Solicitor. The parties' settlement motion seeks a penalty reduction for the one violation involved from \$1,600 to \$188.

The subject citation was issued under section 104(d)(1) of the Mine Act for a violation of 30 C.F.R. § 56.11027 because adequate scaffolding was not provided for the employees installing an iron beam on a wall at the maintenance shop. An employee was standing on the scaffold railing trying to reach the iron beam. The inspector also noted that the employees were warned a week earlier by a company inspector that the scaffolding was inadequate.

30 C.F.R. § 56.11027 provides:

Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platforms shall not be overloaded. Working platforms shall be provided with toeboards when necessary.

The parties propose to amend the standard violated to 30 C.F.R. § 56.11001 which requires that safe access be provided to all working places. As I stated in my April 26 order, the

originally cited standard, 30 C.F.R. § 56.11027, sets forth requirements for the construction of scaffolds while the condition described by the inspector addressed the location of the scaffold. Part 56.11001 is the appropriate standard for the conditions alleged in the citation. Therefore, I approve the parties's request to amend the citation.

The parties also request that the citation be modified from a 104(d)(1) citation to a 104(a) citation, that negligence be reduced from high to moderate and that the likelihood of injury be reduced from highly likely to reasonably likely. The parties state that negligence is less than first thought because the foreman for the employees working on the iron beam was not present when the citation was issued and was not aware that the employees were improperly using the scaffolding. Until the time of the citation, the scaffolding was at a proper height to provided safe access to the iron beam. Instead of adding a section to the scaffold, the employee without the knowledge of the supervisor stepped onto the access ladder with his right foot about one foot above the platform and balanced himself by stepping on the bottom section of the cross brace with his left foot. Moreover, the previous problem with the scaffolding identified by the company inspector referred to in the citation and which formed the basis for the unwarrantable failure finding is not the same as the circumstances cited for this violation. The earlier problem concerned the adequacy of the construction of the scaffolding in that toeboards and railings were not in place. The height of the platform was sufficient to provide safe access to the iron beam. The parties advise that the operator did in fact promptly install the toeboards and railings. According to the parties, gravity is less than originally found because the employees were working within the confines of the scaffolding platform only a few feet above the platform. In addition, the employees were wearing safety belts and lines at the time of the inspection thereby protecting them from falls from the platform itself.

I have carefully reviewed the second settlement motion and have concluded that the facts set forth therein sufficiently justify approval of the recommended settlement under the criteria of section 110(i) of the Act.

In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **APPROVED**.

It is further **ORDERED** that Citation No. 7862421 is **AMENDED** to cite a violation of 30 C.F.R. § 56.11001.

It is further **ORDERED** that Citation No. 7862421 is **MODIFIED** from a 104(d)(1) citation to a 104(a) citation, from high negligence to moderate negligence and from highly likely to result in an injury to reasonably likely to result in an injury.

It is further **ORDERED** that the operator having paid, this case is **DISMISSED**.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive, flowing style with a large initial "P" and "M".

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Brian L. Pudenz, Esq., Office of the Solicitor, U. S. Department of Labor, 525 Griffin Street,
Suite 501, Dallas, TX 75202

Mr. Alfredo Ontiveros, Safety Director, Bowen Industries Incorporated, 9801 Carnegie Avenue,
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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 16, 1999

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 94-704-D
on behalf of KENNETH HANNAH,	:	
PHILLIP J. PAYNE and FLOYD MEZO,	:	MSHA Case No. VINC CD 94-07
Complainants	:	Mine ID No. 11-00601
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Rend Lake Mine

DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a Complaint of Discrimination and a Petition for Assessment of Civil Penalty under Sections 105(c) and 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. The terms of settlement include back pay and interest, expungement from personnel records of references to the incident at issue, an agreed posting and payment of a \$500.00 civil penalty. I have considered the representations and documentation submitted in this case, and I concluded that the proffered settlement is acceptable.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that the parties comply with all the terms of the settlement within 40 days of this order. Under the circumstances this case is dismissed.



Gary Melick
Administrative Law Judge
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 16, 1999

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 95-78-D
on behalf of RICHARD E. GLOVER	:	
and LEON KEHRER,	:	MSHA Case No. VINC CD 92-10
Complainants	:	Mine ID No. 11-00601
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Rend Lake Mine

DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a Complaint of Discrimination and a Petition for Assessment of Civil Penalty under Sections 105(c) and 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has filed a motion to approve a settlement agreement and to dismiss the case. The terms of the settlement include the payment of a civil penalty of \$5,000.00 and an agreed posting at the subject mine. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is acceptable.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that the parties comply with all the terms of the settlement within 40 days of this order. Under the circumstances this case is dismissed.



Gary Melick
Administrative Law Judge
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 23, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-72-M
Petitioner	:	A. C. No. 20-03003-05504
v.	:	
	:	Cherry Valley Pit
HERITAGE RESOURCES, INC.,	:	
Respondent	:	

DECISION

Appearances: Gay F. Chase, Esq., Office of the Solicitor, U. S. Department of Labor,
Chicago, Illinois for Petitioner;
Frederick J. Boncher, Esq., Schenk, Boncher & Prasher,
Grand Rapids, Michigan for Respondent.

Before: Judge Barbour

In this civil penalty proceeding, brought under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §815(d)), the Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), seeks the assessment of a \$40,000 civil penalty against Heritage Resources, Inc. (Heritage or the company) for an alleged violation of 30 U.S.C. §56.14107(a), a mandatory safety standard for surface metal and nonmetal mines requiring that "moving machine parts . . . shall be guarded to protect persons from contacting . . . pulleys . . . and similar moving parts that can cause injury."

The proceeding is the result of the Secretary's investigation of a fatal accident that occurred on May 2, 1997, at Heritage's Cherry Valley Pit, a surface sand and gravel operation. The accident involved Samuel Oakes, a 27 year old miner who functioned as the pit foreman.¹ Oakes was killed when he was pulled into the pinch point of a conveyor belt's rotating idler roller.

¹Although there was a dispute at the hearing concerning Oakes' status as a foreman, the dispute was more apparent than real. Oakes lacked the title, but the company vested in him the traditional duties of a foreman. Oakes was responsible for running the Cherry Valley facility (Tr. 217, 219, 382). He had the authority to supervise other workers (Tr. 219). In addition, he had defacto control over hiring and firing. (Kirk Velting, Heritage's vice president, secretary, and treasurer testified that he relied on Oakes' advice concerning personnel matters and "pretty much did what [Oakes] wanted" (Tr. 384)).

In addition to alleging a violation of section 56.14107(a), the Secretary asserted the violation was a significant and substantial contribution to a mine safety hazard (S&S). The Secretary also asserted the alleged violation was the result of the company's high negligence and its unwarrantable failure to comply with the standard.

Heritage denied the violation. Alternatively, it argued that the violation was not the result of its "high" negligence. The company maintained that any negligence on its part consisted solely of relying on the assurances of the company providing the conveyor system that all necessary and proper guards were in place.

The case was heard in Grand Rapids, Michigan. Subsequently, counsels filed helpful briefs.

STIPULATIONS

The parties stipulated as follows:

1. The Commission has jurisdiction over the proceeding.
2. The [mine] extracts sand and gravel and is located in Caledonia, Kent County, Michigan.
3. The [mine] is owned and operated by Heritage. . . and [is] . . subject to the jurisdiction of the [Mine Act].
4. The [mine's] operations affect interstate commerce.
5. Both [the company] and its [mine] worked approximately 7295 hours during . . . January 1, 1996 to December [31], 1996.²
6. Citation [No.] 4316701 was properly served by a duly authorized representative of the Secretary . . . upon an agent of Heritage . . . on the date indicated (Tr. 13-14).

THE MINE

The pit includes an area where sand and gravel is mined and a plant where the material is washed, screened, and crushed. The plant also includes various conveyors that carry materials to

²Based upon these numbers, counsel for the Secretary characterized the company's size as small (Tr. 14).

the screens and washers, and that take finished materials to the stockpiles. In addition, the plant has an on-site electrical control center where power to the conveyors and to other facilities is activated (see Gov. Exh. 1).

After material is extracted, it is loaded into a haulage truck, taken to the plant area, and dumped into the feed hopper. The material passes through a grizzly, and travels by conveyor belt to the double deck primary screen. After the material is screened, it goes to the crusher, which is located behind the primary screen. From there, the material travels via a short conveyor belt to the washers. From the washers it passes by conveyor belt to the rinse screen where the material is given a final cleaning. From the rinse screen, it moves on three conveyors (the stacker conveyors) that radiate from the rinse screen. The material moves along the stacker conveyors to the discharge ends of the belts where it falls into the stockpiles (see Gov. Exh. 1).

The electrical control center is located at ground level immediately adjacent to the left front of the primary screen facility when facing the facility from the feed hopper (Tr. 24, 27-28; Gov. Exh. 1). The conveyor belt from the feed hopper to the primary screen passes within a very few feet of the control center. Although miners are not supposed to walk under the conveyor belt to get to the control center, there is no barrier to prevent them from doing so.

Heritage purchased its conveyors and other equipment from Central Michigan Tool and Equipment (CMTE) (Tr. 225). Heritage maintained that when it bought the equipment, the company understood the equipment would be "in compliance with all applicable standards" (Tr. 239). Kim Velting, the president of Heritage, put it this way, "When I buy a piece of equipment, I expect it to meet all codes and regulations" (Tr. 240). In the company's view, everything that was required by law and regulation was to be provided by CMTE so all that Heritage needed to do was operate the equipment (Tr. 340-341, 369-370, 398).

At the time of the accident five miners worked at the Cherry Valley Pit (Tr. 397).

THE ACCIDENT

On the morning of May 2, the miners reported for work as usual. It was raining, and everything was wet. Shortly after mining began, B.J. Welton drove a loaded haulage truck to the feed hopper to dump a load of sand. He began backing the truck toward the hopper. In the truck's rear view mirror Welton could see Oakes gesturing to him. However, Welton was concentrating on dumping the load, and as he maneuvered the truck into position, Welton lost sight of Oakes. Once Welton had the truck where he wanted it, he activated the bed of the truck and began to dump the sand (Tr. 33-34).

As he did so, he noticed that the conveyor belt from the feed hopper to the primary screen facility was running erratically. Welton shut down the truck and got out. He walked toward the primary screen (Tr. 34). As he approached the screen he saw Oakes "hanging from the return idler" roller of the conveyor belt (Tr. 34; see Gov. Exh. 1 at "x"). The conveyor belt runs over

the roller and there is a pipe above the belt. The clearance between the belt and the pipe is four or five inches (Tr. 37). Oake's right arm was caught between the roller and the belt, and Oakes was struck in the pinch point created by the roller, the belt, and the belt structure. He was in up to his shoulder, and his head was jammed against the moving conveyor (Tr. 97-98, 283).

Welton started yelling for help. Dick Brant, a miner who was working on the other side of the crusher, heard Welton and came running to see what was wrong. In addition, Mark Van Blaricum, a tire company employee working at the mine, also ran to the scene. The men managed to shut off the conveyor by going to the electrical control center and turning off the power. Then, they tried to pull Oakes out of the pinch point. They could not, and Welton ran to call the rescue squad (Tr. 35, 38). After contacting "911", Welton raced back.

In the meantime Bill Kingsbury, a temporary employee, also arrived on the scene. The men cut some of Oakes' shirt and sweater "to give him some airway" (Tr. 38). Then, Van Blaricum got a cutting torch. He burned away part of the conveyor belt structure freeing Oakes (Tr. 39, 284). The men tried to revive Oakes, but they were not successful (Tr. 39).³

THE INVESTIGATION

On May 3, Paul Blome, a MSHA supervisory mine inspector, received a telephone call from the MSHA assistant district manager. He told Blome about the accident and asked Blome to go to the pit (Tr. 23-14, 106). On May 5 (a Monday and the next work day), Blome, who was accompanied by MSHA supervisory inspector Fred Tisdale, went to Cherry Valley. The inspectors interviewed some of Heritage's employees, and they inspected the accident site.

Blome and Tisdale arrived around 3:30 p.m. (Tr. 121). The first person they met was miner Todd Stevens. They told Stevens who they were and explained the purpose of their visit. They asked Stevens to contact Kirk Velting, and to tell him they were at the pit.⁴ The inspectors proceeded to the accident site. They examined the site, made measurements, and took pictures.

The inspectors first measured the idler roller. It was 51 inches long and 5 inches in diameter. The conveyor belt above the roller was 48 inches wide (Tr. 127-128, Gov. Exh. 6 at 4, Gov. Exh. 12). The pipe that was located above the belt and to the rear of the roller extended from one side of the belt structure to the other. As previously mentioned, there was

³Oakes died of asphyxiation. Examination of Oakes' body revealed that he also suffered a dislocated right shoulder.

⁴When Velting heard the inspectors were present, he came to the mine, but he was too upset to go to the accident scene and he went home. Later that evening, an MSHA inspector called and asked him to return. He did, and he viewed the area where Oakes was killed (Tr. 323-324).

approximately four to five inches of clearance between the top of the roller and the pipe (Tr. 149-150; Gov. Exh. 12). The belt moved at a very fast speed. The inspectors believed if a person were caught by the belt or roller, the speed of the belt would pull the person's body into the pinch point and the lack of clearance would make it virtually impossible for the person to extricate himself or herself without at least losing an arm (Tr. 70, see also Tr. 469). The idler roller was not guarded at the time of the accident, and the inspectors detected no evidence it ever had been guarded (Tr. 162). They considered the unguarded roller to be very hazardous.⁵

In addition to measuring the roller and the clearance, Blome measured the perpendicular distance from the ground to the top of the roller. Using a tape measure, he found that it was 71 inches. Blome and Tisdale testified that Blome measure from a level area of the ground (Tr. 41, 45, 47-48, 49, 135-136, 163-164, 517-518), but they agreed there also was a pile of sand under the roller. The sand fell from the belt, as the belt passed over the roller.

The inspectors also observed a "path" under the conveyor and adjacent to the area beneath the roller. The path was approximately one foot wide. It consisted of "hard packed" sand and dirt (Tr. 81-82). The path lead to the electrical control panel (Tr. 53-54, see also Tr. 146; Gov Exh. 11(2)). Tisdale believed it was the closest path for "[a]nybody from any part of the plant that wanted to . . . do anything to that control panel" (Tr. 156). Given the nature of the compacted sand and dirt, Blome thought the path "had been beaten down for some time" (Tr. 81-82).

The inspectors further noted the conveyor belt structure rested on two 14 inch I-beams that ran parallel to the belt. The distance between the beams was approximately 63 to 71 inches (Tr. 171). The area between and on both sides of the beams was filled with sand and dirt so that, except where sand piled under the roller, the ground level under the belt structure and adjacent to it just covered the tops of the I-beams (Tr. 101, 146, 300 (see Gov. Exh. 11(2))). According to Kirk Velting, the distance from the top of the I-beams to the pinch point was 81 inches (Tr. 368).⁶ Kirk Velting testified the ground was supposed to be kept level with the top of the I-beams (Tr. 343).

The path passed over and between the beams and under the conveyor. There was a dispute among the witnesses whether the path passed under the pinch point, as the inspectors seemed to believe, or passed three to five feet away from the area under the pinch point, as Heritage's witnesses believed.

As a result of the investigation, Blome and Tisdale concluded the company violated

⁵The inspectors were not alone in this belief. Even Heritage's guarding expert, Michael Music, considered the idler roller dangerous if contacted (Tr. 470).

⁶In addition, Music measured the distance and found that it was 81 inches (Tr. 433).

section 56.14107(a), and Blome issued Citation 4316701. It states:

A fatal accident occurred at this mine when a foreman became entangled in a conveyor belt and was asphyxiated. The victim walked underneath the . . . conveyor, which was operating, and contacted the unguarded rotating idler located about 71 inches above ground level. Management knew or had reason to know mine employees travel under this conveyor on a regular basis, yet failed to take corrective action (Gov. Exh. 2).

THE VIOLATION

As noted, section 56.14107(a) requires "[m]oving machine parts shall be guarded to protect persons from contacting" the listed parts "and similar moving parts that can cause injury." When section 56.14107(a) was promulgated, the Secretary stated the standard applied where moving machine parts "can be contacted and cause injury" because the standard's purpose was "to protect persons from coming into contact with hazardous moving machine parts . . . [in order] to prevent contact with [the] . . . parts" (53 F.R. 32509 (1988)).

The Secretary also stated that there were two ways in which to meet the requirements of the standard. Either the hazardous moving machines parts could be guarded physically by installing material guards over or around the parts, or they could be guarded "by location", that is by placing the parts at least seven feet above walking or working surfaces.⁷ The Secretary rejected an interpretation of the standard that required guarding only to protect against inadvertent, careless, or accidental contact. Rather, the secretary made clear that guarding also was to protect against deliberate or purposeful actions (53 F.R. 32509 (1988)).

Interpreting the words of regulation, the Commission held that the phrases "may be contacted" and "may cause injury" "import the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness" (Thompson Brothers Coal Co., Inc., 6 FMSHRC 2094, 2097 (September 1984)). The Commission stressed that the construction of safety standards involving miners' behavior "cannot ignore the vagaries of human conduct" (Id.). Thus, all exposure and injury variables are relevant to the question of whether the standard has been violated, including the accessibility of the machine parts, work areas, work duties, and predictable and unpredictable conduct by miners (Id.).

Applying the Secretary's purpose and the Commission's analytical principals to the facts,

⁷See 30 C.F.R. § 56.14107(b) (guards not required "where the exposed moving parts are at least seven feet away from walking or working surfaces").

I conclude Heritage violated section 56.14107.

First, I find the idler roller, was a "moving machine part" similar to those listed in the regulation, and I reject Heritage's arguments to the contrary (Tr. 443-444, 447-448). Although Music was of the opinion that "similar moving parts" means "[p]arts similar to [those listed in the standard] . . . where a belt changes direction or goes . . . nearly around a pulley" (Tr. 475), Music's view is too restrictive to effectuate the purpose of the regulation. True, there are differences between the listed parts and the subject idler roller. For example, the idler roller did not have power applied to it and only a small portion of the belt touched the roller. However, the listed parts in large measure are included in the standard because they present the danger of a miner becoming caught in a pinch point created by the revolving part and moving belt. The same hazard was presented by the subject return idler roller making it "similar" under the standard.

Second, the idler roller was a part that "may cause injury". The very limited space between the top of the roller and the metal pipe, the speed of the belt, and the identical direction in which the belt and the roller turned, meant that once caught in the pinch point, a person was unlikely to free himself or herself without being severely injured or worse (Tr. 37, 149-150; Gov. Exh. 12). I credit the inspector's testimony in this regard (Tr. 67), and I again note that even Music found the configuration of the roller, pipe, and belt "obviously dangerous" (Tr. 470).

