

AUGUST 1999

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AUGUST 1999

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

Secretary of Labor, MSHA, on behalf of Leonard Bernardyn v. Reading Anthracite Company, Docket Nos. PENN 99-129-D, PENN 99-158-D. (Judge Weisberger, March 18, 1999 and July 26, 1999)

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

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

August 6, 1999

UNITED MINE WORKERS OF AMERICA :
on behalf of WILLIAM KEITH BURGESS, :
GLENN LOGGINS, DAVID McATEER, :
B. RAY PATE AND OTHERS :

v. :

Docket Nos. SE 96-367-D
SE 97-18-D

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
MICHAEL J. LAWLESS, FRANK YOUNG, :
TOM MEREDITH, and JUDY McCORMICK :

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

ORDER

BY THE COMMISSION:

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), complaints were brought by the United Mine Workers of America on behalf of several miners, alleging that the Department of Labor's Mine Safety and Health Administration ("MSHA") and four of its employees had discriminated against the miners in violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). Administrative Law Judge Jacqueline Bulluck initially determined that neither MSHA nor its employees are subject to proceedings filed pursuant to the section 105(c). 19 FMSHRC 294 (Feb. 1997). On review of that decision, the Commission affirmed the judge's holding that MSHA is immune from such suits, and her dismissal of the complaints against MSHA, but vacated the dismissal of the suits against the four MSHA employees on the ground that MSHA employees are not totally immune to suit for Mine Act violations. 20 FMSHRC 691 (July 1998).

Subsequently, the MSHA employees filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit. The court, holding that MSHA officials acting under color of their authority are not amenable to suit under section 105(c) of the Mine Act, granted the petition for review, vacated the Commission's decision, and remanded for the Commission to dismiss the complaints against the MSHA employees. *Meredith v. FMSHRC*,

177 F.3d 1042 (D.C. Cir. 1999). On July 27, 1999, the court issued its mandate in this matter, returning the case to the Commission's jurisdiction. Pursuant to the court's order, we dismiss the complaints against the MSHA employees.



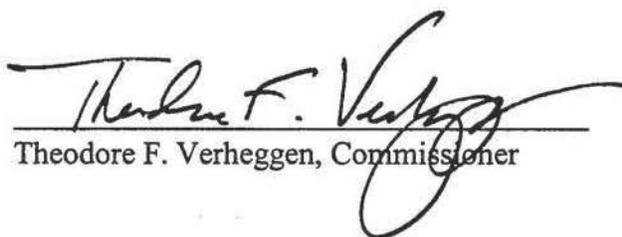
Mary Lu Jordan, Chairman



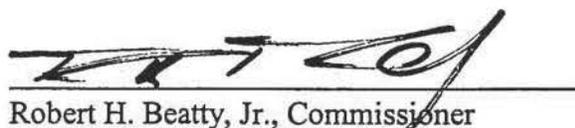
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James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 6, 1999

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

v.

AKZO NOBEL SALT, INC.

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Docket Nos. LAKE 96-45-RM
LAKE 96-65-RM
LAKE 96-66-RM
LAKE 96-80-RM

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

DECISION

BY: Jordan, Chairman; Riley, Commissioner

This consolidated civil penalty and contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"). At issue is the decision of Administrative Law Judge George A. Koutras to vacate a citation issued to Akzo Nobel Salt, Inc. ("Akzo"), charging a violation of the two-escapeway requirement of 30 C.F.R. § 57.11050(a).¹ 18 FMSHRC 1950, 2016-27 (Nov. 1996) (ALJ). The Commission granted the

¹ Section 57.11050 provides:

(a) Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

(b) In addition to separate escapeways, a method of refuge shall be provided for every employee who cannot reach the surface from his working place through at least two separate escapeways

Secretary of Labor's petition for discretionary review ("PDR") in Docket No. LAKE 96-66-RM challenging that decision. For the following reasons, we reverse the judge's decision.

I.

Factual and Procedural Background

Most of the relevant facts were stipulated before the judge and are not in dispute. 18 FMSHRC at 1952-56. Akzo operates an underground salt mine called the Cleveland mine in Cleveland, Ohio. *Id.* at 1952. At the time of the alleged violation, underground employment at the mine was approximately 174 on two production shifts and three maintenance shifts. *Id.*; Jt. Stip. No. 11. Akzo's Cleveland mine has two hoists: one in the 1853-foot production shaft and one in the 1805-foot service shaft. 18 FMSHRC at 1952. In the event of an emergency, the hoist in the service shaft is to serve as the primary escapeway for miners, while the hoist in the production shaft provides an emergency escapeway. *See* Vol. I, Doc. Tab U at 1.

On November 6, 1995, counsel for Akzo wrote Vernon Gomez, the Administrator for Metal and Nonmetal Mines with the Department of Labor's Mine Safety and Health Administration ("MSHA"), regarding MSHA's enforcement position with respect to section 57.11050(a) when an escapeway is taken out of service for maintenance at a mine with only one other escapeway. 18 FMSHRC at 1955; *see* Vol. I, Doc. Tab N. According to Akzo, due to the construction of the wire ropes used with its escapeway hoists, it had to periodically take the hoists out of service to shorten or otherwise adjust the ropes so they were tight and of equal length. 18 FMSHRC at 2053. On December 8, 1995, Gomez responded to that letter. 18 FMSHRC at 1955; *see* Vol. I, Doc. Tab S ("Gomez Response"). The Gomez Response sets forth MSHA's interpretation of section 57.11050(a) that is referred to as the "1-hour rule" as follows:

[With respect to] the need for evacuating miners . . . during hoist outages when the minimum requirements for escapeways could not be met because the hoist was unavailable for use in one of the two escapeways[,] . . . [w]e believe that [section 57.11050(a)] does not authorize maintenance to interfere with a mine operator's ability to use the hoist in the event of an emergency if it is part of, or one of, the two required escapeways.