Third, the idler roller was equipment that "may be contacted". In reaching this conclusion, I have considered the accessibility of the roller, the proximity of the nearby travel area, the proximity of Oakes' even closer work area, and the fact that miners do not always act protectively in their own interests.

I find the path that passed in close proximity to the roller was used by miners. Both Blome and Tisdale saw the path. While there were numerous people in the area between the accident on Friday and the arrival of the inspectors on Monday, people who assisted in removing Oakes from the scene, the inspectors believed the path was so compacted it had been used frequently before the accident. I credit their firsthand observation, especially since the path lead to the electrical control panel which was used from time to time and because the path provided a short route to the panel for miners on the west side of the operation (Tr. 31, 53-54, 81-82, 154, see also Tr. 146; Gov. Exh. 1, Gov. Exh. 11(2)).

I agree with Heritage, however, that the path did not pass directly under the roller. In my opinion, the fact that sand tended to fall from the belt and roller and to pile under the roller, made it unlikely miners repeatedly walked under the roller. Rather, they deviated away from the sand pile and the roller.

But, they did not deviate much. I credit Kirk Velting testimony that a change in course of as little as three feet or as much as five feet would have resulted in a miner coming directly under the roller (Tr. 247-248, 326). (In other words, I find that the path passed within three to five feet of the area directly under the roller.) Although miners were not supposed to use the path to walk

under the conveyor (Tr. 278, 302), the compacted nature of the path and the testimony of one of Heritage's miners that it was used despite the company's contrary policy, meant there were occasions when miners traveled in close proximity to the unguarded and exposed roller (Tr. 279-280, see also Tr. 455).

Did miners using the path walk within seven feet of the unguarded roller? Heritage argued they did not because the diagonal distance (the "hypotenuse") from the surface of the path (the closest "walking surface") to the idler roller was more than 7 feet (Tr.436, see also Tr. 452). The problem with the company's theory is that the record does not support its geometric calculation. Blome was the person who physically measured the distance from the ground to the roller at the time closest to the accident. Tisdale was with Blome. Tisdale saw Blome make the measurement. Both men testified the distance was approximately 71 inches.⁸ Their testimony was consistent with the fact that at the time of the accident there was a point under the roller where sand had accumulated. I find the sand raised the ground level under the roller approximately 10 inches above the top of the I-beams. With the distance between the ground and the roller being 71 inches, the diagonal distance to the edge of the path would have been under seven feet when the base distance was three feet eight inches or less, which means that there were points along the path where the roller was not guarded by location.

More importantly, Oakes's duties at times required him to work in even closer proximity to the unguarded roller than if he had used the path. Kirk Velting testified that he instructed Oakes to remove the sand that piled under the roller and to keep the sand level with the I-beams (Tr. 349, 392-3). As Oakes shoveled the sand he would have come increasingly close to the roller and he would have ended his work almost directly under the roller, if not directly under it.

Heritage argues that Oakes would not have worked under the roller while the belt was running because sand would have fallen on him (Tr. 326), and he would have been "picking sand out of [his] . . . pants the rest of the day" (Tr. 474). However, miners do not always do what is comfortable, and James Weldon testified that Oakes did not always stop the conveyor when work was done under it (Tr. 291). Moreover, there was testimony that wet sand tended to accumulate on the belt and roller more quickly than dry sand (Tr. 348, 455). If a miner were in a hurry to clean the roller, the lack of a guard would have increase the temptation to reach up and to hasten the clean up process (See Tr. 348). Such rank disregard for safety is one of the "vagaries of human conduct" the Commission instructed its judges to considered.

Heritage also argued that the Secretary, in her Program Policy Manual (PPM), specifically exempted rollers like the subject idler roller from the standard. Heritage pointed to a statement in the PPM that "[c]onveyor belt rollers are not to be construed as 'similar exposed moving machine parts' under the standard" (IV PPM 55(a), Resp. Exh. B). However, as the

⁸Tisdale actually testified the distance was 72 inches (Tr. 135-136), but Blome made the measurement, and I accept his testimony as accurate.

Secretary's guarding expert, Richard Feehan, the Chief of MSHA's Metal and Nonmetal Division, testified, the full statement makes clear that conveyor belt rollers are exempted only when they are protected by skirt boards. The complete sentence states, "Conveyor belt rollers are not to be construed as 'similar exposed moving machine parts' under the standard and cannot be cited for the absence of guards and violation of [section 56.14107(a)] where skirt boards exist along the belt" (Id.). If, as argued by Heritage, conveyor belt rollers were exempted from the standard, the presence of skirt boards would be irrelevant. In other words, as Feehan stated, the PPM means "exactly what it says", in that "inspectors cannot cite these rollers where there is a skirt board" (Tr. 505).

I also find persuasive Feehan's testimony concerning a publication entitled MSHA's Guide to Equipment Guarding for Metal and Nonmetal Mining (Gov. Exh. 13). The booklet was authored by MSHA, and it is intended to help mine operators and miners understand the guarding requirements. On page 9 of the publication there is an illustration of a miner with both arms caught between the conveyor belt and the upper surface of a return idler roller (Gov. Exh. 13 at 9). Above the illustration the publication states the reason for guarding return idler rollers is to prevent injuries such as that illustrated and "It is reasonable to expect . . . [such] . . . accidents where the idlers are less than seven feet above the walking surface" (Tr. 112; Gov. Exh. 13 at 9). The publication also states that idler rollers "should be guarded if someone could be injured while working or passing underneath the belt" (Gov. Exh. 13 at 9).

Music's testimony that the Guide refers to the guarding of return idler rollers as a way to meet the requirements of 30 C.F.R. §56.11001 and to provide "safe means of access . . . to all working places", simply is not credible. The Guide specifically refers to section 56.14107(a), not to section 56.11001 (Gov. Exh. 13 at 3).

For all of these reasons I conclude that section 56.14107(a) applied to the subject roller and that the roller should have been guarded.

S&S AND GRAVITY

A violation is significant and substantial, if based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature (Arch of Kentucky, 20 FMSHRC 1321, 1329 (December 18, 1998); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998); National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission held that to establish a S&S violation of a mandatory standard the Secretary must prove: (1) the existence of an underlying violation; (2) a discrete safety hazard — that is, a measure of danger to safety contributed to by the violations; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury in question will be of a reasonable serious nature.

The Secretary met her burden of proof with regard to elements 1, 2 and 4. There was a

violation of the cited standard. The failure to guard the idler roller contributed to the danger a miner would be caught in the pinch point. (Indeed, it is the very thing that happened.) Further, the tight nature of the pinch point and the speed the conveyor belt made it likely that once caught, the miner could not extricate himself or herself, and the miner would be severely injured or killed.

As with most cases in which the validity of a S&S finding is an issue, the crucial question is whether the Secretary established the reasonable likelihood that the hazard contributed to would result in an injury. I find she did. Miners had access to the vicinity of the unguarded roller in that they used the path adjacent to the roller, as shown by the path's compacted nature. More importantly, Oakes was instructed to control the sand pile under the roller by leveling it from time to time. This brought him into the immediate vicinity of the roller. Although the distance between the roller and the ground may have varied depending upon the size of the pile, at 71 inches the roller easily was within the reach of Oakes, who was 5 feet 8 inches tall (Tr. 40), and of other miners too.

I recognize that the height of the roller meant that Oakes and other miners were not going to trip or fall into the pinch point. However, there was credible testimony that miners, including Oakes, worked and traveled under conveyors while their belts were running (Tr. 278-280, 291, 302). This, together with the fact that sand was not supposed to be allowed to build up under the roller, meant there was an incentive to keep sand off the belt and the roller. Although Kirk Velting testified there was no reason to reach into the pinch point to clean the roller because wet sand eventually would fall from the roller when it dried (Tr. 348), the fact that the roller was within reach, the fact that it was unguarded, the fact that access to it was not restricted, the fact that miners, including Oakes, traveled and worked under belts while they were running, the fact that Oakes was assigned to keep the sand from piling under the roller, all meant it was reasonably likely a careless miner would reach into the pinch point and disaster would result.

In addition to being S&S, the violation was serious. The hazards confronting the miners because the roller was not guarded were those of dismemberment or death and the possibility of the hazards coming to fruition was all too real.

UNWARRANTABLE FAILURE AND NEGLIGENCE

The Commission has defined unwarrantable failure as aggravated conduct constituting more than ordinary negligence (Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987)). The Commission also has stated that unwarrantable failure is conduct that is characterized by reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care (Emery, 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 194 (February 1991)).

The Commission has identified several factors to consider when analyzing whether a violation resulted from unwarrantable failure: among them are "the extensiveness of the

violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether [the] operator has been placed on notice that greater efforts are necessary for compliance" (Mullins and Sons Coal Co., 16 FMSHRC 192, 195 (February 1994)). The culpability determination required for a finding of unwarrantable failure is similar to gross negligence or recklessness. It is more than a "knew or should have known" test (Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (October 1993)).

Here, it was clear a guard was required. The minimum distance between the ground and the roller was 71 inches, and the maximum distance was 81 inches, depending on the height of the sand. Therefore, the roller obviously was less than seven feet from the surface. From time to time Oakes was required to work in immediate proximity to the roller. Further, miners, including Oakes, traveled and worked under the conveyors while the conveyors were operating. These factors alone are sufficient to indicate the company failed to exercise the care required of it when it did not guard the idler roller.

But, this was not the full extent of the company's neglect. The record confirms that Heritage abdicated its responsibilities by relying completely upon the vendor of the equipment, CMTE, to make certain there was compliance with all applicable standards (Tr. 239, 398). As Kirk Velting stated, Heritage expected CMTE to deliver a "turnkey operation", one in which Heritage's only obligation would be to operate the equipment (Tr. 398). While CMTE knew this and while CMTE intended to insure compliance as it understood the standards (Tr. 489, 494), Heritage's reliance on CMTE is not exculpatory. Rather, it represents inexcusable indifference to the regulations and to the company's responsibilities under the law. Typical of this indifference is the fact that although the company clearly was engaging in the extraction and preparation of sand and gravel — activities obviously falling within the jurisdiction of the Act — it was not until after the accident that Kirk Velting understood MSHA had jurisdiction over the pit (Tr. 379). Yet Kirk Velting was the company official who was daily at the mine and who interacted the most with the miners. I believe the company's indifference to its responsibilities lead directly to its violation of section 56.1704(a) and that the company's failure was indeed unwarrantable.

In addition, the company was highly negligent. A company engaging in mining and in commerce is presumed to understand that it is regulated, that regulation requires compliance with published standards, and that responsibility for compliance first and foremost lies with itself. The burden is on the company in this regard. Heritage offered no evidence that it made the slightest effort to assume this burden.

CIVIL PENALTY CRITERIA

I have found the violation was serious and the result of the company's more than ordinary neglect of its lawful obligations. In assessing a civil penalty, the Act mandates I consider also Heritage's history of previous violations, the size of its business, the effect of the penalty on Heritage's ability to continue in business, and its good faith in attempting to comply rapidly after

being charged (30 U.S.C. §820(i)).

Three of these criteria may be considered in short order. The Cherry Valley Pit had no history of previous violations, the company is a small operation (See n. 2 supra), and the company exhibited its good faith in complying by installing a guard around the roller shortly after the citation was issued (Gov. Exh. 2).

The remaining criterion is the effect of the penalty on Heritage's ability to continue in business. The burden of proof is on Heritage, and "[i]n the absence of [such] proof . . . it is presumed that no . . . adverse [e]ffect [will] occur" (Sellersburg Stone Co., 5 FMSHRC 287, 294 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); (citing Buffalo Mining Co., 2 IBMA 226, 247-248 (September 1973)); accord Spurlock Mining Co., 16 FMSHRC 697, 700 (April 1994); See also Steel Branch Mining, 18 FMSHRC 6, 15 (January 1996)).

At the hearing, Heritage argued the proposed penalty adversely would affect its continuation (Tr. 242, 307). As evidence, Heritage offered a monthly income statement for September 1998 (Resp. Exh. J). Amplifying on the meaning of the statement and on the company's fiscal condition, company president Kim Velting testified the source of capital keeping Heritage in business was the money earned from its sales. For the first six months of 1998 the company had sales of \$761,550.40 (Tr. 308; Resp. Exh. J). Indeed, its gross profits as of September 30, 1998, were \$536,555.44 (Tr. 312; Resp. Exh. J). However, as summer ended and fall began, contracts the company anticipated were not forthcoming due to delays in state road construction projects (Tr. 308). As a result of the slow down in income and other factors, the company's gross profits were not adequate to offset its expenses and the "bottom line" at the end of September was a loss of \$47,983.11 (Resp. Exh. J). This came at a time when the company needed to build up financial reserves to "cover" the winter months when it would be all but shut down (Tr. 305; Resp. Exh. J). (During the winter, the only activity at the pit was the use of one front end loader to load customers' trucks from stockpiles (Tr. 320).) Kim Velting noted that despite its greatly curtailed winter operations, the company had to meet ongoing financial obligations in the form of salaries, workers' compensation payments, and attorney's fees (See Tr. 305-306). He believed it possible the company would "go under" if the proposed penalty was assessed (Tr. 307).

Because Heritage did not then have available to it all of the financial materials it believed relevant to the issue of its ability to continue in business, the record was left open to allow the company to submit the material and for the Secretary to respond (Tr. 524). Subsequently, the company submitted, among other things, a Federal income tax return for 1997, a financial report signed by Kim Velting and dated November 30, 1998, and an unaudited income statement showing the company's financial position from April 1, 1998 to November 30, 1998 (See letter

from Boncher to [Barbour] and attachments).⁹

A review of the material reveals that in 1997, the company reported income of \$1,195,665 and total deductions, not including an operating loss deduction, of \$1,113,252 . When its net operating loss deduction is included, the company showed a taxable income of \$0.00. In addition, the company showed income ("net sales") of \$1,011, 407.99 from April 1, 1998 to November 30, 1998, a gross profit of 736,158.83, and other income of \$8,402.72. However, after deductions for operating and other expenses, the company showed a loss for that period of \$76,320.95 (See letter from Boncher to [Barbour] and attachments).

In his financial report Kim Velting stated that as of December 29, 1998, the company was "showing an approximate \$80,000 loss" but that "in the interest of full disclosure, the land investment portion of the business recently settled a substantial claim which will allow the corporation to continue." He added that, "It may be best to simply discontinue the mining portion of the business rather than to subsidize it. This decision is currently being considered" (See letter from Boncher to [Barbour] and attachments).

The Secretary argues the company's post hearing materials are "either unaudited or incomplete" and "therefore . . . must be viewed with a high degree of skepticism" (Sec. Br. 32). Nonetheless, she notes they indicate the company paid Kim Velting and Kirk Velting combined salaries of \$110,480.00 in 1977 and of \$102,320 through November of 1998. More significantly, they indicate that the company holds real estate valued at \$718,000 (Sec. Br. 33). Further, the Secretary points out that although the financial statement ending November 30, 1998, reflects a loss of \$76,320.95, depletion and depreciation charges totaling \$308,000 were taken against income and that without them, the company would have shown a net profit of over \$230,000 (Sec. Br. 34). In short, the Secretary maintains that penalty proposed will not affect the company's ability to continue in business.

I agree. Taking the company's most recent financial materials at face value, I find that an assessment of even the maximum penalty allowed by law will not adversely affect the company's continuation. Like the Secretary, I find compelling reports of the company's real estate and real estate-related assets. The fact that the company has investments in land worth well over half a million dollars and Kim Velting's candid disclosure of the settlement of a "substantial claim" that will allow the company to continue, requires the conclusion that whether or not the company chooses to continue the mining portion of its business, the company will remain a going concern even with the added liability arising from this case.

⁹Because the company's taxable year ended after the record closed, this was the most recent information available.

ASSESSMENT OF CIVIL PENALTY

I recognize that the penalty proposed by the Secretary relates directly to the fact that Oakes died as a result of the accident. Had he not been caught in the pinch point and killed, the proposal would have been much lower. I also recognize that the evidence supports finding that Oakes shared in the blame for his death. The height of the roller meant that Oakes could not have fallen or stumbled into the pinch point. The only way he could have been caught was for him intentionally to bring his arm or hand dangerously close to the belt or roller, and for some reason to snag his clothing or to catch his hand (Tr. 294, 341-342, 462). Further, he did this although he knew the belt was running. He acted in flagrant disregard of his own safety.

Oakes was functioning as the supervisor (See n. 1 supra), but gross disregard by supervisors of their own responsibilities mitigates the fiscal consequences of the operator's negligence only if the negligence puts the supervisor alone at risk and if the operator took reasonable steps to avoid the particular class of accident (Nacco Mining Co., 3 FMSHRC 849-850 (April 1981)).

While Oakes acted at his own peril, the record does not support finding that Heritage took reasonable steps to avoid conveyor belt accidents. Miners knew that Oakes at times worked under the belt while it was running (Tr. 291). Moreover, Kirk Velting knew that prior to his death Oakes engaged in two very dangerous work practices — standing on the edge of the log washer while it was running and stepping on the screen deck to try to dislodge stuck material (Tr. 32, 345, 385-386). Despite the hazardous practices Kirk Velting limited Oakes' discipline to an oral reprimand (Tr. 385).

I believe that more than an oral reprimand was required to emphasize the importance of safe work practices, and the company did not establish it did more. For example, the company had no formal program to instruct either management personnel or miners in the rudiments of safety (Tr. 214, 216). It began such a program only after the accident. Further, although Kim Velting believed a handbook describing the company's "safety program" was given to employees prior to the accident (Tr. 213), neither Kim Velting nor Kirk Velting could point to any formal instruction of employees in the hazards of unguarded pulleys or rollers and the alleged handbook was not offered into evidence.

Given all of these factors, I conclude a substantial penalty is warranted. However, I believe the Secretary's proposal is excessive in view of the small size of the company and the fact that the Cherry Valley Pit had not been previously inspected and, hence, the company had no history for prior violations. Accordingly, I find that a penalty of \$20,000 is appropriate.

ORDER

Heritage is **ORDERED** to pay to the Secretary a civil penalty of \$20,000 within 30 days of the date of this decision. Upon receipt of the payment, this proceeding is **DISMISSED**.



David F. Barbour
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868

June 24, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 99-152-M
Petitioner	:	A. C. No. 08-00008-05570
	:	
v.	:	Cabbage Grove
LIMEROCK INDUSTRIES,	:	
INCORPORATED,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On April 16, 1999, the operator filed a request to set aside the final judgment and dismiss the citations in this matter which has been assigned the docket number captioned as above.