. . . [A]s a practical application of this standard, if a hoist could be returned to service within 1 hour of the need to be used then evacuation of the mine would not be required.

within a time limit of one hour when using the normal exit method. These refuges must be positioned so that the employee can reach one of them within 30 minutes from the time he leaves his workplace.

18 FMSHRC at 2019-20; Vol. I, Doc. Tab S at 4-5. On December 15, 1995, counsel for Akzo informed the Secretary that Akzo planned a hoist outage over the upcoming holidays that would provide the basis for a Commission test case for MSHA's interpretation of section 57.11050(a). 18 FMSHRC at 1955.

During the evening and early morning of December 24 and 25, 1995, Akzo took the production hoist out of service for approximately 3-1/2 hours. *Id.* It was stipulated that there was a period during which it would not have been possible to put the hoist back into service in less than 1 hour if it became necessary to use. *Id.* While maintenance work on the production hoist was being performed, three miners performed work underground that did not involve the production hoist, including checking pumps and fans and conducting preventive maintenance on the service hoist. *Id.* No salt extraction or cutting or welding occurred during the outage. *Id.*

Akzo reported the incident to MSHA. *Id.* MSHA investigated the matter and subsequently issued Citation No. 4546276 alleging a violation of section 57.11050(a). *Id.* at 1956. The citation was issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), and states that Akzo "failed to comply with [section 57.11050(a)] because the miners who were underground were not provided with two properly maintained escapeways to the surface to use in the event of an emergency for a period in excess of one hour." *Id.* at 1957; Vol. I, Doc. Tab U at 1.²

Akzo contested the citation, and extensive pretrial discovery ensued.³ Among those deposed were a number of MSHA officials and inspectors, who were questioned at length regarding MSHA's past and present enforcement positions with respect to section 57.11050(a). *See* 18 FMSHRC at 1958-83, 1990-93. Through their testimony, as well as by documents submitted as exhibits, Akzo sought to show not only that MSHA staff did not have a clear

² The citation goes on to state:

During part of the time that the production hoist was out of service, the service hoist (the primary escapeway) was also out of service for a maintenance procedure which did not result in its use being interfered with for over 30 minutes. However, during that time both escapeways were not in service.

Vol. I, Doc. Tab U at 1.

³ After the Secretary proposed, and Akzo paid, a \$50.00 penalty for the citation, the Secretary moved to dismiss the contest proceeding on the ground that, by paying the penalty, Akzo had waived its right to contest. *See* S. Mot. to Dismiss Contest Proceedings at 1. In an unappealed decision, the judge denied the Secretary's motion, accepting Akzo's contention that its payment of the penalty was inadvertent. Unpublished Order at 1-2 (June 10, 1996) (distinguishing *Old Ben Coal Co.*, 7 FMSHRC 205 (Feb. 1985)).

understanding of the application and enforcement of the 1-hour rule, but that the 1-hour rule was a change in MSHA's previous interpretation of the standard. Under the previous interpretation, hereinafter referred to as the "end-of-shift rule," MSHA allegedly "allowed production to continue until the end of the shift, provided miners were notified that only one escapeway was available and they agreed to continue working until the end of the shift, and provided the next shift was not permitted to go underground until the second escapeway was repaired." 18 FMSHRC at 2026.

Akzo moved for summary decision on the ground that "there was no violation of [section] 57.11050 . . . in that, at all relevant times, Akzo maintained two properly maintained escapeways to the mine's surface." A. Mot. for Summ. Dec. at 2. Akzo contended that it was at all times in compliance with section 57.11050, in that it could perform maintenance on hoisting equipment without violating the standard, the standard does not require both escapeways to be functional at the same time, and MSHA had previously recognized the end-of-shift rule. Mem. in Supp. of A. Mot. for Summ. Dec. at 16-23. Akzo also characterized the 1-hour rule as a new evacuation requirement, which MSHA was engrafting onto section 57.11050(a) in violation of the Administrative Procedure Act ("APA") and the terms of the Mine Act. *Id.* at 23-34.

The Secretary cross moved for summary decision on the ground that the facts as stipulated established a violation of section 57.11050(a) as set forth in the citation. S. Resp. to A. Mot. and Cross Mot. for Summ. Dec. at 2. The Secretary argued that it was reasonable for her to interpret the standard as prohibiting what occurred in this case, which she characterized as a failure by Akzo to "properly maintain two separate escapeways" while non-necessary personnel were underground. S. Mem. in Supp. of Cross Mot. for Summ. Dec. at 5-9, 14-17.