On July 28-30, 1998, the fourteen citations in this case were issued to the operator. During the same inspection other citations and orders were issued to the operator which are contained in four other cases pending before the Commission (Docket Nos. SE 99-17-M, SE 99-18-M, SE 99-19-M, and SE 99-20-M). On October 5, 1998, the Secretary of Labor issued notices of proposed penalty assessments in this case and the four others. By letter dated October 19, 1998, the operator contested the assessments in all five cases. The files of the four other cases show that on October 22, 1998, MSHA received the operator's contests.

Thereafter, in December 1998, the Solicitor filed with the Commission petitions for the assessment of civil penalties in the other four cases. A petition was not filed in this case. Instead the Solicitor sent the operator a letter dated March 24, 1999, stating that the assessment in this case had become final and demanding payment.

In an order dated April 20, 1999, I stated that it appeared the operator had timely contested the penalty assessments in this case and that the Solicitor had failed to timely file a penalty petition. Therefore, I ordered the Secretary to show cause why this case should not be dismissed for failure to file the penalty petition within 45 days of the date the operator's contest was received as required by Commission regulations. 29 C.F.R. § 2700.28(a).

On May 17, 1999, the Solicitor filed the penalty petition accompanied by a response to the show cause order and by a motion to accept late filing. Attached to the response is a statement from Charles H. Brinkley, Acting Chief MSHA Civil Penalty Compliance Office, admitting that the operator had timely contested the proposed penalty assessment and that due to clerical error the case was not forwarded to the Commission. According to Mr. Brinkley, the

failure to process the case was the reason the demand letter was erroneously sent and the error was not discovered until the operator protested the demand for payment and the case was examined in light of the protest.

On June 10, 1999, the operator filed a motion to dismiss the penalty petition because it was not filed timely and the Secretary did not demonstrate adequate cause for the untimeliness.

The penalty petition was due on December 7, 1998. 29 C.F.R. § 2700.8. Filing is effective upon mailing and the petition was mailed on May 13, 1999. 29 C.F.R. § 2700.5(d). It was therefore, more than five months late.

The Commission has permitted late filing of penalty petitions where the Secretary demonstrates adequate cause for the delay and where the respondent fails to show prejudice from the delay. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981). The Secretary must establish adequate cause apart from any consideration of whether the operator has been prejudiced. Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989).

A determination of adequate cause is based upon the reasons offered and the extent of the delay. I have not permitted late filings based on mishandling of cases where the delay was lengthy. In Phelps Dodge Morenci Inc., 1993 WL 395589 (June 1993), a delay of over five months was not countenanced where the Regional Solicitor's Office misplaced the case upon receipt and the Solicitor did not file the petition until after the Commission issued a show cause order. See also, Hecla Mining Company, 1993 WL 395630 (June 1993) where a delay of five months resulted in a dismissal of the petition. And in Lawrence Ready Mix Concrete Corp., 6 FMSHRC 246 (Feb 1984), the petition was dismissed where the delay was a year and a half and the filing came only after a show cause order was issued. Finally, I have not accepted a late penalty petition where the Solicitor claimed that the case was mishandled when he had referred the matter to MSHA under the Alternate Case Resolution Initiative (ACRI). Swenson Granite Company, LLC, 20 FMSHRC 859 (August 1998). In Swenson, I held that sending the case to MSHA did not excuse the Solicitor from his responsibility of filing required pleadings.

However, I have accepted late filings where the delay caused by clerical error was of short duration. Apac Oklahoma, Docket No. CENT 97-187-M, unpublished (December 16, 1997) (attached to Patterson Materials Corp, 21 FMSHRC 463, 466 (April 1999)), M. Jamieson Company, 12 FMSHRC 901 (March 1990). And I have accepted late filings where the Secretary discovered the error and did not wait until either the Commission or the operator took action. Patterson Materials Corp, 21 FMSHRC 463 (April 1999).

The circumstances in this case are similar to those cited above where late filing was not permitted. The delay here was very long and the error was only discovered when the operator responded to MSHA's demand for payment. In addition, the Solicitor has not offered any other special factors beyond its statement of clerical error. If this five months delay were allowed, a clerical error of any kind always would provide a basis to avoid the regulation. Therefore, I find that the Solicitor has failed to demonstrate adequate cause for the delay and the case must be dismissed.

In light of the foregoing, it is **ORDERED** that this case is **DISMISSED**.

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive style with a large, stylized "P" and "M".

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 Skyline, Suite 1000

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Falls Church, Virginia 22041

June 28, 1999

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-130-D
ON BEHALF OF	:	MSHA Case No. MORG CD 97-07
JOHN E. PALMER AND,	:	
JAMES W. TAYLOR,	:	Docket No. WEVA 98-131-D
Complainants	:	MSHA Case No. MORG CD 97-07
v.	:	
	:	Federal No. 2 Mine
EASTERN ASSOCIATED COAL CORP.,	:	Mine ID 46-01456
Respondent	:	

DECISION

Appearances: Yoora Kim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainants;
David R. Joest, Esq., Eastern Associated Coal Corporation, Henderson, Kentucky, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Complaints of Discrimination filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), on behalf of John E. Palmer and James W. Taylor, against Eastern Associated Coal Corporation, under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A hearing was held in Fairmont, West Virginia. For the reasons set forth below, I find that Eastern Associated did discriminate against Palmer and Taylor.

Background

The Respondent's Federal No. 2 Mine is an underground, coal mine near Fairview, West Virginia. Access to the underground workings is provided by a man cage (elevator) which is lowered down a 740 foot shaft. Under normal conditions it is the only way to get in, or out of, the mine. The cage holds approximately 40 men and can also be used to load equipment into and out of the mine.

A steel cable runs from the top of the cage, up a tower (head frame) built over the shaft, and goes over a "bull wheel" located at the top of the tower and comes back down to where it is connected to a counter-weight. As the cage goes down, the counter-weight goes up. The process

reverses when the cage comes up. The raising or lowering of the cage is accomplished by a motor. The elevator operates in two modes, automatic and manual. In the automatic mode, a button is pushed and the cage goes up or down at a constant, full speed. In manual mode, the elevator is operated by a hoist operator in the hoist house and the speed of the cage is controlled by the operator. Automatic mode is normally used when men are going in or out of the mine. Manual mode is normally used when work is being done on the hoisting equipment or the shaft and cage are being inspected.

The cage is equipped with safety catches, called "safety dogs," which are steel wedges designed to deploy if the cage should begin to free-fall by digging into the wooden guides between which the cage operates. The "dogs" and guides are visually checked daily and the "dogs" are deployed bi-monthly, although they have never been tested in a free-fall because then they and the guides would have to be replaced.

September 17, 1997

In the early morning hours of September 17, 1997, an electrician was called out of the mine to check a noise being made by the elevator. When the day shift electricians performed their preshift examinations that morning, the noise was louder. After completing their preshifts, Dan Hart, the electrical supervisor, and two other electricians spent most of the day trying to determine and correct the cause of the noise, which appeared to be coming from the "bull wheel."

Sometime between 3:30 and 3:40 p.m., John Horn, an afternoon shift mechanic was waiting to be lowered into the mine and heard the noise from the wheel. He notified mine committeeman, Joe Reynolds, who in turn contacted safety committeeman, Bob Kurczak.¹ Horn said that the noise was "a loud, screeching noise and something like grinding at the time." (Tr. 61.) He also noticed "the side structures of the light metal on the cage vibrating rapidly more than it usually does at any time like something was off balance or something could have maybe come loose on the bull wheel." (*Id.*)

Reynolds and Kurczak went to Complainant Palmer, president of the local union, who was completing his shower after finishing his shift and explained the situation to him. Sometime later, Complainant Taylor, chairman of the union safety committee, was notified at home and he returned to the mine. After several meetings between various members of management and the union and with the electricians in an attempt to determine what was causing the noise, it was evident that no one knew its source. The best assurances that anyone could give was from the electricians who thought that the elevator would be safe to operate in the *manual* mode.

¹ The miners at Federal No. 2 are represented by the United Mine Workers of America.

There were several aborted attempts to take the afternoon shift miners down into the mine. At least five miners exercised their individual rights to withdraw from unsafe conditions by getting off of the elevator or refusing to get on it. Finally, Palmer told the shift foreman, James Wilmoth, that "the cage is down until we kn[o]w where the noise is coming from." (Tr. 159, 284, 362, 427.) Taylor arrived at the mine some time after this, and after making his own investigation, told management that he could not in good conscience allow the men to ride the elevator until the cause of the noise was identified and it was determined that it was safe.

At about 8:00 p.m. Darrell Harper, a representative of 3-H Mining, the manufacturer of the bull wheel, arrived at the mine. He examined the wheel and concluded that the noise was being caused by the liners in the wheel.² He declared that the cage was safe to operate and everyone accepted his opinion.

By this time, the afternoon shift had been sent home. Palmer and Taylor remained at the mine until the midnight shift came on to advise them that the cage was safe.

Discriminatory Action

At a meeting with mine management on September 23, 1997, Palmer and Taylor were informed that they were being disciplined for their activities on September 17. Palmer was suspended without pay for five days "for your actions on the Afternoon Shift of Wednesday, September 17, 1997, when you interfered with management of the mine when you refused to let our employees enter the elevator on this [sic] date." (Jt. Ex. 8.) Taylor was removed from the Mine Health & Safety Committee "as a result of the incident that occurred on the Afternoon Shift of Wednesday, September 17, 1997, in which you were involved." (Jt. Ex. 11.)

Palmer and Taylor filed discrimination complaints with MSHA on September 23 as a result of the disciplinary action taken against them. They also pursued their grievance rights under the union contract. As of the date of the hearing, the grievances had been settled with Taylor having been restored to his position on the safety committee, he was in fact never removed, and the disciplinary letter having been removed from Palmer's personnel file, although he did serve the five day suspension without pay.

Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity

² The liners protect the bull wheel itself from wear by the cable.

and (2) that the adverse action complained of was motivated in any part by that activity.³ *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 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); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

It is the Complainants' position that they engaged in protected activity when they refused to allow the cage to be used without knowing whether it was safe to do so. The company argues that the Complainants did not engage in protected activity because neither of them refused to go into the mine in the cage and they cannot refuse to allow other miners to work in unsafe conditions. Finding that individual miners can exercise statutory rights on behalf of others, I conclude that Palmer and Taylor did engage in protected activity.

Good Faith and Reasonable Work Refusal

The Commission has long held that a miner's refusal to perform work is protected activity under the Act if it is based on a reasonable, good faith belief that the work involves a hazard. *Secretary on behalf of Hannah, Payne & Mezo v. Consolidation Coal Co.*, 18 FMSHRC 2085, 2090 (December 1996); *Secretary on behalf of Dunmire & Estle v. Northern Coal Co.*, 4 FMSHRC 126, 133-38 (February 1982); *Robinette*, 3 FMSHRC at 807-12; *Pasula*, 2 FMSHRC at 2789-96. While accepting this proposition, the Respondent asserts that Palmer and

³ Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or, (4) he has exercised "on behalf of himself or others . . . any statutory right afforded by this Act."

Taylor did not have the right to refuse to allow other miners to work. The company makes this assertion based on the following language from the Third Circuit Court of Appeals:

In upholding the ALJ's decision the Commission relied on what it asserted to be the right of miners to walk off the job when confronted with unsafe and unhealthful work conditions. Assuming the existence of such a right, it is still clear that the Mine Act does *not* provide for the right to shut down equipment so that *other* miners may not work. There is no right in the Act to shut down an entire shift's work. An individual is protected by the Act from retaliation for asserting and acting on his real fear that conditions are unsafe or hazardous to his health; but no one has the right to stop others from proceeding to work if they so wish.

Consolidation Coal Co. v. Marshall, 663 F.2d 1211, 1219 (3rd Cir. 1981).

While this language could be interpreted to support the company's position, it is a strained interpretation. The court is plainly saying that no one has the right to prevent someone who wants to go to work from doing so; not that no miner can assert the protection of the Act on behalf of another miner. In this case, there is no evidence that Palmer and Taylor prevented anyone from going to work who wanted to.⁴ In addition, the operators reading of the decision flies directly in the face of the plain language of section 105(c)(1) of the Act that a miner cannot be discriminated against "because of the exercise of such miner, [or] representative of miners . . . on behalf of himself or others of any statutory right afforded by this chapter" (emphasis added).

Furthermore, if the Respondent's rendition of *Marshall* is correct, it is curious that the Commission held in a decision subsequent to *Marshall* "that the test of section 105(c)(1) supports the extension of protection, in appropriate circumstances, to individual miners exercising statutory rights on behalf of others" and did not even mention *Marshall*. *Cameron v. Consolidation Coal Co.*, 7 FMSHRC 319, 322 (March 1985). Finally, even if the company has correctly read *Marshall*, it is a Third Circuit case and thus binding only in the Third Circuit. The

⁴ The Respondent cites the following as an indication that miners were prevented from going to work:

Q. Your understanding was that the miners wanted to go underground?

A. Yes. That's what we all go up there for to go underground to make a living.

(Tr. 491.) This clearly is a general statement of why everyone was there and not evidence that miners were precluded from going to work against their will.

instant case occurred in the Fourth Circuit, as did *Cameron*, which was affirmed by the Court of Appeals. *Consolidation Coal Co. v. FMSHRC*, 795 F.2d 364, 367-67 (4th Cir. 1986).

Thus, the principle that individual miners can invoke the protections of the Act on behalf of other miners is applicable in this case.⁵ Significantly, the Commission has applied the principle in a case with facts very similar to the ones here. In holding that a surface electrician had properly exercised safety rights under the Act when he refused to restore power to the mine because two mine examiners, who could be killed or maimed by an explosion if there was an electrical fault with methane present, were still underground, the Commission stated:

While Hannah did not work underground, and thus would not himself have been exposed directly to the risk of death or injury from explosion that could have resulted from restoring power when accumulations of methane gas were present, this does not in itself render his work refusal unprotected. The Commission has held that, in appropriate circumstances, the Mine Act extends protection to a miner who refuses to perform an assigned task due to the danger posed to the health or safety of another miner.

Hannah, 18 FMSHRC at 2092 n.6 (citations omitted). Consequently, I conclude that Palmer and Taylor were entitled to exercise safety rights on behalf of the other miners in this case.

Even though Palmer and Taylor could properly exercise safety rights on behalf of the other miners, they do not come within the protection of the Act if their belief that operation of the elevator could be hazardous was not in good faith and reasonable. The company contends that the complainants did not act in good faith and reasonably because no hazard in fact existed, neither complainant noticed the noise during the day shift, they could not explain exactly what they thought would happen as a result of the noise, Taylor did not object to management using the elevator, the electricians working on the elevator stated that they thought it was safe to operate in the manual mode, and the elevator has safety features. None of these arguments has merit.

Initially, it should be noted that the fact that it was finally determined that the elevator was safe to operate does not mean that the Complainants did not act in good faith or were unreasonable. They need only show that at the time they acted they were acting in good faith and reasonably, not that a hazard actually existed. *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989); *Robinette*, 3 FMSHRC at 812. In the same vein, it is not significant that the miners could not describe exactly what they believed would happen to the elevator because of

⁵ I find that Palmer and Taylor were representatives of miners, although the outcome would not change even if they were acting in their individual capacities. *Cameron*, 7 FMSHRC at 322.

whatever was causing the noise. There is no requirement that they describe the exact hazard they fear, only that they reasonably and in good faith believe that there is a hazard. Furthermore, it is clear from the testimony of all of the miners that they were afraid that, in the worst case, the elevator would free fall down the 740 foot shaft.

Whether or not the Complainants heard the noise during their shift at the mine is irrelevant. No one disputes that the bull wheel began making the noise in the early morning hours of September 17, that it got louder during the day and that the electricians spent all day trying to locate its source. Moreover, it is clear that Palmer and Taylor did hear the noise before they acted; they were not relying on second hand information.

Taylor's statement to management that management could use the elevator if they wanted to because they believed that it was safe does not indicate that he did not have a good faith belief that the elevator was not safe. He was merely stating the obvious, the miners thought the elevator was unsafe, management did not, therefore, if management wanted to use the elevator, it was up to them. As he testified: "I thought that they would probably take disciplinary action against me for interfering with mine management, that they deemed it was safe and who was I to tell them that they couldn't ride their own cage anytime they wanted to." (Tr. 636.)

When concerned about the possibility of the elevator falling down a 740 foot shaft, a statement by the electricians that they did not know what the problem was, but thought that it would be safe to operate in the manual mode was hardly reassuring. The statement itself indicates that even the electricians did not think it was safe to operate the elevator in the normal mode. In addition, they did not give any reason why they believed the manual mode would be safe, if the normal mode was not. Therefore, the statements of the electricians do not provide a basis for concluding that the Complainants' actions were not taken in good faith and were unreasonable.

Finally, the fact that there were emergency safety devices on the elevator does not mean that the elevator was safe. The fact that the safety devices would only deploy in the event of a free fall undermines the company's reliance of them to rebut the reasonableness of the complainant's belief.

In short, the Complainants were faced with a situation where the elevator was making a loud, screeching, grinding noise and no one knew what was causing it or what effect the cause of the noise might have on the operation of the elevator. To ride the elevator, the miners had to believe that it would safely deliver them down a 740 foot shaft into the mine. The most reassuring statement anyone could make was that they thought the elevator could be safely operated in the manual, or non-normal mode. Several miners had already exercised their individual rights to remove themselves from the elevator. In these circumstances, I conclude that Palmer and Taylor were acting in good faith and reasonably when they refused to allow miners to ride the elevator until it could be determined what was causing the noise and whether the elevator was safe to operate.

Concerns Communicated to Management

In order for a work refusal to be protected, the safety concerns must be communicated to the operator. *Hannah*, 19 FMSHRC at 2090-91; *Dunmire*, 4 FMSHRC at 133. In this case there is no doubt that the Complainants' safety concerns were communicated to mine management.

Failure to Allay Fears

Once a miner has expressed a good faith, reasonable concern about safety, the operator has a duty to address the perceived danger in a manner that should reasonably resolve the miner's fears. *Gilbert*, 866 F.2d at 1441; *Secretary of Labor v. Metric Constructors, Inc.*, 6 FMSHRC 226, 230 (February 1984), *aff'd sub nom. Brock v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985); *Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1534 (September 1983). The operator argues that miners' fears were addressed by the electricians.

As noted above, the electricians did not adequately dispel the concerns. In a similar case, the Commission found that the company had not conveyed sufficient information to complainants who were refusing to ride an elevator to allay their reasonable fears. The Commission pointed out that "[t]hey were told by Hager and Smith that the elevator was safe, *but they were not told what caused the malfunctions or why it was now considered safe.*" *Hogan and Ventura and UMWA v. Emerald Mines Corp.*, 8 FMSHRC 1066, 1074 (July 1986) (emphasis added). Likewise, in this case, the electricians could not say what was causing the noise, nor could they say why the elevator was safe to operate in the manual mode, but not the normal mode.

It was not until Harper arrived, determined the cause of the noise, and concluded that the elevator was safe to operate that the Complainants' concerns were adequately addressed. If matters had ended there, everything would have been fine. Instead, management took disciplinary action against Palmer and Taylor. As is made clear in the disciplinary letters, this action was taken because of the protected activity in which the Complainants engaged.

Conclusion

In sum, I find that the Complainants had a reasonable, good faith basis for refusing to let the elevator be used to take miners into the mine, that they were entitled to make this refusal on behalf of the other miners both in their individual capacities and as representatives of miners, that they communicated their fears to management and that management did not adequately address those fears until a representative of the manufacturer of the bull wheel came to the mine. I further find that the company took adverse action against Palmer and Taylor for having engaged in protected activity. Thus, I conclude that the Complainants have made out a *prima facie* case of discrimination.

The operator does not claim that the adverse action was not motivated by the protected activity, nor does it claim that there was some other unprotected activity which motivated the disciplinary action. Accordingly, I conclude that Palmer and Taylor were disciplined in violation of section 105(c) of the Act and are, therefore, entitled to the remedies prescribed by that section.

Entitlement to Relief

The Respondent asserts that "Complainant's settlement of their labor grievances, which grieved the same actions which are the subject of their 105(c) complaints, without any reservation of the right to pursue those complaints, should bar Complainants from receiving any relief in these proceedings." (Resp. Br. at 31.) The Commission has held that: "Generally, when a discriminatee is unconditionally and in a bona fide fashion offered reinstatement, the running of back pay is tolled." *Bryant v. Dingess Mine Service et al*, 10 FMSHRC 1173, 1180 (September 1988). This is true even if the offer arises out of contractual grievance negotiations, when the grievance and the discrimination complaint arise out of the same circumstances. *Id.* at 1181. Thus, the settlement of a grievance may serve to terminate, prospectively, any relief to which the complainant may be otherwise entitled.

In this case, however, the Respondent did not make an unconditional offer of reinstatement. Palmer was not made whole, he has served the five day suspension and lost five days pay. Consequently, unless the settlement of the grievance specifically provided that it also settled the discrimination complaint, which it apparently did not, I find that the Complainants are not precluded from seeking relief under the Act.

Civil Penalty Assessment

The Secretary has proposed penalties of \$7,500.00 for each complainant. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, I find that Federal No. 2 is a very large mine, that its controlling entity, Peabody, Inc., is a very large mining conglomerate and that the mine has a low history of previous violations. (Jt. Ex. 1.) I further find that the proposed penalties will not adversely affect the operator's ability to remain in business.

With regard to the Respondent's demonstrated good faith "in attempting to achieve rapid compliance after notification of a violation," it would seem that the Respondent will not receive notification of a violation until it receives this decision. There is no evidence, however, that on being notified of the complaints the company has penalized, harassed, discriminated against or

otherwise treated the Complainants in any way different than any other miner. Therefore, I find to that extent the company has demonstrated good faith.⁶

I find that the company has been only moderately negligent with regard to these complaints. The line between raising legitimate safety concerns and "interfering with the management of the mine" can be a thin one. While the Complainants did not cross it in this case, it cannot be said that the company over-reacted to the loss of an entire production shift. If the Complainants *had* interfered with mine management, the disciplinary action taken by the company would be relatively lenient.

Likewise, the Secretary has not shown that this was a grave violation of the rights of miners. While Palmer speculated that some miners may be reluctant to raise safety concerns as a result of the discipline meted out to Taylor and him, no direct evidence was presented of such reluctance. Palmer testified that miners were still bringing complaints to him. Further, there is no evidence that the company discourages safety complaints. Indeed, while the union contract calls for bi-monthly paid safety inspections by the union safety committee and management, management proposed and carries out paid safety inspections for the months when the contract does not provide for them.

Accordingly, taking all of these factors into consideration, I conclude that a penalty of \$7,500.00, \$3,750.00 for each complainant, is appropriate.

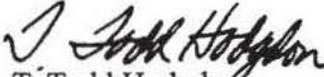
Order

Accordingly, it is **ORDERED** that:

1. The Respondent **PAY** Mr. Palmer full back pay, with interest and benefits, for the five days that he was suspended;
2. The Respondent **REIMBURSE** Mr. Palmer and Mr. Taylor for any reasonable and related economic losses or litigation expenses incurred as a result of the adverse action taken against them;
3. The Respondent **EXPUNGE** any and all references to the disciplinary action taken against Mr. Palmer and Mr. Taylor, and the circumstances surrounding it, from any and all records kept by Respondent, including but not limited to the Complainants' personnel files;

⁶ Management's attempts to settle the grievances do not demonstrate any lack of good faith, as argued by the Secretary.

4. The Respondent, and its agents and employees, **REFRAIN** from informing any prospective employer of the section 105(c) complaints filed by Mr. Palmer and Mr. Taylor, the circumstances and events underlying and/or related to the complaints, or any other instance in which either complainant may have made safety complaints or exercised his rights under the Mine Act;
5. The Respondent **POST** a copy of this decision on the mine bulletin board for a period of **30 days**.
6. The Respondent **PAY** civil penalties of **\$7,500.00** within 30 days of the date of this decision.⁷


T. Todd Hodgdon
Administrative Law Judge

Distribution:

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David R. Joest, Esq., Eastern Associated Coal Corporation, 1951 Barrett Court, Henderson, KY 42420 (Certified Mail)

/nj

⁷ In addition to the remedies ordered, the Secretary also requested that the Respondent be ordered to cease and desist discriminating against the Complainants in violation of section 105(c) and to post a notice stating that it will not violate section 105(c) with respect to any miner. There is no evidence that the Respondent is currently discriminating against the Complainants. In addition, no purpose will be served by ordering the Respondent to comply with a law with which it is already required to comply.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 28, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 96-21-M
Petitioner	:	A. C. No. 44-00040-05559
v.	:	
	:	Eastern Ridge Lime
EASTERN RIDGE LIME COMPANY, L.P.,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Weisberger

This matter is before me pursuant to the Commission's Decision, 21 FMSHRC 416 (April 1999), vacating my Decision on Remand (20 FMSHRC 758 (July 1998)), on the ground that the decision did not contain the additional "fact finding and analysis of the penalties to be assessed." The Commission set forth the scope of the remand as follows:

On remand, we direct the judge to state whether he is relying on the failure to provide adequate ground support as a cause of the accident and as support for his S&S and penalty determinations and, if so, to indicate the basis in the record for doing so. We also remind the judge that he does not have to find that the violation led to the ground fall which caused a fatality in order to conclude that the violation was S&S. See *Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998).

On April 28, 1999, an order was issued directing the Parties to file briefs regarding the issues framed by the Commission's Remand. On May 26, 1999, Respondent filed its brief on remand. On May 17, 1999, Petitioner filed its brief on remand. Additionally, on May 27, 1999, Respondent filed a Motion for Leave to Adduce Additional Evidence, and Petitioner filed an Opposition to this Motion on June 9, 1999.

1. Respondent's Motion for Leave to Adduce Additional Evidence.

Respondent alleges that subsequent to the hearing in this matter the mine at issue was sold by Respondent, and that subsequent to the sale the mine's records revealed a set of color photographs of the area of the rock fall after the rock fall. It is alleged that these photographs are clearer than the photographs used at the hearing; that they show that conditions observed by

some of the miners and relied on by the undersigned "are not borne out by the physical evidence;" and that the photographs show "how the mechanism of the fall was not related to any condition known to the miners prior to the accident." It is alleged that Respondent's counsel was not aware of the existence of the photographs until after the hearing.

Petitioner, in her opposition to Respondent's motion alleges that on June 13, 1997, Respondent had filed a Motion for Leave to Adduce Additional Evidence with the Court of Appeals of the Fourth Circuit seeking to introduce into the record the exact same photographs that are the subject of the instant motion, and that the motion was opposed by the Petitioner who set forth, inter alia, that the photographs are cumulative, and impeaching in nature. On July 3, 1997, the Fourth Circuit issued an order denying the Motion.

The Motion before me is, in substance, the same Motion that had been filed before the Fourth Circuit.¹ Accordingly, the Fourth Circuit's Order becomes the law of the case, as it relates to the merits of Respondent's Motion for Leave to Adduce Additional Evidence. Accordingly, on that basis alone, I must find that Respondent's Motion be denied.

2. The Failure to Provide Adequate Ground Support Is Not Being Relied Upon as the Cause of the Accident and as Support for Significant and Substantial and Penalty Determinations.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981).

^{1/} In the instant Motion, Respondent alleges that the color photographs it seeks to introduce were discovered, subsequent to the hearing, "[d]uring a review of those records" after they had shipped to Respondent's parent's facilities in Illinois. In contrast, in the motion that had been filed with the Fourth Circuit, Respondent described the photographs as having been found "[d]uring the a routine review of those record." There is no indication in the order of Fourth Circuit that its decision denying Respondent's Motion was based, in any part, upon the fact that the photographs were discovered during a "routine" review of their records. I thus find that this difference in the wording of the motions not to be significant or material.

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

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

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

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

I reiterate my earlier findings that Respondent did violate 30 C.F.R. § 57.3360, and that the essence of the violation, i.e., failure to provide ground support, contributed to the hazard of roof fall. I thus find the first two elements set forth in *Mathies*, supra, have been met.

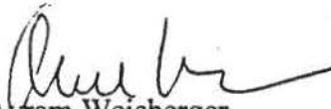
The third element set forth in *Mathies* "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Company*, 6 FMSHRC 1834, 1836 (August 1984). In applying the third element set forth in *Mathies*, supra, to the instant case, I specifically do not find that either of the violations at issue led to the ground fall which caused a fatality. In the same fashion, although Respondent failed to provide adequate ground support, I am not relying on this as a cause of the accident, and as support for the significant and substantial penalty determinations that I previously made. My conclusion that the third and fourth elements set forth in *Mathies*, supra, have been met, is based on the record which establishes that there was a reasonable likelihood that the hazard of a roof fall was contributed to by the violations. Additionally, the record establishes that there was a reasonable likelihood that the hazard of a roof fall will result in an injury of a reasonably serious nature, based upon the existence of the combination of the following conditions: a cavity in the roof of 204E heading that extended most of the way across the face of the 204E heading, the roof of the 204E heading was "drummy," there was popping and cracking in the roof of the 204E in December 1993 which indicated that the top was not sound, the presence of mud seams, the presence of bad top in the 206 heading prior to the July 25, 1994, roof fall in 204E/11S, and the proximity of the left rib in 11S to the vertical cavity in 204E.

Since there was a reasonable likelihood of a roof fall, I find that even not considering the fatality and serious injuries which resulted as a consequence of the roof fall herein, I conclude that since there was a reasonable likelihood of a roof fall, it is clear that there was a reasonable likelihood that a roof fall will result in injuries of reasonably serious nature to exposed miners. For these reasons, I reiterate my finding that the violation of section 57.5360, supra, was significant and substantial. Further, the existence of the combination of roof conditions in the area in issue, as set forth above, is the basis for the finding that the violation of 30 C.F.R. § 57.3201 was significant and substantial.

Essentially for the reasons set forth above, I find that the violations at issue were of a high level of gravity, as they could have resulted in a fatality or serious injuries to exposed miners.² I thus reiterate my initial findings regarding the penalties to be assessed.

ORDER

It is **ORDERED** that Order No. 4289773 and Citation 4389772 be **AFFIRMED** as written, and that to the extent, if any, that Respondent has not paid any penalties for these violations, it shall, within 30 days of this Decision, pay a total civil penalty of \$85,000.00.


Avram Weisberger
Administrative Law Judge

Distribution:

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dcp

^{2/} The scope of the Commission's remand does not require me to reconsider or make additional findings regarding any of the additional factors set forth in section 110(i) of the Act regarding the assessment of a penalty. Thus, it is not necessary to consider Respondent's arguments regarding what it knew or should have known prior to the accident.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 Skyline, Suite 1000

5203 Leesburg Pike

Falls Church, Virginia 22041

June 29, 1999

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-155-D
ON BEHALF OF	:	Docket No. WEST 97-156-D
MICHAEL PODOLAK,	:	Docket No. WEST 97-157-D
RODNEY DAUGHTERY,	:	Docket No. WEST 97-158-D
CALVIN BENNETT,	:	
LYNDON GARDNER,	:	MSHA Case Nos. DENV CD 96-15 and
Complainants	:	MSHA Case Nos. DENV CD 96-16
v.	:	
	:	
ENERGY WEST MINING COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEST 99-56-D
ON BEHALF OF MICHAEL PODOLAK,	:	
Complainant	:	MSHA Case Nos. DENV CD 98-02
v.	:	Trail Mountain Mine
	:	Mine ID 42-01211
ENERGY WEST MINING COMPANY,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Hodgdon

These cases are before me on Complaints of Discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The parties, by counsel, have filed a motion to approve a settlement agreement.

Background

On July 18, 1996, Energy West employees Michael Podolak, Rodney Daugherty, Calvin Bennett and Lyndon Gardner filed discrimination complaints with the Mine Safety and Health Administration (MSHA) alleging that the company had violated their rights under the Act by announcing at a May 1996 meeting that employees on the graveyard shift would no longer be permitted to withdraw from welding or cutting fumes. On the same day, Mr. Podolak filed a separate complaint alleging that Energy West had discriminated against him on June 26, 1996, by

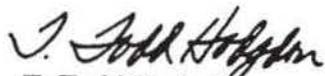
requiring him to remain in welding fumes after he had informed his supervisor that he had been made ill by the fumes. On October 6, 1997, Podolak filed an additional complaint asserting that Energy West had discriminated against him for his earlier protected activity by transferring him from his regular job on the longwall set-up crew to a position on a rotating shift labor pool, with the result that he suffered a loss of shift differential pay and other benefits.

The Agreement

Energy West has agreed to settle the cases by paying civil penalties of \$1,000.00 each for the section 105(c) violations in Docket Nos. WEST 97-155-D, WEST 97-156-D, WEST 97-157-D and WEST 97-158-D. The Secretary has agreed to move for the withdrawal of the complaint in Docket No. WEST 99-56-D, with the agreement of Mr. Podolak. To reduce the likelihood that such problems will be repeated, the company has agreed to post, for a period of 45 days, on the mine bulletin board where notices to employees are normally posted, a "Notice to All Miners" clarifying its position on withdrawals from welding or cutting fumes and acknowledging that "given the wide range of variables involved, it is possible that there could be circumstances in which a miner may reasonably believe the welding, cutting (burning) fumes he or she is assigned to work in are dangerous." Finally, Energy West agreed to pay to Mr. Podolak \$1,415.00 for wages he lost as a result of his transfer from the graveyard shift longwall set-up crew (by separate check with appropriate deductions), plus an additional \$500.00 to reimburse his expenses incurred in connection with this litigation.

Order

Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under section 105(c) the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i) is and in the public interest. Accordingly, the motion for approval of settlement is **GRANTED**, the Secretary's Motion to Withdraw the complaint in Docket No. WEST 99-56-D is **GRANTED** and that Docket is **DISMISSED** and the Respondent is **ORDERED** to carry out its obligations under this agreement and **TO PAY** civil penalties of **\$4,000.00** within 30 days of the date of this order.


T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
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June 29, 1999

ARTHUR R. OLMSTEAD,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 99-106-D
v.	:	
	:	Savage Mine
KNIFE RIVER CORPORATION,	:	
Respondent	:	Mine I.D. 24-00106

DECISION

Appearances: Arthur R. Olmstead, Savage, Montana, Pro se;
David M. Arnolds, Esq., Jackson & Kelly, Denver, Colorado, for
Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Author R. Olmstead against Knife River Corporation ("Knife River") under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). The complaint alleges that Knife River suspended Mr. Olmstead without pay and demoted him to a lower paying position in October 1998 in violation of section 105(c). A hearing in this case was held in Sidney, Montana, on May 25 and 26, 1999. For the reasons set forth below, I find that Mr. Olmstead did not establish that he was discriminated against and I dismiss his complaint of discrimination.

I. FINDINGS OF FACT

Knife River operates two open pit coal mines. The Beulah Mine in North Dakota produces about 2.7 million tons of coal a year and employs about 130 miners. The Savage Mine near Savage, Montana, is a much smaller mine that employs about eight to ten miners. Mr. Olmstead has worked at the Savage Mine for about 33 years. During this time, he has held a number of positions and has operated most of the equipment at the mine.

On June 30, 1995, when Mr. Olmstead was discharged from his employment at the Savage Mine, he filed a discrimination complaint under section 105(c) of the Mine Act. Mr. Olmstead injured his wrist and decided to have his wrist fused. He did not immediately return to work after his surgery. The stated reason for Mr. Olmstead's discharge was dishonesty for failure to advise management that the doctor had released him to return to light duty work.

A hearing was held before Commission Judge T. Todd Hodgdon in February 1996. Judge Hodgdon determined that Knife River had discharged Mr. Olmstead in violation of section 105(c) of the Mine Act. *Secretary of Labor o/b/o Arthur R. Olmstead v. Knife River Coal Mining Co.*, 18 FMSHRC 1103 (June 1996). Judge Hodgdon found that Mr. Olmstead engaged in protected activity. The judge credited the testimony of Mr. Olmstead and concluded that while "Mr. Olmstead was ostensibly discharged for dishonesty, I find that he was really discharged for continually raising safety concerns at the mine." *Id.* 1116. Judge Hodgdon ordered Mr. Olmstead reinstated to his previous position and awarded him back pay.

Mr. Olmstead was reinstated in July of 1996 to his previous position as tiple operator. Soon after he was reinstated, he bid on the loader operator position. This position is at the highest rate of pay for an hourly employee. Because of his seniority, he was awarded this position. The loader operator scoops up coal that has been blasted and dumps it into coal trucks for transportation to the preparation plant. The loader is a very large piece of equipment with an 18-yard bucket and tires that are about 8 feet tall. (Tr. 170, Ex. C-2M). It weighs about 90 tons.

Knife River has a written disciplinary policy in its employee handbook. (Ex. R-7). Rule 11 concerns carelessness and negligence. This rule states that it applies whenever an employee: (A) demonstrates carelessness or negligence in the performance of work assignments; or (B) damages property or product due to carelessness or negligence in the operation of equipment. *Id.* Under a section entitled "Penalty for Violation," the rule states: "First Offense - Warning Letter; Second Offense - Disciplinary Suspension; Third Offense - Dismissal." *Id.* Knife River contends that the actions that it took against Mr. Olmstead were pursuant to Rule 11 of the employee handbook and section 2(C) of the employee manual.