The judge determined that Akzo had not violated section 57.11050(a). 18 FMSHRC at 2016-27. He concluded that MSHA's interpretation and application of section 57.11050(a) went well beyond the language of the provision, was unreasonable, and not entitled to deference. *Id.* at 2027. He found no credible evidence of the existence, prior to the instant litigation, of any written MSHA national policy statements concerning mandatory mine-wide evacuation if compliance with section 57.11050(a) is not achieved within 1 hour, or the fixing of an "automatic" 1-hour abatement time to achieve such compliance, or uniform enforcement methods for citing a mine operator for a violation of section 57.11050(a). *Id.* at 2016.⁴ The

⁴ The judge found that, prior to the Gomez Response, "MSHA's inspectors in the North-Central District, and probably other districts, followed an apparent long[-]standing practice of *not* requiring the evacuation of miners working underground when only a single escapeway was available during a shift." *Id.* at 2026 (emphasis in original). Among the evidence the judge relied upon was a 1990 memorandum from James M. Salois, District Manager for MSHA's North Central District, to MSHA field staff in that district. *Id.* at 2017; *see* Vol. I, Doc. Tab G. In his memorandum, Salois stated that, in the absence of a national policy on mine evacuation related to hoist repairs and maintenance in mines with only two escapeways, the North Central District would begin to follow variations of the end-of-shift rule. Vol. I, Doc. Tab G at 1-3.

judge characterized the Gomez Response as having been prepared unilaterally and not shared with other members of the mining community, and noted that its contents had not been reduced to other written form or included as part of MSHA's enforcement guidelines or policy manuals. 18 FMSHRC at 2020-21. He further found, from the deposition testimony of the MSHA officials and inspectors, that there appeared to be inconsistent, uncertain, and confusing enforcement practices as to the interpretation and application of section 57.11050(a). *Id.* at 2021-24. The judge particularly noted that MSHA witnesses could not agree regarding how the 1-hour rule would apply in practice. *Id.* at 2021-22.

The judge found nothing in the text of section 57.11050(a) to support MSHA's 1-hour rule. *Id.* at 2025-26. He also concluded that the language of subsection (a), requiring the positioning of escapeways so that damage to one shall not lessen the effectiveness of the others, recognizes that one escapeway in a two-escapeway mine may not always be available, because of damage or for maintenance. *Id.* at 2026. The judge rejected MSHA's reliance on subsection (b) of section 57.11050 as authority for requiring evacuation of an entire mine if one of the only two escapeways is going to be unavailable for more than 1 hour. *Id.* at 2024. He concluded that subsection (b) does not provide for any mine evacuation, but only for refuges if miners cannot reach the surface within an hour by using the escapeways provided by subsection (a). *Id.* Finally, the judge agreed with Akzo that the Gomez Response was not just a general explanatory or interpretative statement regarding the application of section 57.11050(a), but instead constituted a substantive rule and was therefore subject to the notice, comment, and publication requirements of the APA. *Id.* at 2027.

The Commission granted the Secretary's PDR in which she requests that we reverse the judge's decision, affirm the citation, and remand for penalty assessment.

II.

Disposition

A. The Parties' Arguments

The Secretary contends that the 1-hour rule is an interpretative rule, falling under the exception to the APA that does not require notice and comment rulemaking, because it is based on the regulation's language and intent. S. Br. at 5-12. The Secretary argues for deference to the 1-hour rule because it is a "safety-promoting" interpretation of section 57.11050 that is reasonable and consistent with the language and purpose of the standard. *Id.* at 14-20. Citing to the legislative history of the Mine Act and its predecessor statute, the Secretary claims that the purpose of the standard is to ensure that miners will have a way out of the mine at all times in an emergency, even if one escapeway is damaged. S. Br. at 16-17.

The Secretary argues that the 1-hour rule is consistent with past MSHA national practice. *Id.* at 21-23. She argues that even if, at an earlier time, MSHA staff applied a different interpretation of section 57.11050(a), she is not precluded from announcing a new interpretation of the standard. *Id.* at 23-25. The Secretary contends that this arguably is the first time she has advanced the 1-hour rule, which does not in itself make it undeserving of deference under applicable case law. *Id.* at 25-27. She also asserts that even if she is found to have modified her position, it is permissible for her to do so as long as she adequately identifies a reasonable basis for the change. *Id.* at 27-28.⁵

Amicus United Steelworkers of America (“USWA”) repeats many of the Secretary’s arguments. USWA Br. at 1, 3-5. It also contends that section 57.11050(a) could be reasonably interpreted to prohibit all underground work when there are less than two escapeways available. *Id.* at 3, 5.

Akzo urges that the judge’s decision be affirmed on the ground that MSHA’s interpretation of section 57.11050(a) is very different than its previous interpretation, is unsupported by the language of the standard, and is an attempt to engraft new substantive requirements onto the regulation, which would result in a requirement that the operators of all two-shaft mines either add an additional shaft or evacuate the entire mine whenever a hoist is to be disabled for an hour or more. A. Br. at 11-12, 14-21. According to Akzo, this new interpretation should have been subject to APA procedures. *Id.* at 23-28. Akzo further contends that no reasonably prudent operator would have had notice of MSHA’s regulatory construction of the standard. *Id.* at 21-23. Akzo argues that a mandatory evacuation requirement exceeds any withdrawal authority under the Mine Act, and facially violates the statutory requirement that MSHA grant each operator a “reasonable time” to abate any violation. *Id.* at 12-13. Akzo nevertheless concedes “that a common sense reading of the standard includes the tacit requirement that miners may not remain underground indefinitely while there is only one functioning escapeway.” *Id.* at 15 n.12.