The first event at issue in this proceeding occurred on or about March 12, 1997. Duane "Chuck" Reynolds, an electrician at the Savage Mine, went to the mine superintendent, Carl "Junior" Etzel, to complain about Mr. Olmstead's operation of the loader. As stated above, the loader is used to load coal but, on occasion, it is used to move submersible sump pumps in and out of holes dug to dewater the area. A chain is attached to the pump and a tooth on the bucket of the loader. An electrician on the ground uses hand signals to guide the loader operator to raise or lower the bucket and to move forward or backward. The pumps are very heavy. Mr. Etzel testified that Mr. Reynolds told him that "Art pays absolutely no attention to [his] direction of when to lower, when to raise, when to tip the bucket back, when to tip it forward, and that he had come close to catching his fingers in the chain." (Tr. 174).

Mr. Reynolds testified that when he gave hand signals to Mr. Olmstead, who was operating the loader, Reynolds would never know which way Olmstead would go. (Tr. 338). Reynolds stated that when he gave a signal to stop, Olmstead would follow it some of the time and ignore it other times. Reynolds complained that Olmstead was not consistent with respect to the same hand signals. Reynolds testified that he told Mr. Etzel that he felt he was putting his

life in jeopardy when he worked with Mr. Olmstead. (Tr. 339-40). Reynolds testified that this was not the first time that Mr. Olmstead failed to follow his hand signals.

Following Mr. Reynolds' complaint, Mr. Etzel talked to Mr. Olmstead about the incident. Mr. Olmstead told Etzel that Reynolds did not know what he was doing and did not know how to give proper hand signals. (Tr. 174). Mr. Etzel told Mr. Olmstead that he should try to be more careful, but Mr. Reynolds felt that the situation was more serious than that. Mr. Etzel called Larry Duppong, vice president of operations, to discuss the situation. Mr. Duppong works at the company's headquarters in Bismarck, North Dakota. About a week later, Mr. Duppong traveled to the Savage Mine to attend a meeting with Messrs. Etzel and Olmstead. It was agreed that a system of uniform hand signals would be adopted. (Tr. 176). Nevertheless, Etzel and Duppong did not believe that it was really a hand signal issue. (Tr. 176, 291). Other mine employees had told Mr. Etzel that "it doesn't really matter what you do, Art does not pay any attention to you." (Tr. 176-77). Two of the employees who complained to Etzel were Leroy Miller and Garry "Bink" Miller.

Management considered this meeting as an oral warning to Olmstead. (Tr. 291). Etzel put his notes of the meeting in Olmstead's personnel file but a copy was not given to him. (Tr. 177; Ex. R-6). Mr. Olmstead did not consider this meeting to be an oral warning. Indeed, Etzel's written notes do not indicate that the discussions were an oral warning. Olmstead believes that the hazards created were entirely the result of Mr. Reynolds' lack of understanding of hand signals. Olmstead does not believe that he was at fault.

The second event occurred on April 20, 1998, when Mr. Olmstead ran the loader into a beam supporting the overhead walkway at the fuel station. (Tr. 79, 178). Mr. Olmstead approached the fuel station from the east, misjudged the distance between his bucket and the support beam, and pushed the beam to the west. (Tr. 178). The beam was made of 12-inch pipe filled with concrete, which helped support the walkway and protect the fuel station. Mr. Etzel attempted to straighten it by using a chain and a backhoe, but he was only partially successful. (Tr. 179).

Mr. Olmstead testified that the accident was not his fault. (Tr. 79). He stated that the fuel station was not properly designed and that, on that particular day, he had to approach it from an angle because a pile of rocks was in his way. (Tr. 80). He also testified that the area was very muddy. He stated that he gave the pipe only a "glancing blow." *Id.*

As a result of this accident, Mr. Etzel issued Mr. Olmstead a warning letter for carelessness and neglect under rule 11 of the employee handbook. (Tr. 180; Ex. R-4). The letter states:

This is a warning letter regarding your violation of Rule #11,
Carelessness and Negligence of Knife River Corporation's Rules
of Conduct.

On April 20, 1998, while preparing to fuel the 992 loader, you hit the fuel station with the loader bucket, causing the station guard to tip backward.

After examining the incident, I have resolved that no real monetary damage was done, other than labor costs to straighten the guard back up to the proper position.

Nevertheless, Art, it is critical for your safety and the safety of your fellow employees that due care be exercised at all times on the job.

(Ex. R-4). Mr. Olmstead refers to this letter as "Step 1" discipline. He contends that this letter was unfairly issued because other employees have had accidents which caused more significant damage or resulted in lost production in which no disciplinary action was taken. He testified about several accidents. These accidents are discussed later in this decision.

Mr. Etzel stated that he issued the letter because it is his practice to issue warning letters to employees who have a significant accident. He also took into consideration the fact that he had received a number of safety complaints about Mr. Olmstead from other employees. (Tr. 180-81). He discussed the letter with Mr. Duppong before he issued it. (Tr. 183, 291).

The final event in this case is the accident that occurred on September 24, 1998. Olmstead's loader is parked in a garage during the night to protect it from the elements. At the end of his shift on September 23, he drove the loader into the garage bucket first as was his practice. He arrived at the mine on September 24 at about 5:30 a.m. to begin his shift at 6 a.m. He entered the garage from the back, pre-shifted his loader, and entered the cab. Using the remote control inside the cab for the large garage door, he opened the door. It was still pretty dark outside. After looking in his rear view mirrors, he backed out and hit a company pickup truck that was parked outside. The pickup was demolished. (Exs. C-2H, R-1). There are no yard lights in the vicinity of the doors for this garage.

Generally, vehicles are not parked behind these garage doors. On the evening of September 23, repair work was being performed on another vehicle in the other bay of the garage. The repair crew needed parts to complete the repair. Mr. Etzel drove to Glendive, Montana, procured the parts, and returned to the mine. He parked the pickup by the large garage doors because he believed that a winch might be necessary to remove the heavier parts from the truck. The repair crew would be able to easily get to the parts from that location. He parked the pickup about 12 feet back from and parallel to the garage door. This placed the pickup directly behind and perpendicular to the loader that was behind the closed garage door. Mr. Etzel then left the mine at about 6:30 p.m. to start his vacation.

The repair crew was not able to complete the repairs that evening. When the crew left the mine, they did not move the truck. Mr. Olmstead left the mine after the end of his shift on September 23 before the pickup was parked near the garage. Mr. Olmstead testified that he did

not see the pickup and, because it was still dark, it would have been very difficult to see from inside the cab of the loader. The pickup was a deep red color and there were no yard lights in the area. The headlights on the back of the loader were working, but they are about ten feet off the ground. There is an obstructed area behind the loader than cannot be seen from the cab.

Knife River conducted an investigation of the accident. In Mr. Etzel's absence, Leroy Miller did a preliminary investigation. He apparently concluded that Mr. Olmstead failed to look behind the loader when he backed out. (Tr. 184). When Mr. Etzel returned to the mine a week later, he parked a pickup in the same general area and got into the loader's cab at about 6 a.m. to find out what could be seen. He testified that it was hard to see the pickup in the right mirror, but that it was easy to see the pickup in the left, driver's side mirror. *Id.* He stated that the mercury vapor lights inside the garage provided enough illumination to see the truck from inside the cab of the loader. (Tr. 185).

Mr. Etzel also testified that he did not know that Mr. Olmstead was using the remote control device to open the garage door from the inside of his cab. (Tr. 186-87). He stated that he would have removed the remote control from the cab if he had known that Olmstead was using it to open the door upon exiting the garage. (Tr. 234). He stated that the proper procedure was to open the garage door using the button on the wall of the garage so that the loader operator can check the area behind the loader. (Tr. 188, 233-34). The remote control device was placed in the cab so that the operator could open the door to enter the garage without getting out.

Mr. Alan Abbey, the safety director for Knife River, also conducted an investigation at the request of Mr. Duppong. (Tr. 293). Mr. Abbey is normally stationed at the Beulah Mine. He traveled to the Savage Mine, met with Mr. Olmstead, and tried to reenact the accident scene. Mr. Olmstead explained how the accident happened and showed Mr. Abby where the pickup was parked. Mr. Abbey returned to the Savage Mine at 5:30 a.m. the next day, parked his red pickup in the location that Mr. Olmstead had indicated, and got in the cab of the loader to find out what he could see using the rear view mirrors. (Tr. 257-59). Mr. Abbey testified that he could clearly see the pickup from the rear view mirrors. (Tr. 262; Ex. R-13). He stated that he could see it even more easily by standing on the platform just outside the left door of the loader that the operator uses to enter the cab. (Tr. 260-61). He concluded that Mr. Olmstead failed to look behind the loader before he backed out of the garage. (Tr. 263-64). In his accident report, Mr. Abbey stated that he "could see the pickup quite well with the illumination from [t]he shop lights." (Ex. R-8). Mr. Abbey testified the photographs that he took accurately represent what he saw that morning. (Tr. 262; Ex. R-13).

Knife River distributes a safety booklet to all employees. (Ex. R-9). Rule 39 in the section entitled "Loading and Haulage" provides as follows:

Prior to backing a machine with restricted rear visibility, the operator, or a guide, is responsible to inspect the area to the rear of the machine. In all cases, the operator has the ultimate responsibility for the safe operation of the machine.

(Ex. R-9). Based on these investigations and Knife River's safety rule No. 39, Mr. Etzel determined that Mr. Olmstead was responsible for the accident. When Etzel and Duppong discussed the accident, they were concerned that Mr. Olmstead might be having vision problems because everyone else could see the pickup from the cab of the loader. (Tr. 293). Mr. Olmstead has diabetes and they wanted to make sure that it was not affecting his eyesight. Duppong called a physician in Sidney, Montana, who agreed to see Mr. Olmstead. The physician also suggested that Olmstead see an ophthalmologist in Williston, North Dakota. *Id.* Knife River's employee manual at section 9(G) provides that an employee can be required to undergo a medical examination if the company reasonably believes that the employee "poses a danger to himself or to other employees because of a physical or mental impairment." (Ex. R-11).

Mr. Olmstead was given leave with pay so that he could see these two physicians. (Tr. 193-94, 294; Ex. R-10). The physicians subsequently advised Knife River that there was nothing about Mr. Olmstead's health or eyesight that should prevent him from operating the loader safely.

Messrs. Etzel and Duppong discussed the accident and Mr. Olmstead's "track record with the operation of the [loader]." (Tr. 294). They were especially concerned because whenever Mr. Olmstead was involved in an accident or a safety dispute with another employee, Mr. Olmstead always denied any responsibility. *Id.* It was always "somebody else's fault." *Id.* Knife River decided to suspend Mr. Olmstead for four days without pay for the accident and to demote him to a general equipment operator position. He was assigned to operate the dozer because he would not be working around other employees in that position. The dozer operator is paid \$20.19 an hour while a loader operator is paid \$20.86 an hour; a difference of 67 cents an hour.

The suspension letter was sent to Olmstead on October 19, 1998. It states that Olmstead failed to insure that the area behind the loader was clear. (Ex. 12). The letter further states that the accident was the result of Mr. Olmstead's "recklessness and carelessness" in the performance of his duties. *Id.* The letter advised Mr. Olmstead that under rule 11 of the employee handbook he was being suspended for four days because this was his second offense within 12 months. (*See* Ex. R-7). The letter also advised him that under section 2(C) of the employee manual he would "revert to a general equipment operator position" upon his return to the mine. (Ex. R-12). Section 2(C) of the employee manual provides that if an employee "cannot perform his present job due to health or safety considerations, he may revert to a general laborer position or be assigned to another classified position, if able to perform the duties of that position." (Ex. R-11).

Mr. Olmstead contends that the accident of September 24, 1998, was not his fault. First, he maintains that Mr. Etzel should not have parked the pickup behind the garage doors. He testified that Etzel knew or should have known that his loader was parked in the garage and that he would be backing out the following morning. Furthermore, Olmstead contends that Etzel knew or should have known that it was his habit to open the garage door from inside the cab of the loader rather than from the floor of the garage. Second, Olmstead contends that Leroy Miller was at fault for not warning him that the pickup was there. He testified that Mr. Miller was

responsible for doing the preshift inspection of the mine and that this inspection should have included the area behind the garage. Third, Olmstead contends that the repair crew that was working on the vehicle in the other bay should have moved the pickup when they did not use the parts in the bed of the pickup that evening. The crew should at least have warned him. Fourth, Olmstead testified that he had asked that a yard light be installed behind the garage and that additional lights be installed on the loader. Fifth, Olmstead believes that windows should have been installed in the garage doors so that he could look out before he opened the door. Sixth, Olmstead states that because no small vehicle had been parked behind the door since he began operating the loader, he “saw no reason to change his method of [opening the garage door], because [he] could usually see something that was big enough to be seen...” (Tr. 122). Finally, Olmstead disagrees with Knife River’s safety rule that places responsibility on loader operators to make sure that the area behind their vehicle is clear. He believes that the driver of a small vehicle, such as a pickup, should not be allowed to park behind a large vehicle, such as a loader.

It is Mr. Olmstead’s contention that he was treated differently from other employees in part because he had been reinstated to his job in 1997 under Judge Hodgdon’s decision finding that he had been discriminated against under section 105(c) of the Mine Act. He believes that other employees have caused accidents that are as serious or more serious than his accidents and that these employees have not been disciplined as severely as he has.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

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).

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

A. Did Arthur Olmstead Engage in Protected Activity?

Mr. Olmstead engaged in protected activity when the Secretary of Labor filed a discrimination complaint on his behalf and he was ordered reinstated by Judge Hodgdon. In his decision, Judge Hodgdon found that Mr. Olmstead “was well known for raising operational and safety matters, both with management and state and federal mine inspectors.” 18 FMSHRC at 1104. Although Mr. Olmstead asked for more lighting around the garage and on the loader, there is no evidence in the present case to indicate that he was actively engaged in safety issues or that he discussed safety issues with mine inspectors. Nevertheless, I adopt Judge Hodgdon’s findings in this regard.

B. Was Arthur Olmstead’s Suspension and Demotion Motivated in any part by his Protected Activity?

In determining whether a mine operator’s adverse action was motivated by the miner’s protected activity, the judge must bear in mind that “direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev’d on other grounds*, 709 F.2d 86 (D.C. Cir 1983). “Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.” *Id.* (citation omitted).

Mr. Olmstead is claiming disparate treatment. He points to a number of events to establish that he was treated differently than other miners. I find that Mr. Olmstead failed to show that he suffered disparate treatment. Indeed, the events that he relies upon are reasonably consistent with Knife River’s decision to suspend and demote Mr. Olmstead.

The first event relates not to a previous accident, but to the failure of Knife River to discipline a former mine superintendent, Richard Kalina. Mr. Kalina was the superintendent when the Secretary filed the previous discrimination complaint on Mr. Olmstead’s behalf. He was also the superintendent when Mr. Olmstead was reinstated. Apparently, Olmstead was operating a loader that was having starter problems on one particular day in February 1997. Olmstead shut down the loader during his lunch break. When Olmstead was not able to start it after lunch, Kalina became angry with Olmstead for not letting the loader idle through lunch. (Tr. 89-91). Kalina apparently thought that Olmstead’s actions were malicious and he shoved Olmstead against the door of the loader. Kalina was not disciplined. Instead, the record indicates that he was given a desk job “in the basement in the Bismarck office” the next day. (Tr. 22). Etzel succeeded Kalina as superintendent. Rule 4 of the employee handbook provides for immediate dismissal for assaulting another individual.

The second event that Olmstead relies upon occurred when Bud King overturned a scraper in October 1995. Mr. King was using a scraper on top of a soil pile and his front left tire went off the edge of the pile. Rather than trying to back off the pile, Mr. King decided to raise the bowl of the scraper and drive forward down the hill. (Tr. 16, 87-88). The scraper overturned as he was descending the hill. (Ex. C-1). Mr. King was not disciplined for this accident. (Ex.

R-3). The cab windows, left fender, air filter, and muffler were damaged. *Id.* Mr. Etzel was not the superintendent at the time of this accident and knew nothing about it.

The third event occurred in 1994 when a coal truck that Bink Miller was operating went off the road and overturned. Bryan Carr, who testified on behalf of Mr. Olmstead, believes that the accident occurred because Mr. Miller fell asleep. (Tr. 49). Mr. Olmstead was involved in the recovery effort and felt that the truck was damaged but did not suffer "serious heavy damage." (Tr. 93). He believes that Mr. Miller should have been disciplined for the accident. Knife River did not discipline Mr. Miller because the truck was only slightly damaged and the incident was not considered to be an accident. (Ex. R-3). Mr. Etzel testified that after the truck was uprighted it was in good enough shape to be returned to service the same day. (Tr. 200-01). Although Mr. Etzel was an hourly worker at the time of this incident, it is his understanding that the berm gave way and the incident was attributed to road failure not operator error. (Tr. 202).

The fourth event concerns two incidents involving pickup trucks operated by Carl Vender. Mr. Vender is an engineer at the mine who is sometimes required to drive through reclamation areas. On two occasions he drove through areas that had suffered heavy erosion and damaged the pickup he was driving. Although Mr. Olmstead testified that these two incidents occurred a few months apart, Knife River's records establish that the first accident occurred in July 1996 and the second occurred in October 1998. (Ex. R-3). Mr. Vender received an oral warning for the first accident. The second event occurred at night and, after it began raining heavily, his pickup slid into a gully. (Tr. 204). The vehicle was not damaged and no disciplinary action was taken because it was not attributed to operator error. (Tr. 205). Instead, Mr. Vender was instructed to use an "older junkier pickup" whenever he traveled in reclamation areas. (Tr. 95).

The fifth incident occurred when a coal truck operated by George Swisse ran into a pickup operated by Bink Miller in March 1966. The coal truck was a large vehicle with an obstructed rear view. There had been a blockage in the tippie and Mr. Swisse parked his coal truck in the area until the blockage was removed. In the meantime, Mr. Miller parked a pickup behind the coal truck. When Mr. Swisse backed up after operations resumed, he ran into the pickup. Mr. Swisse received a written warning under Rule 39 of the company's safety booklet, quoted above, for not making sure that the area was clear before backing the coal truck. Mr. Miller did not receive any discipline. As stated above, Mr. Olmstead does not agree with this safety rule and believes that Mr. Miller should have received the written warning for parking a pickup in the blind spot behind the coal truck. (Tr. 96-98).

The sixth incident that Olmstead relies upon to establish disparate treatment involved two draglines, which were in the same confined area in February 1994. The dragline that was operating had just been moved and the operator, Mr. Leroy Miller, swung it around to see if there was enough clearance between the two draglines. The cable on his dragline hit the other dragline and damaged it. Mr. Miller received a written warning. (Tr. 100, 205-06).

The final incident also involved Leroy Miller. In April 1997, Mr. Miller damaged the east wall of the garage when he was moving an engine with a loader. A Caterpillar dealer had brought an engine to the mine and Mr. Miller was using the loader to lift it out of the truck when he struck the wall of the garage and damaged it. A representative from the dealer was on the ground guiding Mr. Miller. (Tr. 101-02, 206-07). Mr. Miller received an oral warning.

I find that these incidents do not establish that Mr. Olmstead was treated more harshly than other employees who were involved in accidents. Knife River looks primarily at the carelessness and negligence of the equipment operator when determining whether discipline is warranted. Mr. King, for example, had been regularly operating the scraper for only a few days when the accident occurred. (Tr. 34-35). Although his actions might have been negligent, it appears that he was given the benefit of the doubt. When Leroy Miller ran into the wall of the garage with a loader, he was only given an oral warning because management took into consideration that fact that he was relying on a guide on the ground.

Knife River's handling of the George Swisse-Bink Miller accident is entirely consistent with the discipline of Mr. Olmstead in this case. The operator of the larger coal truck was given a written warning and the operator of the pickup was not disciplined. Although Mr. Olmstead disagrees with the rule that puts the responsibility for making sure that an area is clear on the operator of the larger vehicle, that is the rule at the Savage Mine and it appears that the rule has been consistently applied.

The other accidents that Olmstead referred to are either different or the discipline given is consistent with the discipline that Mr. Olmstead received. The incident concerning Mr. Kalina is not really relevant here. Although Kalina could have been disciplined, he was a management employee. He was immediately removed from the mine property.

The record in this case indicates that no other employee at the Savage Mine had caused two significant accidents within a 12-month period, at least since 1996 when Olmstead returned to work. His suspension and demotion is directly related to the fact that he had two accidents within six months and other employees were complaining to Mr. Etzel about Olmstead's ability to safely operate the loader. The record reveals that Olmstead typically blamed others whenever safety issues were raised. For example, he only grudgingly accepted partial responsibility for backing into the pickup truck. (Tr. 145-46).

When Olmstead requested more lights on the loader, Mr. Etzel looked into the matter. An MSHA inspector advised Etzel that as long as all the lights installed on the loader by the manufacturer are working, the loader complies with MSHA lighting requirements. Etzel apparently was not aware that Olmstead had requested a yard light near the garage doors. (Tr. 224). I credit the testimony of Messrs. Etzel and Duppong concerning the chain of events that led to Mr. Olmstead's suspension and dismissal.

I find that Mr. Olmstead could have seen the pickup behind his loader on September 24 if he had looked more carefully. Although it may have been a little difficult to see using the rear

view mirrors, he could have looked from the platform adjacent to the door to the cab or from the floor of the garage. The discipline he received was consistent with Knife River's written policies and as well as its practices. The record establishes that other Knife River employees have been suspended under rule 11 of the employee handbook and at least one employee at the Beulah Mine has been taken off equipment for safety considerations. (Tr. 265; Ex. R-7).

At the hearing, I asked Mr. Olmstead why he thought he was suspended and demoted by Mr. Etzel. It appears that he believes that the principal reason was to allow Bink Miller to operate the loader. (Tr. 140). Apparently Bink Miller operated the loader prior to Olmstead's reinstatement. Olmstead was able to bump Bink Miller from that position after he returned because he had greater seniority.

I find that Mr. Olmstead established a *prima facie* case that his discipline may have been motivated, at least in part, by his protected activity. If Olmstead was demoted because Etzel wanted to return Bink Miller to the loader, Etzel was motivated, at least indirectly, by Olmstead's protected activity. The evidence to support Mr. Olmstead's claim is not very convincing but I am giving Mr. Olmstead the benefit of the doubt because he proceeded in this case without the benefit of counsel.

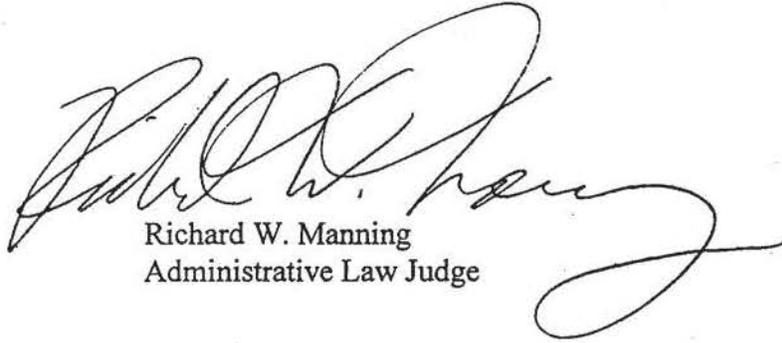
I find, however, that Knife River successfully rebutted Mr. Olmstead's case. I find that Knife River established that, even if it was motivated in part by Mr. Olmstead's protected activity, it would have taken the adverse action for the unprotected activity alone. I base my conclusion on the facts described above. I credit the testimony of Etzel and Duppong as to their reasons for disciplining Mr. Olmstead. In analyzing motivation, I have taken into consideration that fact that Mr. Olmstead was reinstated in July 1996 and the suspension and demotion involved in this case occurred over two years later. Although people can hold grudges for a long period of time, I did not get any sense of that in this case. Moreover, Mr. Etzel was not involved in the decision to discharge Olmstead in 1995 and Mr. Kalina was not involved in any discipline against Olmstead in this case.

Both Etzel and Olmstead testified that their personalities clashed to a certain extent. The Savage Mine is a small operation and personalities can play a large role when there are less than ten employees at a work site. Olmstead testified that his relationship with Etzel improved when Etzel became the superintendent at the mine. They did not get along particularly well when they were both hourly employees.

Mr. Olmstead believes that his suspension and demotion were unfair. I do not have the authority to determine whether this discipline was fair or reasonable. The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990)(citations omitted). I conclude that Mr. Olmstead's suspension and demotion did not violate section 105(c) of the Mine Act.

III. ORDER

For the reasons set forth above, the complaint filed by Arthur R. Olmstead against Knife River Corporation under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

June 30, 1999

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	
ADMINISTRATION ON BEHALF	:	Docket No. WEVA 99-84-D
OF LEWIS FRANK BATES,	:	HOPE CD 99-12
Complainant	:	
v.	:	
	:	Lilly Branch Surface Mine
CHICOPEE COAL COMPANY	:	Mine ID 46-08723
INCORPORATED,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	
ADMINISTRATION ON BEHALF	:	Docket No. WEVA 99-85-D
OF EARL CHARLES ALBU,	:	HOPE CD 99-15
Complainant	:	
v.	:	Lilly Branch Surface Mine
	:	Mine ID 46-08723
CHICOPEE COAL COMPANY, INC.,	:	
Respondent	:	

DECISION

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainants;
Forest H. Roles, Esq., Mark E. Heath, Esq., Heenan, Althen & Roles, Charleston, West Virginia, for the Respondent.

Before: Judge Feldman

These consolidated matters, heard on June 2, 1999, in Charleston, West Virginia, are before me based on applications for temporary reinstatement filed by the Secretary, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2), on behalf of Lewis Frank Bates and Earl Charles Albu, a/k/a Chuck Albu. This statutory provision prohibits operators from discharging or otherwise discriminating against miners who have complained about alleged safety or health violations or who have otherwise engaged in safety related protected activity. Section 105(c)(2) of the Act authorizes the Secretary to apply to the Commission for the temporary reinstatement of miners pending the full resolution of the merits of their complaints.

The scheduled hearing of these matters was delayed until June 2, 1999, due to a conflict in the respondent's counsel's schedule. Consequently, the respondent agreed that any relief awarded in these proceedings would be retroactive to May 26, 1999. *See Notice of Hearing*, May 13, 1999.

Procedural Framework

The scope of these proceedings is governed by the provisions of section 105(c) of the Act and Commission Rule 44(c), 29 C.F.R. § 2700.44(c), that limit the issue to whether the subject discrimination complaints have been "frivolously brought." Rule 44(c) provides:

The scope of a hearing on an application for temporary reinstatement is limited to a determination by the Judge as to whether the miner's complaint is frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint is 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 is frivolously brought.

Thus, the "frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In this regard, the Court of Appeals, in *J. Walter Resources v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990), has stated:

The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit' -- an interpretation that is strikingly similar to a reasonable cause standard. [Citation omitted]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are *not insubstantial or frivolous*.' 920 F.2d at 747 (emphasis in original) (citations omitted).

... Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of an employer's right to control the makeup of his work force under section 105(c) is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor. *Id.* at 748, n.11. (emphasis in original).

Consequently, the Supreme Court has articulated that the narrow scope of these temporary reinstatement proceedings, as well as the minimal statutory standard of proof required by the Secretary under section 105(c)(2) of the Act, far exceed the Constitutional requirements of due process. *Brock v. Roadway Express, Inc.*, 481 U.S. 252 (1987).

Consistent with the above discussion concerning the “not frivolously brought” standard of proof in temporary reinstatement proceedings, I noted in my opening statement at the hearing that the issues in this proceeding are whether protected activity in fact occurred, and, if so, whether the protected activity was reasonably contemporaneous with the adverse actions complained of, *i.e.*, the terminations of Bates and Albu. (Tr. 5-6).

I. The Bates Application for Reinstatement

At the hearing, the parties advised that they had reached a settlement agreement with respect to the temporary reinstatement of Lewis Frank Bates. Specifically, the respondent, Chicopee Coal Company, Inc., (Chicopee), agreed to economically reinstate Bates by reinstating Bates’ medical benefits, and paying Bates the weekly salary he was earning immediately prior to his alleged January 25, 1999, discriminatory discharge.

II. The Albu Application for Reinstatement¹

a. Findings of Fact

The Chicopee Coal Company Inc. (Chicopee), was formed in 1995. Paul Moran is Chicopee’s President and Robert Warnick is its Vice President. Chicopee obtained its mining permit and started mining at Lilly Branch Surface Mine facility (Lilly Branch) on March 16, 1998. Chicopee’s Lilly Branch operation consists of clearing abandoned, unclaimed highwalls, mining the area with highwall mining machines, and reclaiming the area upon completion of mining. In addition, Chicopee operates a preparation plant where coal is cleaned that is located 5.5 miles from the Lilly Branch site. In the mid summer of 1998, Chicopee borrowed 1.5 million

¹ At the hearing Chicopee claimed Albu’s temporary reinstatement application should be dismissed because his underlying discrimination complaint was not filed within 60 days of his alleged January 26, 1999, discriminatory discharge as required by section 105(c)(2) of the Mine Act. Albu filed his complaint on April 21, 1999, approximately four weeks after the 60 day filing period had expired. Although Chicopee was advised to address its untimeliness assertion in its post-hearing brief, it failed to do so. Consequently, I assume Chicopee has withdrawn its untimeliness claim. In any event, the 60 day filing period in section 105(c)(2) is not jurisdictional, and Chicopee has failed to demonstrate it suffered any material prejudice as a result of Albu’s delayed filing. *See, e.g., Secretary of Labor o/b/h of Hale v. 4-A Coal.Co.*, 8 FMSHRC 905, 908 (June 1986).

dollars in cash and equipment from Vecellio and Grogan (Vecellio), an established company specializing in road building and mining in the State of West Virginia. Chicopee currently has approximately 55 employees. It also uses the services of approximately 30 contractor employees, including personnel employed by Vecellio.

Lewis Franklin Bates, a certified mine foreman, was hired on July 27, 1998, by Moran and Warnick to serve as Chicopee's superintendent. Bates was directly responsible for approximately 11 employees. Bates' duties included supervising the clearing crews that prepared areas for highwall mining, overseeing the maintenance of the haulage road, providing hazard training and ordering parts for the maintenance of equipment. Bates reported directly to Warnick. On occasion, he also reported to Moran.

Bates first met Albu in 1996 when they were fellow employees working for the Battle Ridge Company. At that time, Albu, who had been a surface miner for approximately 16 years, was a driller-blaster. Bates hired Albu to perform drilling and blasting for Chicopee in September 1998. When Bates was not drilling and blasting, he operated rock trucks, loaders and dozers. Bates testified that Albu did a fine job, that Albu never received any complaints about his work, and that Albu had no disciplinary problems.

In the fall of 1998, the haul road running to the deep mine site became soft due to heavy rain. At that time, Chicopee realized it needed additional financial assistance as well as help with haulage road construction. Consequently, Vecellio provided additional equipment and sent personnel to Lilly Branch to assist in road building construction and maintenance. Chicopee and Vecellio employees worked together performing road construction activities and operating the equipment. Vecellio sent its superintendent, Dale McGrady, to oversee the road construction activities. As time went on, McGrady's supervisory activities increasingly overlapped and conflicted with the duties assigned to Bates.

Because the road required a hard surface of rock, Chicopee decided to blast additional rock from the mountain for use on the road. In January 1999, Chicopee leased a drill from Anderson Drilling Equipment for thirty days. Bates assigned Albu to operate the leased drill. Albu, Bates and Warnick testified that Albu's drilling and the resultant blasting was ineffective primarily because the drill used by Albu did not function properly. Consequently, at the suggestion of Vecellio, in January 1999 Chicopee contracted with Beckley Drilling to perform the drilling and blasting activities.

Albu was disappointed over the loss of his drilling responsibilities to an outside contractor. Consequently, on January 15, 1999, Albu told Bates he was considering quitting because he was upset over Chicopee's decision to use a contractor for drilling and blasting. Richard Tincher, Chicopee's mechanic, testified that Albu told him on or about January 15, 1999, that, "he was going to quit, that this outfit didn't know what the hell they were doing . . . and he was going to whip Dale McGrady's goddamned ass." Although Tincher told Bates about Albu's remarks, Tincher testified he did not tell Warnick about Albu's statements until after Albu was discharged on January 26, 1999. (Tr. 201).

After Albu informed Bates of his intention to quit, Bates granted Albu's request to take the rest of the work day on January 15, 1999, off. Later that day, Bates discussed Albu's threat of quitting with Warnick. Warnick told Bates "the decision to move to an outside drilling company was made for financial reasons . . . if he [Albu] quit, he quit; but we don't blame him for the shooting and drilling problems." (Tr. 233). Warnick asked Bates to contact Albu to convince him to stay on the job. Bates contacted Albu, and Albu returned to work the next day on January 16, 1999.

On Sunday, January 24, 1999, Moran informed Bates that Vecellio's McGrady was taking over the supervisory responsibilities for the haulage road and the blasting areas. Bates was told he would be in charge of the contour preparation for the highwall miner. Bates, who had been performing the pre-shift examinations for the haulage road and blasting areas, was concerned because he no longer had control of these areas.

The following day, at 7:00 a.m., on Monday, January 25, 1999, Bates held a meeting with Albu and approximately 12 other employees. Although McGrady attended the meeting, Warnick and Moran did not. Bates informed the employees that he was no longer responsible for the main haulage road, the cut-through, the box cut or blasting, and that McGrady was taking over those responsibilities. During the meeting Albu commented about the berm not being maintained along the haulage road. Tincher testified Albu also complained about the condition of the Vecellio's equipment, characterizing the equipment as "junk." Albu also complained to McGrady that Vecellio employees were not certified by the State of West Virginia to work at the mine. At the culmination of the meeting, Bates had the attendees sign a sheet of paper acknowledging their attendance at the meeting and acknowledging that Bates informed them of the change in his responsibilities.

Shortly after the January 25 meeting, Bates granted Albu's request to leave work early so that Albu could take care of personal business. Tincher and Warnick testified that when Albu left the mine site in his truck on January 25, 1999, they heard Albu on his C.B. radio angrily cursing Chicopee, its management, and Vecellio. After hearing Albu's statements over the C.B. radio, Warnick testified he believed Albu had quit. (Tr. 244). Later that day, Warnick met with Moran and they agreed that, if Albu returned to work, he should be laid off due to his cursing on the C.B. radio while leaving the job, and because his services were no longer needed. (Tr. 245).

After Albu had left the mine site on January 25, 1999, Bates was approached by Warnick about the earlier meeting. Warnick, who had spoken to McGrady about the meeting, asked Bates to show him the paper the men had signed. Warnick examined the paper and told Bates he would speak to Moran about what should be done.

At approximately 11:00 a.m., two hours after speaking to Warnick, Moran spoke to Bates at the job site. Moran told Bates he was relieved of his duties because he had a bad attitude and because he was trying to take over the job. Moran also told Bates he was terminated because he could not get along with Vecellio.

Warnick testified that Albu had a history of complaining about Vecellio's presence at the mine, and about the condition and quality of the equipment. After Bates was terminated on January 25, 1999, Warnick told supervisor Gary Rutherford, to go ahead and lay off Albu if he returned to work on Tuesday, January 26, 1999. Despite the fact that the decision to terminate Albu occurred on the same day Albu had made safety related complaints at the meeting, Warnick claimed the decision to discharge Albu was based on the fact that his drilling services were no longer needed. However, Warnick's claim that there was no work for Albu on January 26, 1999, is inconsistent with Warnick's admitted desire to prevent Albu from quitting on January 15, 1999, after Albu became discouraged because drilling and blasting duties had been turned over to an outside contractor.

Albu returned to work on January 26, 1999, whereupon he was told by Rutherford that he was no longer needed. At that time, Albu testified Rutherford stated, "I just wish you hadn't said what you said yesterday morning." (Tr. 147).

On January 27, 1999, in apparent response to safety related complaints conveyed to the Mine Safety and Health Administration (MSHA), Inspectors James Haynes and Glen Counts conducted an inspection of Chicopee's Lilly Branch Surface Mine. Haynes had known Bates prior to Bates' employment at Chicopee. Haynes issued Citation No. 7176974 citing an alleged violation of the mandatory safety standard in 30 C.F.R. § 77.1605(k) that requires adequate berms on the outer bank of an elevated roadway. Counts issued Citation No. 7179004 citing an alleged violation of the mandatory safety standard in 30 C.F.R. § 77.1606(c), that prohibits use of defective equipment, for an inoperative low air brake pressure warning device on a Euclid haulage truck. Chicopee did not contest either citation and has paid the assessed civil penalties. The State of West Virginia also issued citations to Chicopee's contractors for employing men who had not received the requisite state certification.

b. Further Findings and Conclusions

Albu's temporary reinstatement application is based on his allegation that his discharge was motivated by his safety related complaints. It is axiomatic that miners have an absolute right to make good faith safety or health related complaints about mine practices or conditions when the miner believes such circumstances pose hazards. *Secretary of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor ex rel. Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981). A miner's right to voice safety related complaints is so fundamental that the Mine Act even protects complaints about conditions that do not pose an immediate hazard as long as the complaint does not involve a work refusal. *Secretary o.b.o. Ronny Boswell v. National Cement Company*, 16 FMSHRC 1595, 1599 (August 1994).