⁵ The Secretary advanced a number of inconsistent arguments for finding a violation. While the citation at issue referenced the 1-hour rule, and the case was litigated under that theory before the judge, the Secretary’s briefs to us repeatedly describe her new interpretation as one requiring that two escapeways be available at all times, and that miners would have to evacuate if, for any length of time, there were less than two escapeways available. *See* S. Br. at 17, 18, 20; S. Reply Br. at 2, 7. At oral argument, her counsel disavowed statements made in the briefs, and explained that section 57.11050(a) was being interpreted to include the 1-hour rule. Oral Arg. Tr. 13, 38. However, the Secretary also contended for the first time at oral argument that the 1-hour rule was compelled by the plain meaning of the standard. Oral Arg. Tr. 6, 13-14. Her counsel also claimed that there were two reasonable interpretations of the 1-hour rule — one measuring the hour by the time it would take to return the hoist to service, and the other measuring it by time it would take to return the hoist to service and evacuate the mine. Oral Arg. Tr. 15-16.

Amici National Mining Association (“NMA”) and the Salt Institute (“SI”), who filed a joint brief in support of Akzo’s position, make similar APA and notice arguments. NMA/SI Br. at 2-9, 14-17. They add that the 1-hour rule is so significant a departure from the standard’s plain meaning that it does not merit the Commission’s deference. *Id.* at 9-14.

While arguing that MSHA’s 1-hour rule is a radical change from its previously recognized end-of-shift rule, neither Akzo nor NMA/SI argue for the end-of-shift interpretation of section 57.11050(a). At oral argument, counsel for Akzo denied that by opposing the 1-hour rule Akzo sought to retain in place by default the end-of-shift rule. Oral Arg. Tr. 25. Akzo’s counsel stated that Akzo instead wants MSHA “to take into account [the] enumerable variety of circumstances and fashion a rule that speaks to that continuum of circumstances so that the requirements imposed on the . . . operator are reasonable in view of the circumstances that are occurring at the time.” Oral Arg. Tr. 32.

B. Interpretation of Section 57.11050(a)

The Commission has recognized that “[w]hen the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning.” *Western Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989); *Consolidation Coal Co.*, 18 FMSHRC 1541, 1545 (Sept. 1996). It is a cardinal principle of statutory and regulatory interpretation that words that are not technical in nature “are to be given their usual, natural, plain, ordinary, and commonly understood meaning.” *Western Fuels*, 11 FMSHRC at 283 (citing *Old Colony R.R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1932)). It is only when the plain meaning is doubtful that the issue of deference to the Secretary’s interpretation arises. See *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (deference is considered “only when the plain meaning of the rule itself is doubtful or ambiguous”) (emphasis in original).

Section 57.11050 states:

(a) Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others. A method of refuge shall be provided while a second opening to the surface is being developed. A second escapeway is recommended, but not required, during the exploration or development of an ore body.

Under the plain terms of the standard, an operator must provide two means of escape at all times.⁶ We disagree with the judge that the phrase requiring the positioning of escapeways so “that damage to one shall not lessen the effectiveness of the others” somehow signals that both escapeways do not always have to be operational when miners are underground. 18 FMSHRC at 2026. Instead, the phrase simply means that escapeways in a mine should be located so that if an accident causes damage to one escapeway the others will remain functional, to provide miners a way out. The standard unequivocally states that two escapeways must be provided. It follows therefore that an operator risks being cited if miners remain underground when two escapeways are not operational.⁷

This two-escapeway requirement is of utmost importance to miner safety because of the constant threat of unforeseen hazards in underground mines. When Congress enacted the requirement as an interim mandatory standard for all underground coal mines, Congress specifically provided that two escapeways be provided *at all times*. Section 317(f) of the Mine Act provides: “[A]t least two separate and distinct travelable passageways which are maintained to insure passage *at all times* of any person, . . . and which are to be designated as escapeways, . . . shall be provided from each working section continuous to the surface . . .” 30 U.S.C. § 877(f) (emphasis added). This two-escapeway requirement was originally included in section 317(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) (“Coal Act”), and was carried over without change to the Mine Act. The legislative history of the Coal Act indicates that the continual need for two escapeways applies to salt mines as well as coal mines. The report from the Senate Committee responsible for drafting the Coal Act states:

Mine fires, extensive collapse of roof, or similar occurrences may completely block the regular travelway between the working section and the surface, thus cutting off escape in an emergency unless an alternate route is provided to the surface. As recently as March 1968, 21 men at a *salt mine* lost their lives because a second escapeway was not provided.

⁶ In support of his argument that the standard is not plain, Commissioner Verheggen argues that Akzo would never have brought this test case if the regulation were clear on its face. Slip op. at 20. However, the mere fact that a party contests a citation — even setting up a violation as a “test case” seeking clarification of a regulation’s meaning — does not automatically lead to the conclusion that the standard at issue is ambiguous. It would be curious indeed if, simply because litigants disagree about the interpretation of a regulation, the Commission were then precluded from finding that the standard was clear.

⁷ We nevertheless believe that when citing a violation of section 57.11050(a), the Secretary should carefully consider all of the facts surrounding the violative condition to properly characterize the nature of the violation, and to also correctly fix a reasonable time for abatement pursuant to section 104(a) of the Mine Act.