Communication of potential health or safety hazards, and responses thereto, are the means by which the Act's purposes are achieved. Once a reasonable, good faith concern is expressed by a miner, an operator, usually acting through on-the-scene management personnel, has an obligation to address the perceived danger. *Boswell v. National Cement Co.*, 14 FMSHRC 253, 258 (February 1992); *Secretary o.b.o. Pratt v. River Hurricane Coal Company, Inc.*, 5 FMSHRC 1529, 1534 (September 1983); *Secretary of Labor v. Metric Constructors, Inc.*, 6 FMSHRC 226, 230 (February 1984), *aff'd sub nom. Brock v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985).

Although an operator is under no obligation to agree with a miner's concerns, an operator must address a miner's concern in a way that reasonably quells the miner's fears. *Gilbert v. FMSHRC*, 866 F.2d 1433, 1441 (D.C. Cir. 1989). A miner's willingness to express safety and health related complaints should be encouraged rather than inhibited. Such protected complaints may not be the motivation for adverse action against the complainant by mine management personnel.

In order to evaluate whether Albu has satisfied the lesser burden of establishing the "not frivolously brought" standard, it is helpful to consider the framework for establishing a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, Albu must establish that his expressed safety related concerns during the January 25, 1999, safety meeting constituted protected activity, and, that the adverse action complained of, in this case Albu's January 26, 1999, discharge, was motivated in some part by his protected activity. See *Secretary on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d. Cir. 1981); *Robinette* 3 FMSHRC at 817-18.

In a temporary reinstatement proceeding, Chicopee can establish that Albu's case has been "frivolously brought" by showing that Albu did not engage in the protected activity claimed. Chicopee has failed to challenge effectively the protected activity claimed by Albu that is related to Albu's attendance at the January 25, 1999, meeting. Although, Chicopee, in its post-hearing brief, asserts Warnick and Moran did not have knowledge of the safety complaints expressed by Albu when Albu was discharged on January 26, 1999, (*Chicopee Br.* at 13), it is clear that McGrady informed Warnick of the substance of the January 25, 1999, meeting prior to Albu's discharge. Moreover, Warnick testified Albu had a history of complaining about the condition of equipment.

Having failed to demonstrate that Albu did not engage in protected activity, or that Chicopee had no knowledge of Albu's protected activity, Chicopee can only defeat Albu's application for temporary reinstatement by showing that his protected activity was so far removed in time and circumstance from Albu's January 26, 1999, discharge as to render Albu's discrimination claim frivolous. Obviously, it cannot be said that Albu's application for temporary reinstatement based on his January 26, 1999, discharge, that occurred the very next day following his protected activity, has been frivolously brought.

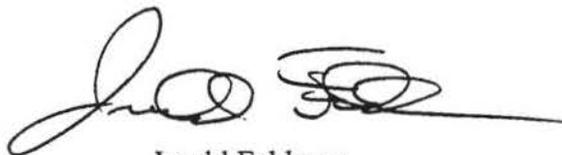
Whether, Albu's discharge was motivated solely by the profane language allegedly used by Albu on his C.B. radio, or, whether Chicopee can affirmatively defend by claiming that it was justified in discharging Albu for profanity despite Albu's protected activity, goes beyond the scope of this temporary reinstatement proceeding. *See, e.g., Pasula*, 2 FMSHRC at 2799-800; *Robinette*, 3 FMSHRC at 817-18; *Eastern Assoc. Coal Corp. v. United Castle Coal Co.*, 813 F.2d 639, 642 (4th Cir. 1987).

ORDER

In view of the above, consistent with the respondent's stipulation, **IT IS ORDERED** that Chicopee Coal Company, Inc., immediately compensate Earl Charles Albu, a/k/a Chuck Albu, for back pay and benefits from May 26, 1999, until the date of Albu's temporary reinstatement.

IT IS FURTHER ORDERED that Chicopee Coal Company, Inc., immediately reinstate Albu to the position that he held immediately prior to his January 26, 1999, discharge, or to a similar position, at the same rate of pay and benefits and with the same, or equivalent, duties assigned to him. Alternatively, Chicopee Coal Company, Inc., may immediately provide Albu with economic reinstatement, retroactive to May 26, 1999, and continuing during the pendency of the resolution of Albu's discrimination complaint. Economic reinstatement shall consist of the salary and benefits Albu earned immediately prior to his January 26, 1999, discharge.

IT IS FURTHER ORDERED, consistent with its settlement agreement, that, effective May 26, 1999, Chicopee Coal Company, Inc., economically reinstate Lewis Frank Bates to the salary and benefits he earned immediately prior to his January 25, 1999, discharge. Such economic reinstatement shall continue during the pendency of the resolution of Bates' discrimination complaint.



Jerold Feldman
Administrative Law Judge

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June 30, 1999

NOLICHUCKEY SAND COMPANY, INC.,	:	CONTEST PROCEEDINGS
	:	
Contestant	:	Docket No. SE 99-101-RM
v.	:	Citation No. 7777862; 1/28/99
	:	
SECRETARY OF LABOR,	:	Docket No. SE 99-102-RM
MINE SAFETY AND HEALTH	:	Citation No. 7777863; 1/28/99
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. SE 99-103-RM
	:	Citation No. 7777864; 1/28/99
	:	
	:	Docket No. SE 99-104-RM
	:	Citation No. 7777865; 1/28/99
	:	
	:	Docket No. SE 99-105-RM
	:	Citation No. 7777866; 1/28/99
	:	
	:	Docket NO. SE 99-106-RM
	:	Citation No. 7777867; 1/28/99
	:	
	:	Pit No. 436
	:	Mine ID 40-00806

DECISION

Appearances: Thomas A. Bewley, President, Nolichucky Sand Company, Inc., Greeneville, Tennessee, pro se, for the Contestant;
Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Respondent.

Before: Judge Weisberger

These case are before me based on a Notices of Contest filed by Nolichecky Sand Company, Inc. ("Nolichecky") contesting the issuance by the Secretary of Labor ("Secretary") of six citations on January 28, 1999, alleging violations of 30 C.F.R. § 56.14109(a).¹

Pursuant to notice, the cases were heard on March 9, 1999, in Johnson City, Tennessee. Nolichecky filed a Brief on April 29, 1999. On June 15, 1999, the Secretary filed a Brief and Argument.

I. Statement of the Facts

Elton Hobbs, an MSHA Inspector, inspected the subject sand and gravel operation on January 19, 1999. He observed that conveyor belts did not have either stop cords or railings, and he discussed these conditions with Jerry Knight, the foreman, and Nolichecky's President, Thomas Anthony Bewley. Hobbs was told by Bewley that in the past MSHA had informed him (Bewley) that if the conveyor was a 42-inch structure, it did not need to have a railing or stop cord.² Hobbs then spoke with his supervisor, Larry Nichols, who informed him to allow Nolichecky to fix its belts, and not to issue any citations. Hobbs indicated that Bewley refused his request to install stop cords or railings on the belts at issue. When Hobbs returned on January 28, he issued citations for the belts at issue citing the lack of stop cords or railings.³

Hobbs explained that the section 56.14109(a), supra, is designed to protect persons from falling on or against the conveyor. He explained that a miner inspecting the belt from the travelway might lose his footing and fall onto the conveyor. Hobbs indicated that material on the

^{1/} 30 C.F.R. § 56.14109(a) provides that "[u]nguarded conveyors next to the travelways shall be equipped with - (a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor motor; or (b) Railings which - (1) Are positioned to prevent persons from falling on or against the conveyor;"

^{2/} The Secretary stipulated that Bewley was in fact told in the past by MSHA inspectors that a 42-inch belt structure would constitute a guard on the belts at issue, and that MSHA had not issued Nolichecky any citations for violations of 30 CFR § 56.14109(a).

^{3/} Government Exhibit 2 depicts a belt in issue. "A" is the support structure (known as a 42-inch deep truss) which has a vertical height of 42 inches. "B" depicts the idler rollers supporting the belt. "C" depicts the conveyor belt itself which conveys the material. "D" depicts the travelway or catwalk that runs alongside the conveyors. "E" depicts the hand rail on the travelway, which is 42 inches from the bottom of the catwalk or travelway. The horizontal distance to the nearest point where the belt rides on the rollers is 8 inches; the distance to the nearest point on the rollers is approximately 6 inches.

travelway, or accumulated snow or ice could be a tripping hazard. He stated that one falling against the belt could get caught in a pinch point between the conveyor and the support rollers, and could fracture his fingers or his hand.

Hobbs opined that a railing on top of the belt is necessary to keep someone from falling against the belt, and that the 42-inch structure itself would not prevent one from falling against the belt. He explained that there is approximately 12 inches between the belt structure and the top of the belt, and that someone falling could fall into the moving rollers or the belt itself.

On cross-examination, Hobbs indicated that there is no danger of falling to the ground below as the result of the lack of a railing or stop cord, because the handrail of the 42-inch truss was sufficient to keep this from happening.

Larry Nichols, the field office supervisor of MSHA's field office in Knoxville, opined that the belt structure itself is not a guard as it does not prevent a person from falling against the belt.

Bewley agreed that, once a day, one man walks up and down each catwalk that runs alongside the conveyor to inspect the belt and check the rollers. He opined that if railings would be installed on the 42-inch structures, it would be hazardous for a person to reach over the belt in order to change a roller. In this connection, Guy Morgan indicated in an unsworn statement made on a video tape that he would be less safe if there would be a rail installed for most of the length of the structure at issue. Bewley indicated that he contacted various conveyor manufacturers "if they would warrant any of their conveyors to meet MSHA standards for guarding, specifically under this standard and to a man and manufacturer[,] [t]hey all said, no, we can't do that because it varies with the inspector as well as varying within districts" (sic) (Tr. 148-149).

Bewley opined that the catwalk at issue is really a maintenance platform as it is attached to the conveyor to ease maintenance, but is not used to allow men and machinery to go from one place to another.

II. Nolichuckey's Defenses

Nolichuckey does not contest the fact that the conveyors at issue did have either stop devices or railings. Nolichuckey's position that the citations at issue should be dismissed is based upon the following arguments: that the catwalk or walkway along which a Nolichuckey employee walks to carry out daily inspections is not a "travelway" within the meaning of section 56.14109(a) supra; that it is not required, as a matter of law, to have emergency stop devices or railings for its conveyors because these conveyors are guarded by a 42-inch truss or

belt structure; that the Secretary is estopped from issuing citations for violations of section 56.14109(a) supra, because in the past other MSHA inspectors had not enforced this regulation against it, and that equipping the conveyors or belts with stop devices or railings would result in a “greater hazard” to the safety of miners.

III. Discussion

Essentially, it is Nolicheckey’s position that the catwalk located alongside the conveyor is not a travelway, and hence the cited conveyors are not within the scope of section 56.14109(a) which requires the guarding of conveyors that are located next to “travelways.” Nolicheckey in this connection refers to the fact that the catwalks are not used by miners as part of the normal traffic pattern at the mine to go from one point to another.

The term “travelway” is defined in 30 C.F.R. § 56.14000 as follows: “[a] passage, walk, or way regularly used or designated for persons to go from one place to another.” Since this definition applies to section 56.14109(a), supra, it must be adhered to in the case at bar. According to this definition, a walkway or catwalk is considered to be a travelway if it is designated for persons to go from one place to another or “regularly used.” Although the walkway in question was not designated for persons to go from one place to another, it was used by miners daily to carry out inspections of the belt conveyors. Accordingly, it clearly falls within the definition of a travelway as set forth in section 56.14000, supra. Hence, it follows that the cited conveyor belts are within the purview of section 56.14109(a), supra.

I find that there is not any merit to Nolicheckey’s argument that since in the past MSHA has not cited it for the conditions at issue, and has allowed the conveyors to be considered guarded based upon the height of the 42-inch belt structure, the Secretary should be estopped from presently enforcing section 56.14109(a), supra, against Nolicheckey. I find that although the failure in the past of MSHA to enforce section 56.14109(a), supra, against Nolicheckey has a bearing on the level of Nolicheckey’s negligence and hence the level of a penalty to be assessed, it does not constitute a defense to the issuance of the citations at issue. Aside from stipulations that Nolicheckey had been told by MSHA inspectors that a 42-inch belt structure would constitute a guard, and that MSHA had not issued it any citations for violations of section 56.14109(a), supra, there is no evidence that any such MSHA “policy” was incorporated as part of its official policy manual, or promulgated pursuant to notice, and normal APA rule making procedures. Accordingly, any past practices by MSHA are not binding in litigation before the Commission. In the same fashion, the lack of previous enforcement does not support a claim of estoppel (See, *Secretary of Labor v. Walker Stone Company, Inc.*, 16 FMSHRC 337, 359 (Judge Koutrus) (February 16, 1994), and cases cited therein. See also, *Emery Mining Corporation v. Secretary of Labor*, 744 F 2nd 1411, 1416 (Tenth Cir. 1984) affirming *Emery Mining Corporation* 5 FMSHRC 1400 (August 1983).

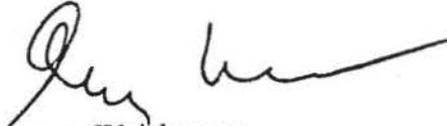
MSHA's past practices of not citing the belts at issue might have been based upon a rationale that a 42-inch belt structure constitutes a guard within the meaning of section 56.14109(a), supra, and that no stop device or railing is required. However, I note that there is nothing in the language of section 56.14109(a) which in any way even suggests such an exception (See, Hinkle Contracting Corporation, 12 FMSHRC 431, 433 (Judge Melick) (March 1990). Moreover, as explained by Hobbs, the 42-inch structure itself would not prevent one from falling against the belt because there is approximately 12 inches between the belt structure and the top of the belt, and that accordingly someone falling could fall onto the moving rollers or the belt itself. Nolichuckey does not dispute these distances. I therefore accept Hobbs testimony in these regards, and find that the structure itself would not adequately guard a stumbling or falling miner from falling against the belt.

Lastly, Nolichuckey argues, in essence, that if it were to be required to comply with section 56.14190(a), supra, a greater hazard would be created for miners. It argues that the video demonstration, Petitioner's Exhibit 1, specifically demonstrates that installing a railing on top of the 42-inch truss changes what is now a safe and routine roller changing procedure "into an opportunity for falling from the conveyor." This defense is also without merit. The Commission, in Sewell Coal Co., 5 FMSHRC 2026, 2029 (December 1983), held, in essence, that a defense of "diminution of safety," is not available to an operator unless the operator had first filed a petition for modification, and that the Secretary had granted the modification, but nonetheless continued the enforcement proceedings. Since no evidence was presented here that these conditions have been met, I find that Nolichuckey can not raise the defense of diminution of safety before the Commission at this time.

Therefore, for all the above reasons, I conclude that the citations in these cases were properly issued, and shall be affirmed.

ORDER

It is **ORDERED** that the citations issued in these proceedings shall be **AFFIRMED** as written, and the Notices of Contest shall be **DISMISSED**.


Avram Weisberger
Administrative Law Judge

Distribution:

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Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 17, 1999

REINTJES OF THE SOUTH, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. CENT 99-153-RM
	:	Citation No. 7867335; 2/2/99
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Ormet Corporation
ADMINISTRATION (MSHA),	:	Mine ID 16-00354 FDP
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Weisberger

I.

This case is before me based upon a Notice of Contest filed by Reintjes of the South, Inc., ("Reintjes") contesting the validity of Citation No. 7867335 issued on February 2, 1999, which alleges, as modified, a significant and substantial and high negligence violation of 30 C.F.R. § 48.23(f), which requires, as pertinent, that "[t]he operator shall make a copy of the MSHA approved standard plan available at the mine site for MSHA inspection and examination by the miners and their representatives." (Emphasis added).

On April 15, 1999, the parties filed stipulations of fact stipulating as follows:

1. Reintjes of the South, Inc. ("Reintjes") is subject to the jurisdiction of the 1977 Federal Mine Safety and Health Act (the "Act") and the Federal Mine Safety and Health Review Commission.
2. ALJ Avram Weisberger has jurisdiction over these proceedings pursuant to section 105 of the Act.
3. Reintjes was issued section 104(a) Citation No. 7867335 on February 2, 1999, which was subsequently modified on March 4, 1999.
4. On January 27, 1999, and on February 2, 1999, Reintjes was working at the Ormet Corporation Mine as an independent contractor.

5. Reintjes' training plan was approved by South Central District Manager Doyle D. Fink on February 26, 1998, and maintained at Reintjes' main office, located at 3800 Summit Kansas City, Missouri 64111.

6. On January 27, 1999, a copy of the approved training plan was not physically maintained at the Ormet Corporation Mine.

7. Reintjes provided by facsimile a copy of the approved training plan to MSHA Inspector Ron Mesa on January 28, 1999.

In addition, the parties have stipulated as follows: "[m]iners employed by Reintjes of the South, Inc. received training at their work sites, which for various employees included, but was not limited to, the Ormet Corporation, in Burnside, Louisiana."

On April 23, 1999, each party filed a Motion for Summary Decision. On April 30, 1999, the parties each filed a reply to their adversaries' motion. Both parties indicated that an evidentiary hearing is not necessary.

II.

It is the Secretary's position that inasmuch as the training plan was not physically present at the mine site, it was not "available" as required by section 48.23(f), *supra*. In contrast, Reintjes takes the position that section 48.23(f), *supra*, does not require it to physically maintain a copy of its training plan at the mine site. Inasmuch neither as section 48.23(f), *supra*, nor any other section of Title 30 of the Code of Federal Regulations defines the term "available," both parties rely on the ordinary meaning of that word as set forth in *Webster's New Collegiate Dictionary* ("*Webster's*") (1979 edition). *Webster's* as relevant, defines available as follows:

“. . . 3 : present or ready for immediate use 4 : ACCESSIBLE, OBTAINABLE
<articles ~ in any drugstore> 5: qualified or willing to do something or to assume
a responsibility <~ candidates> 6 : present in such chemical or physical form as to
be usable (as by a plant) <~ nitrogen> <~ water>”

As set forth in *Webster's*, common usage of the term "available," can mean both present for immediate use, which would support the Secretary's position, and accessible or obtainable, which would support Reintjes' position. I thus conclude that the common usage of the term "available" as set forth in *Webster's* is not dispositive of the issue presented herein.