S. Rep. No. 91-411, at 83 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 209 (1975) (emphasis added). The plain meaning of the regulation, requiring two escapeways when miners are underground, is not only consistent with this Congressional view, but also with the primary purpose of the Mine Act. *See Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989) (“This court has several times observed that the ‘primary purpose’ of the Mine Act was ‘to protect mining’s most valuable resource — the miner’”) (citations omitted). As the Secretary explains, the “purpose of the standard and the statute is to ensure that miners will have a way out of the mine at all times, even if something happens during an emergency situation and one escapeway is damaged.” S. Br. at 17.

Here, it is undisputed that two emergency escapeways were not provided at all times for the miners’ protection. The judge found, and the parties stipulated that, on December 24, 1995, the “cited production hoist, which was one of the escapeways, was not available for use for approximately three hours and thirty seven minutes while the hoist rope was being shortened.” 18 FMSHRC at 2016. Under the plain terms of section 57.11050(a), Akzo violated the standard by closing down one of its escapeways for approximately 3-1/2 hours while miners were underground.

Commissioner Verheggen contends in dissent that the presence of the requirement in Mine Act section 317(f) that coal mine operators maintain two escapeways at all times is “an indication that the Secretary, in promulgating section 57.11050(a), may have opted not to include an ‘at all times’ element in the regulation.”⁸ Slip op. at 21. It is noteworthy however that at least two metal/non-metal regulations, 30 C.F.R. §§ 57.8518(a) and 57.8534(a), mandate that fans be continuously operated in active workings when individuals are present *except* for “scheduled production-cycle shutdowns or planned or scheduled fan maintenance.” Applying the same logic as our dissenting colleague, the presence of this exception in those regulations makes its absence from section 57.11050 all the more significant, reinforcing our conclusion that this standard contains no implicit exception for planned maintenance.

Our dissenting colleagues believe we are “ignoring . . . practical problems” and claim that our ruling “will seriously inhibit the ability to maintain escapeways[.]” Slip op. at 21, 26.⁹ Our colleagues also imply that our ruling may have a negative impact on safety in that an operator

⁸ There is no regulatory history to support this assertion.

⁹ Our dissenting colleague Commissioner Beatty questions how escapeway maintenance and repair work could ever be performed in a two escapeway mine under our approach, since the miners doing the repair work would not have two escapeways until the work was finished. Slip op. at 26-27. We note, however, that the Mine Act allows those persons necessary to abate a condition to remain in a mine even when other personnel are required to be withdrawn. *See* section 104(c), 30 U.S.C. § 814(c), and section 107(a), 30 U.S.C. § 817(a).

who is required to stop production in order to service its hoist or perform other maintenance work may be deterred from doing that work at all. Slip op. at 27. Alternatively, they raise the concern that “frequent calls to evacuate could result in miners . . . begin[ning] to second-guess the need to evacuate.” Slip op. at 28.

We recognize that adopting the plain meaning of section 57.11050(a), and thus requiring two operational escapeways while miners are underground, may be inconvenient, because the nature of the mining industry presents numerous situations, other than the malfunctioning of a hoist, where an escapeway may become temporarily unavailable for a certain period of time. However, when a regulation states unequivocally that each mine “shall have two or more . . . escapeways” (30 C.F.R. § 57.11050(a)), it would be adding an improper gloss to tack on an “only some of the time” qualification. The requirement that mines must have two or more escapeways does not apply for only two shifts out of three, or only when it is convenient for the operator, or only during times when maintenance is not being performed. When a standard says “[e]very mine *shall* have two or more” escapeways (*id.*), it follows that two escapeways be provided and available at all times when miners are underground.

We are confident that our ruling is faithful to the objectives of the Mine Act, which was enacted for the express purpose of strengthening the safety protections under the predecessor Metal/Non-Metal Act and to prevent the recurring mine disasters in that industry. S. Rep. No. 95-181, at 4-5, 8-9, *reprinted* in Senate Subcommittee on Labor, Committee on Human Resources, *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 589, 592-93, 596-97 (“*Legis. Hist.*”). Congress was concerned with improving safety protection for all miners in both coal and non-coal mines. H.R. Rep. No. 95-312, at 8 (1977), *reprinted in Legis. Hist.* at 357, 364; S. Rep. No. 95-181, at 9, *Legis. Hist.* at 597. One of the disasters that prompted enactment of the Mine Act was the tragedy at the Sunshine Silver Mine in Idaho in May 1972, where 91 miners died of carbon monoxide asphyxiation. S. Rep. No. 95-181, at 4, *Legis. Hist.* at 592. The Senate Report attributed one of the major causes for this disaster as “the failure of mine management to provide a secondary escape route trap[ping] miners as much as a mile underground.” *Id.* Providing two escapeways, as section 57.11050(a) mandates, is an important measure to prevent recurrence of such disasters in the future.

We believe our dissenting colleagues’ extrapolation that dire consequences may result from our ruling is hypothetical rather than supported by the record before us.¹⁰ In addition, like the Secretary, our colleagues are unable to indicate how long an operator can require miners to

¹⁰ Our colleagues claim we are being impractical, yet, as indicated above, operators of coal mines are already required by section 317(f) of the Act to provide two escapeways “at all times.” Moreover, although they supported the Secretary’s 1-hour rule in this case, the United Steel Workers of America, on behalf of the miners at this facility, additionally argued that it would also be reasonable for the Secretary to prohibit all underground work when there are less than two escapeways available, USWA Br. at 3, 5.

work underground with only one escapeway available. Commissioner Beatty urges “the Secretary to engage both miners, and the regulated community, in an attempt to develop a uniform rule that provides clear guidance” Slip op. at 29. Commissioner Verheggen contends that “the Secretary is in a better position to balance . . . concerns and promulgate an appropriate guidance document or rule that clearly and reasonably addresses these problems.” Slip op. at 23. Both of our dissenting colleagues express concern about our “inflexible” approach (*see* slip op. at 21, 28), yet their decision would leave the miners’ escapeway protection standard in legal limbo while their suggested rulemaking process occurs.

Having found the meaning of the regulation to be plain, we would normally have no need to consider the reasonableness of the 1-hour rule set out in the Gomez Response. *Heckler*, 735 F.2d at 1509. However, because we find the Secretary’s interpretive gloss in this case to be particularly troubling, we feel compelled to comment on it.

The Gomez Response states that “routine maintenance is allowed with miners underground, if, at all times, a hoist can be reactivated and miners withdrawn from the mine within 1 hour.” 18 FMSHRC at 2020; Vol. I, Doc Tab S at 5. Under this interpretation of the regulation adopted by the Secretary, miners could remain underground regardless of the length of time an escapeway is inoperable, so long as it could be placed back in service and miners withdrawn from the mine within 1 hour.¹¹ Because the Secretary considers an escapeway operable, for purposes of the escapeway standard, as long as it “*could* be returned to service within one hour of the need to be used” (18 FMSHRC at 2020 (emphasis added)), an operator could simultaneously disable both escapeways for maintenance while miners were underground and would apparently not violate the escapeway standard unless the escapeways would not be available for use within 1 hour of any need which may arise. Under this approach, miners could technically remain underground for an indefinite period of time, without access to *any* escapeway, so long as the operator is able to make the escapeways operable within 1 hour of intended use.¹²

We have carefully considered the Secretary’s arguments in favor of adopting a 1-hour rule. However, the Secretary’s conflicting arguments were more confusing than illuminating. *See* slip op. at (6 n.5). In the instant case, the Secretary’s 1-hour rule leaves unresolved whether the hour is fixed or floating as to when it starts and stops and whether the entire hour is available for restoration of service or includes the time necessary to evacuate the mine. Under this policy,

¹¹ Counsel for the Secretary confirmed this interpretation during oral argument by stating that “[a]s long as at any point in time, you are capable of bringing that escapeway back into service within an hour, . . . it doesn’t really matter how long the escapeway is out of service.” Oral Arg. Tr. 37.

¹² Significantly, even Akzo concedes that miners cannot be left underground indefinitely when only one escapeway is available. *See* A. Br. at 15 n.12.

the requirement that every mine provide two escapeways has been reduced to merely a showing of the *potential* for making two escapeways available within an hour.¹³

In sum, we conclude that section 57.11050(a) means what it says — that two escapeways must be provided to miners while underground. Therefore, the operator had adequate notice of the terms of the standard. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997) (adequate notice provided by unambiguous regulation); *see also Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 156 (2d Cir. 1999) (operator had “sufficient notice of its regulatory obligations because the Commission’s interpretation of [the regulation at issue] is consistent with the plain meaning of the regulation and a reasonably prudent mine operator would take the Mine Act’s objectives into account when determining its responsibilities to comply with a regulation promulgated thereunder.”).

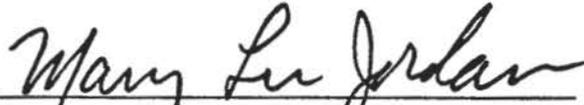
Accordingly, we reverse the judge and find a violation. While the Secretary requests that we remand for penalty assessment, we note that the operator has already paid the \$50 penalty the Secretary proposed. In such circumstances, and in the interest of judicial economy and finality, we see no reason to remand for penalty assessment. *See* 30 U.S.C. § 823(d)(2)(C) (Commission empowered to affirm, set aside, or modify decision of ALJ in conformity with record); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293-94 (Mar. 1983) (Commission eschewed remand to set penalty where there was no dispute between Secretary and operator regarding penalty). Taking into account the statutory criteria of section 110(i), we conclude that such a nominal penalty is appropriate under the unique circumstances of this case, where the operator staged the violation in order to test the Secretary’s interpretation of a standard at a time no mining was underway.

¹³ In light of our holding, we do not address the Secretary’s argument that the 1-hour rule is an interpretative rule that is not subject to notice and comment rulemaking.

III.

Conclusion

For the foregoing reasons, we reverse the judge's determination and find that there was a violation of section 57.11050(a) and assess a penalty of \$50.


Mary Lu Jordan, Chairman


James C. Riley, Commissioner

Commissioner Marc Lincoln Marks concurring:

I write separately to specifically emphasize the safety aspects of this case and to call attention to certain facts in the evidence not a part of the opinion filed by Chairman Mary Lu Jordan and Commissioner James Riley.

BACKGROUND

When the Mine Act of 1977 was passed by the 95th Congress of the United States and signed by then President Jimmy Carter, this extraordinary piece of legislation set the public policy of the United States once and for all, above all else, in favor of SAFETY. As has been said over and over again, the primary purpose of the Mine Act was to protect mining's most valuable resource — the miner. *See* 30 U.S.C. § 802 (a).