Reintjes correctly refers to the rule of construction that "effect must given, if possible to every word, clause, and sentence of the statute," (2A Sutherland Statutory Construction section 46.06 (5th ed., 1992)). Applying this rule to section 48.23(a), *supra*, I note that the phrase "available at the mine site" is immediately followed by, and modified by, the following phrase: "for MSHA inspection and examination by the miners . . ." I find that it is clear, as

argued by the Secretary, that the expressed propose of allowing for examination of training plans by miners, is to be achieved when such plans are available at the site, i.e., present at the site where they can be examined by the miners. Any contrary interpretation would warp the plain meaning of words in section 48.23(f), and the specific order and wording of the operative phrases.

Reintjes, in support of its position, in addition to relying upon dictionary definitions of the term “available,” makes reference to 30 C.F.R. §§ 48.29(a), and 48.29(c), and argues that, based on the language in these section, it is clear that the regulatory term “available” does not mean “kept at the mine.” Specifically, Reintjes cites section 48.29(a), supra, which provides that training certificates for each miner trained shall be “available at the mine site . . . for examination by the miners . . .” Reintjes next refers to section 48.29(c) and asserts that it imposes an additional requirement with regard to training certificates for miners who are currently employed at the mine in that only such records must be “kept at the mine site for 2 years, or for 60 days after termination of employment.” Reintjes argues, in essence, that the regulatory scheme distinguishes between all training records that must be “available,” and those records that pertain only to “currently employed” miners that must be “kept at the mine,” for a specified time period. Reintjes concludes that the regulatory scheme intended for the word “available” in section 48.29(a), supra, not to mean “kept at the mine;” and that to conclude otherwise would render section 48.29(c), supra, unnecessary. For the reasons that follow, I find that Reintjes’ arguments to be without merit.

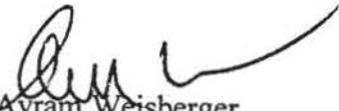
I agree with the Secretary that a clear reading of sections 48.29(a), supra, and 49.29(c), supra, indicates that 48.29(c), supra, limits the obligation of operators to retain training certificates at the mine site to either 2 years or 60 days, as pertinent. To allow Reintjes’ reasoning to prevail, would thwart the regulatory purpose of requiring training certificates and training plans to be “available at the mine site,” i.e., examination by the miners. This purpose would not be totally effectuated by having miners wait for the operator to obtain these documents from their storage sites and provide them to the miners.¹ I conclude that the clear wording of section 48.23(f) requires that training plans be physically present at the site for examination by miners. Since the plans were not present at the date at issue, they were not available. Therefore, Reintjes did violate section 48.23(f), supra, as alleged in the Citation at issue.

Therefore, for all the above reasons, the Secretary’s Motion for Summary Decision is **GRANTED**, and Reintjes’ Motion of for Summary Decision is **DENIED**.

^{1/} Such a delay in the enforcement of a miner’s explicit right set forth in section 48.23(f), supra, and 49.29(a), supra, might not be unreasonable. However, the issue of whether in a certain specific circumstance an operator can be held liable under section 48.23(f), supra, considering the time that had lapsed between a miner’s request for a training plan, and the time it was provided to miners by an operator, is not the issue posed by the pleadings in this case, and need not be decided herein.

ORDER

It is **ORDERED** that the instant Notice of Contest be **DISMISSED**, and that this case be **DISMISSED**.


Avram Weisberger
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868

June 10, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 99-24-M
Petitioner	:	A. C. No. 11-03024-05502
	:	
v.	:	
SPROULE CONSTRUCTION	:	Portable No. 2
COMPANY, INCORPORATED,	:	
Respondent	:	

ORDER TO VACATE DEFAULT
ORDER OF ASSIGNMENT

This case is before me pursuant to order of the Commission dated April 26, 1999.

On April 27, 1999, I issued an order directing the parties to file certain information. On May 27, 1999, the Solicitor filed his response to the April 27 order. The Solicitor advises that MSHA received a letter from the operator on December 16, 1999, and that on December 24 MSHA responded. The Solicitor has provided copies of these letters. With respect to the telephone call from the operator on December 15, the Solicitor merely refers to the statement in MSHA's December 24 letter and offers no independent investigation into the occurrence of the phone call.

On May 27, 1999, counsel for the operator filed its response to the April 27 order. Counsel states that the operator's initial understanding of the December 24 correspondence with MSHA was that it only had to send the appropriate forms to establish a new mining operation and that upon execution of the forms, the matter of standing on the original allegations was placed in abeyance. Counsel claims that the operator sent the forms to MSHA's office in Peru, Illinois and confirmed its understanding and submission with a telephone call. Counsel further argues that at the time the operator received the penalty petition, the operator was not familiar with the applicable Commission procedures and failed to appreciate the significance of the Show Cause Order. The operator was under the mistaken belief that it was already involved in the process to settle and resolve the violations in the penalty petition. Finally, Counsel states that he has been engaged in settlement discussions with the Solicitor.

The Commission has observed that default is a harsh remedy and held that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. Coal Preparation Servs., Inc., 17 FMSHRC 1529, 1530 (Sept. 1995). Here the operator was appearing pro se up

until the default order was issued and was not familiar with Commission procedure. In addition, a review of the file shows that the penalty petition was mailed on December 11, 1999. It is apparent that the operator contacted MSHA when it first received the petition and mistakenly believed that it had resolved this matter. It was this erroneous belief that caused the operator to ignore the show cause order. Therefore, I find that the operator has demonstrated adequate cause to warrant relief from the default order. The operator is now familiar with Commission procedure and is on notice that similar excuses will not be accepted in the future.

Counsel for the operator filed an answer to the penalty petition with his March 25, 1999, motion to vacate the default order. Accordingly, this case is ready for assignment

In light of the foregoing, it is **ORDERED** that the March 15, 1999, default order is hereby **VACATED**.

It is further **ORDERED** that this case is assigned to Administrative Law Judge Jacqueline Bulluck.

All future communications regarding this case should be addressed to Judge Bulluck at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Two Skyline Center, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

Telephone No. (703) 756-6210
Fax No. (703) 756-6201

A handwritten signature in black ink that reads "Paul Merlin". The signature is written in a cursive, flowing style with a long horizontal line extending from the end.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Rafael Alvarez, Esq., Office of the Solicitor, U. S. Department of Labor, 230 South Dearborn Street, Chicago, IL 60604

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 25, 1999

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-604-D
on behalf of LONNIE BOWLING,	:	MSHA Case No. BARB CD 95-11
Complainant	:	
v.	:	Mine ID No. 15-17234-NCX
	:	Huff Creek Mine
MOUNTAIN TOP TRUCKING CO., INC.,	:	
ELMO MAYES; WILLIAM DAVID RILEY;	:	
ANTHONY CURTIS MAYES; and MAYES	:	
TRUCKING COMPANY, INC.,	:	
Respondents	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-605-D
on behalf of	:	MSHA Case No. BARB CD 95-11
EVERETT DARRELL BALL,	:	
Complainant	:	Mine ID No. 15-17234-NCX
v.	:	Huff Creek Mine
MOUNTAIN TOP TRUCKING CO., INC.	:	
ELMO MAYES; WILLIAM DAVID RILEY;	:	
ANTHONY CURTIS MAYES; and MAYES	:	
TRUCKING COMPANY, INC.,	:	
Respondents	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-613-D
on behalf of WALTER JACKSON	:	MSHA Case No. BARB CD 95-13
Complainant	:	
v.	:	Mine ID No. 15-17234-NCX
	:	Huff Creek Mine
MOUNTAIN TOP TRUCKING CO., INC.,	:	
ELMO MAYES; and MAYES TRUCKING	:	
COMPANY, INC.,	:	
Respondents	:	

ORDER REQUESTING INFORMATION
CONCERNING JACKSON'S STUDENT STATUS

This matter concerns the Commission's March 31, 1999, remand with respect to the determination of the proper backpay and interest to be awarded to Walter Jackson. 21 FMSHRC 265 (March 1997). The period for relief has been determined to be the period immediately following Jackson's discriminatory discharge on February 18, 1995, through June 21, 1996, the date the respondents ceased hauling coal for Lone Mountain Processing, Inc. *Supplemental Decision*, 19 FMSHRC 876, 878-79 (May 1997).

To date, Jackson is seeking \$41,973.29 backpay plus interest for the period of relief. The backpay is calculated at eight round trip haulage loads driven each day from approximately 6:00 a.m. until 6:00 p.m. @ \$13.00 per load, constituting \$104.00 per day wages, or \$520.00 wages per five day work week. *Jackson's March 3, 1997, Statement of Back Pay*, at p.3; *Jackson's June 4, 1999, Proposed Order for Relief* at pp.1-2; *Supplemental Decision*, 19 FMSHRC at 878.

In order to determine if Jackson is entitled to the backpay claimed it is necessary to determine if Jackson was available for employment at all times during the relevant period for relief. Although the Secretary's counsel and Jackson's private counsel (hereinafter referred to as "counsel") have asserted Jackson was actively looking for work during the February 1995 through June 1996 relief period, new evidence reflects, and Jackson now concedes, that he was a full time student at Union College in Barbourville, Kentucky, beginning the fall semester of 1995. Specifically, as discussed below, evidence indicates Jackson has stated he was a full time student at Union College beginning in August 1995.

Throughout this proceeding Jackson's counsel have represented that Jackson withdrew his application for temporary reinstatement at the temporary reinstatement hearing on August 23, 1995, because he was employed at Cumberland Mine Service (hereinafter referred to as "Cumberland"). In this regard, counsel have represented that Jackson was employed by Cumberland from August 1, 1995, through October 10, 1995, earning \$3,343.00 during this period. Counsel have furnished a 1995 W-2 form issued by Cumberland Mine Service reflecting Jackson earned \$3,343.00 in 1995, although the W-2 form does not state the dates of employment.

In addition to representations concerning Jackson's 1995 Cumberland employment, counsel have repeatedly represented that at all times during the relevant February 18, 1995, through June 21, 1996, period, Jackson had been actively looking for work and that he was available for work. For example, in the Decision on Liability in these matters, in order to determine the appropriate relief, Jackson was specifically ordered to state any "periods when Jackson was not available for employment" beginning on February 18, 1995, through the present time. 19 FMSHRC 167, 204 (January 1997).

Despite Jackson's full time college attendance at a time when he was seeking lost wages for working twelve hours per day, Jackson's response to the Decision on Liability did not specify any periods during which Jackson was unavailable for employment. *March 3, 1997, Statement of Backpay for Walter Jackson.*

As a further example of inquiries concerning Jackson's availability for employment, by Order dated March 24, 1997, concerning the appropriate calculation for damages, Jackson was requested to state what he did to look for work from October 11, 1995, after he reported he was laid-off from Cumberland, through the June 21, 1996, relief period termination date. Jackson's private Counsel responded:

Although Jackson objects to the question, his answer is that he registered with the state unemployment agencies in both Kentucky and Virginia, followed up on potential job referrals made by those agencies, and otherwise applied for work at numerous businesses, both in the mining and non-mining fields. (Response of Walter Jackson to the Court's Order of 3/24/97, at p.3).

While Jackson may have registered with the Virginia and Kentucky state unemployment offices, there is no evidence that he ever advised unemployment officials that he was a full time student. Thus, his reported eligibility for unemployment does not, in itself, evidence that he was available for work.

Finally, during these proceedings, counsel for the respondents sought to determine if Jackson had been involved in a civil personal injury suit that was relevant to Jackson's ability to work. Jackson's private counsel responded that Jackson received a favorable jury verdict on January 5, 1996, in the U.S. District Court in London, Kentucky in a products liability law suit brought against General Motors for an injury to Jackson's right eye in February 1991. However, Jackson's counsel did not provide additional information and stated:

Mr. Jackson did not file a disability claim regarding his eye injury, nor did it affect his ability to work during the backpay period in this proceeding. *Therefore, the matter is irrelevant* to my client's claim for backpay herein (emphasis added). (March 21, 1997, correspondence from Jackson's counsel to Judge Feldman).¹

¹ As discussed *infra*, although this statement was presumably made in good faith by Jackson's counsel, it was not true. This misinformation prevented the respondents from pursuing relevant evidence with regard to Jackson's unpublished civil suit and contributed to the Commission striking evidence concerning Jackson's civil suit under the mistaken belief that issues concerning representations made by Jackson in his civil suit had previously not been raised by the respondents. *Commission Order*, July 27, 1998 (Unpublished). In fact, in this proceeding Jackson had been specifically asked if he had "been a party in any legal action or claim involving allegations of physical or mental impairment." *Order Requesting Comments on the Calculation Period for Damages* (March 24, 1997).

As a consequence of the Commission's remand decision, a conference call with respondents' counsel Edward Dooley, the Secretary's counsel Donna Sonner, and Jackson's private counsel Stephen Sanders, was conducted on April 22, 1999. At that time Dooley stated he had information to submit concerning Jackson's availability for work. Consequently, a filing schedule was established during the conference call for Dooley to file this information and for Jackson's counsel to respond.

On May 10, 1999, Dooley provided a report dated October 27, 1995, prepared by Luca E. Conte, a Vocational Rehabilitation Consultant, summarizing a standard vocational evaluation of Jackson that occurred on October 11, 1995, to determine the impact, if any, on Jackson's alleged eye impairment on his ability to work. *Resp.'s May 10, 1999, Response Concerning Jackson's Availability for Work*, Ex. 1. The vocational evaluation was performed as a consequence of Jackson's product liability suit docketed as Civil Action 92-112, U.S. Dist. Ct., Eastern District of Kentucky.

Conte reported Jackson had received an Associate in Arts degree from Southeast Community College in December 1991. *Id.* at p.2. Jackson reportedly told Conte that he began full time course work at Union College as a first semester junior in August 1995 and that he was taking 12 credits as an education major. *Id.* Jackson reported his college costs were \$4,100.00 per semester and that he was receiving a combination of a PELL Grant and a Stafford loan to finance his education. Jackson further reported the commute from his home to college was approximately 50 to 70 miles, one way. *Id.* at p.1.

During the course of the vocational assessment, Jackson provided his employment history. He indicated he had worked for Cumberland Mine Service from October 1986 through August 1988, for seven months through the fall of 1990, and from June 1992 until October 1993. *Id.* at p.2. Conte's report does not reflect that Jackson reported he was employed by Cumberland Mine Service from August 1, 1995, until October 10, 1995, the day preceding the vocational assessment.

During the vocational evaluation Jackson complained of a continuing right eye impairment and "loss [of] some vision in the left eye" reportedly due to "overcompensation." *Id.* Jackson stated he had previously failed a physical examination for a truck driving position at Manalapan Mining Company although no further details were given. *Id.* at p.2-3. Although Conte concluded Jackson retained "his pre-injury capacity to access the labor market," *Id.* at p.3, Jackson's statements to Conte reflect he was pursuing his education in order to change careers because of his physical complaints.

In response to the information provided by Dooley, Jackson's private counsel now admits Jackson was a full time student at Union College beginning the fall semester of 1995. However, specific details concerning the dates and extent of Jackson's college attendance were not provided. *June 4, 1999, Statement of Walter Jackson*, p.5. The Secretary's response to Dooley's information did not even address whether Jackson had been a full time college student. Rather, the Secretary asserted that the Commission's remand decision was "*res judicata*" on the issue of

mitigation. *Secretary's May 24 1999, Response*, p.2-3. Thus, Jackson's private counsel and the Secretary have not provided details concerning the dates of Jackson's college attendance and the times of his scheduled classes.

The Commission's remand decision concluded Jackson's failure to seek to reopen his temporary reinstatement application, regardless of his extended unemployment, could not be considered as evidence of his failure to mitigate damages. 21 FMSHRC at 285. While the Commission also concluded the record supported "the operator did not show a failure to mitigate on the part of Jackson," *Id.*, the record before the Commission contained misleading statements regarding Jackson's availability for work. Although the issue of Jackson's relief is not final, misstatements concerning his availability for employment could be a basis for reopening the issue of Jackson's relief under Rule 60(b) of the Federal Rules of Civil Procedure even if this matter had become a final decision. Consequently, the Secretary's claim of *res judicata* is lacking in merit.

While counsel may not previously have known about Jackson's full time college attendance during a period they represented Jackson was actively looking for work, they know now. Counsel have an obligation to correct any misleading evidence and misstatements presented in Jackson's behalf. *See Model Rules of Professional Conduct Rule 3.3 (4)*.²

This matter has been brought on behalf of Jackson by the Secretary pursuant to section 105(c)(2) of the Mine Safety and Health Act of 1977, 30 U.S.C. 815(c)(2). Consequently, while the requested information and documentation can be obtained through consultation with Jackson's private counsel, the Secretary primarily is responsible for presenting evidence in this matter. Consequently, the Secretary is obliged to take the necessary remedial measures to correct this record. Accordingly, the Secretary is ordered to provide the following information and supporting documentation within 30 days of the date of this Order.

² Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures. . . . [T]he alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth finding process which the adversary system is designed to implement. *Model Rules of Professional Conduct Rule 3.3 cmt.* (1995).

ORDER

IT IS ORDERED that the Secretary shall request Walter Jackson to request Union College current **Certified Copy** of Jackson's college transcript. If Jackson fails to cooperate, the Secretary shall so state.

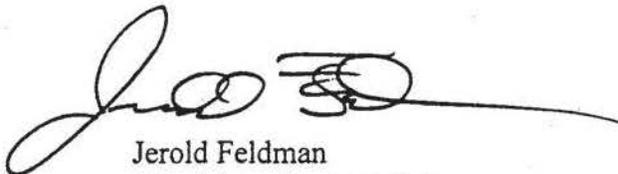
IT IS FURTHER ORDERED that the Secretary specify Jackson's hours of attendance for each of the courses reflected on the transcript.

IT IS FURTHER ORDERED that the Secretary state, with specificity, the days of the week and hours worked for each day reportedly worked at Cumberland Mine Service from August 1, 1995 through October 10, 1995, and the Secretary shall provide copies of Jackson's pay stubs issued during this period.

IT IS FURTHER ORDERED that the Secretary provide a sworn affidavit form an official of Cumberland Mine Service detailing Jackson's dates of employment during 1995, his job duties, and the reason for his termination of employment.

Jackson is seeking relief for daily lost wages that would have been earned from 6:00 a.m. until 6:00 p.m. during the period February 18, 1995, through June 21, 1996. **IT IS FURTHER ORDERED** that the Secretary explain, in detail, why she asserts Jackson was available for work each day during this entire period; what Jackson did to look for work each day during the period of his college attendance; and the impact of his PELL Grant and Stafford Loans on his decision whether or not to continue his full time college attendance.

Failure by the Secretary to provide the requested information within 30 days of the date of this Order may result in the dismissal of Jackson's discrimination complaint. Jackson's private counsel may also submit any additional information, documentation or arguments for my consideration within 30 days of the date of this Order.



Jerold Feldman
Administrative Law Judge

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