During that legislative process there were many voices who attempted to temper the safety provisions — trying to weaken them — but fortunately those voices were overridden by the vast majority of the legislative and executive branch and therefore strong safety and health provisions prevailed.

There were also those voices of gloom who predicted that the safety and health provisions of the Act would penalize the operators so harshly that production would be reduced, if not curtailed so drastically that only bankruptcy of the mining industry would follow.

Neither of these predictions proved true! In fact, not only have the miners benefitted from the Act but so have the operators.

Yet, today, there are still those operators and their defenders who try to weaken the safety provisions of the 1977 Act and as well as those regulations that have come about as a result of it. The battle to uphold the 1977 Act's sole purpose, greater safety and better health for miners, is still being fought. This case, as much as any case that has come before this tribunal while I have served, makes that point!

Because of that, I choose to write separately, so that timidity will not keep the real issue in this case hidden. That real issue is whether or not production should be our first consideration or should the safety and health of our miners continue to take priority even though it may cost an operator some production time and/or additional money to provide the safety necessary to the miners' well being.

Let me begin by going back to March 5, 1968. On that date a disastrous and horrendous fire occurred in a Louisiana mine called Belle Island Salt Mine, which was owned by a company named Cargill. Vol. I, Doc. Tab. B., *Final Report on Major Mine - Fire Disaster Belle Isle Salt Mine* ("Belle Isle Report"). At the time the fire started, there were 21 miners working underground. ALL 21 MINERS SUFFERED AN AWFUL DEATH. *Id.* at 1. Twenty of them

died of carbon monoxide poisoning and one apparently as the result of a massive skull fracture. *Belle Isle Report* at 1.

Over a period of the next number of months, an investigation was made of that fire, (perhaps the most thorough investigation ever made up to that time), by the Department of Interior's Bureau of Mines under Public Law 89-577, the Federal Metal and Nonmetallic Mine Safety Act. *Id.* Subsequently, a report was filed that indicated, in no uncertain terms, that a separate shaft for use as an escapeway would prevent underground disasters such as the one that killed the 21 men during the fire in that Louisiana salt mine. *Id.* at 44, 46. The Bureau pointed out that the blast and intense heat in the single shaft made escape of any of the 21 men in the mine at the time, impossible! Bureau of Mines, Press Release at 1 (Feb. 14, 1969). The Bureau's report cited the fact that the lack of A SECOND WAY OUT OF THE MINE was a major contributing factor to the loss of life. *Belle Isle Report* at 44. That report also points out that the company had been advised to place a second shaft in its mine nearly six months before the disaster occurred, although at the time of the disaster work on the second escapeway had not even started! *Id.*

What makes all of this even more relevant, is the fact that Cargill owns the Cleveland mine that is involved in the case at bar. But you say, it didn't own it at the time all escapeways were closed down with miners underground, which prompted the citation that brought this case before us. And you're right. However, interestingly enough the company that did own the mine at the time, Akzo, sold the mine in question to Cargill before this matter was heard in oral argument by us. In fact the sale took place on April 25, 1997. Akzo's Status Report, ¶ 1 (May 23, 1997). Although it seems unusual that the name Cargill does not appear on the caption or that at no time has any attempt been made to substitute or add Cargill as a party on the record, such neglect, if one thinks about it, is understandable. How in the world could Cargill have wanted its name to appear on a matter in which it was promoting the idea that when a mine regulation says every mine shall have two or more separate properly maintained escapeways, that isn't what it really means, in light of the experience it had back in 1968. When counsel was asked who he represented at the oral argument of this matter, counsel indicated that he represented Akzo Nobel Salt and did not indicate that he represented Cargill. Oral Arg. Tr. 4. No explanation was given for this mysterious posture, even though a representative of Cargill sat at the counsel's table alongside of "Akzo's" counsel. Oral Arg. Tr. 4.

Akzo Nobel Salt, Inc., at the time it was cited in violation of section 57.11050(a) was a company owned by Akzo Nobel N.V., headquartered in the Netherlands. Akzo Nobel N.V., Press Release (Aug. 15, 1996) <http://www.akzo.nobel.se/om_akzo_nobel_press960815.htm>. This huge foreign organization, worth billions of dollars in assets, chose to make an issue of what is now before us: whether or not there must be two escapeways or more at all times for miners underground according to section 57.11050(a).

I want now to discuss, somewhat briefly, but importantly, the background that led to this case coming before us and who was responsible for the plot that set it up.

There is no question but that the record indicates that counsel for Akzo Salt Inc., from the very beginning set up the procedures that were to be followed, in fact the record would indicate that none of the company officials who were involved in the shutdown would speak to any one of the MSHA investigators unless their counsel was present. *See* Vol. I., Doc. Tab T at 16, 19. And when the MSHA investigators began to question the company officials, the officials refused to answer the question as to whether they knew that they were violating the law, as a result of being told not to answer by their counsel. *Id.* at 17, 19. The record is clear that this matter was set up and carried out in detail as a result of instructions from legal counsel.

At this time it is incumbent upon us to ask the question, why would this huge foreign company, aware of the public policy of the United States to provide United States miners with a way out of a mine at all times, want to involve itself in this type of a dispute? Why would it take the chance that an accident of any nature would take place during the 3-1/2 hours there were not two escapeways available to the miners underground, trapping the miners? What insensitivity would prompt Akzo company officials to take the advice of their counsel and not evacuate the miners during the shutdown — and by the way, not advise the miners at any time either before or during this happening? Vol. I., Doc. Tab. X at 5, 7, 8; Vol. I., Doc. Tab. Y at 22. I believe that the answer to those questions is obvious.

This billion dollar foreign corporation owned a salt mine that had but two escapeways and it was going to cost them a substantial amount of money and a loss of production to dig a third escapeway so that it would be in conformance with the requirement, that if one escapeway was shut down for any reason, there would be two escapeways as required by section 57.11050(a). Rather than spend the money, or have some loss of production when any one of its escapeways were down,¹ it was willing to gamble on expending the lives of the miners underground.

SECTION 57.11050(a)

Section 57.11050(a) provides:

(a) Every mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others.

¹ In his dissenting opinion. Commissioner Beatty takes out of context the suggestion of Commissioner Marks that one of the ways that an operator could come into compliance with section 57.11050(a) was to dig a third escapeway so that two would be available at all times. Slip op. at 25 & n.2. Commissioner Beatty neglects to mention that Commissioner Marks stated that an operator also could halt production when any one of its escapeways were down in order to be in compliance.

Our responsibility in this case, as in all cases that come before us, is to decide without equivocating the meaning of section 57.11050(a). To do this there are certain guidelines that have been set down for us to follow by Congress, the Supreme Court of the United States, the Federal Courts of Appeals, and by our own tribunal.

First and foremost, we are directed by Congress that our prime concern and chief responsibility, as laid out under section 2(a) of the Mine Act, is the SAFETY of the miners! *See* 30 U.S.C. § 802(a). Additionally, the Court of Appeals for the District of Columbia made it clear that Congress intended the Mine Act to be liberally construed to achieve that goal of mine safety. *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989). Again, the Second Circuit recently stated that it is the responsibility of this Commission to interpret the Mine Act and its regulations, consistent with the remedial goal of the Act, and to enhance safety. *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 161 (2d Cir. 1999) (Commission interpretation correctly took into account Mine Act goal of preventing “mine accidents”). Justice Marshall writing for a majority of the United States Supreme Court recognized in *Donovan v. Dewey*, 452 U.S. 594, 602-03 (1981), that the Mine Act was “specifically tailored” to address the mining industry’s “notorious history of serious accidents and unhealthful working conditions,” and that “there is a substantial federal interest in improving the health and safety conditions in the nation’s underground and surface mines.”

Having established our responsibility, we now turn to the law we must follow when we find a regulation to be plain on its face. It is well established that if a regulation’s meaning is plain on its face, it must be interpreted to mean what it says (and not something different from its plain meaning). *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984); *K Mart Corp. v. Cartier, Inc.* 486 U.S. 281, 291 (1988); *Old Colony R.R. v. Commissioner of Int. Rev.*, 284 U.S. 552, 560 (1932) (in interpreting statutory language, “the plain, obvious and rational meaning of a statute is to be preferred to any curious, narrow, hidden sense.”)

At this point it would seem appropriate to define the word “shall” as it applies to its use in a government regulation. The ordinary connotation of the word “shall” is “must.” *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990). “The word ‘shall’ generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.” *Association of Civilian Technicians v. FLRA*, 22 F.3d 1150, 1153 (D.C. Cir. 1994). Many courts have explained that “shall” is a term of legal significance in that it is mandatory or imperative, not merely precatory. *Exportal*, 902 F.2d at 50 (citing *Conoco, Inc. v. Norwest Bank, Mason City*, 767 F.2d 470, 471 (8th Cir. 1985); *Continental Airlines, Inc. v. Department of Transp.*, 850 F.2d 209, 216 (D.C. Cir. 1988); *Weil v. Markowitz*, 829 F.2d 166, 171 (D.C. Cir. 1987); *Association of Am. R.R. v. Costle*, 562 F.2d 1310, 1312 (D.C. Cir. 1977)). *See also Jim Walters Resources, Inc.*, 3 FMSHRC, 2488, 2490 (Nov. 1981) (the language “shall be used” in a standard was mandatory).

Accordingly, the Commission construes standards that use the word “shall” to require a certain condition, to mean that the condition “must” be provided. For example, in *Amax Coal Co.*, 19 FMSHRC 470, 474 (Mar. 1997), the plain language of the standard stated that methane content of the air “shall be less than 1.0 volume per centum” and the Commission reversed the judge’s finding of no violation because methane exceeded that level. See also *Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1146 (July 1996) (when standard provides that “[s]elf-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment . . . the service brakes must be capable of stopping and holding the equipment”) (emphasis added).

The use of the word “shall” in the standard at issue means “must”; there must be two escapeways, and these must be functional at all times when miners are underground.²

The case *Fluor Daniel*, 18 FMSHRC 1145-46, makes the point dramatically. In that case, the regulation in question required mobile equipment to be equipped with a service brake system and the operator argued that since the regulation did not use the words “in functional condition,” the regulation did not require the brakes to be functional. *Id.* at 1145. That foolish argument was rejected by this tribunal. *Id.* at 1146. The same thing was made clear in *Mettiki Coal Corp.*, 13 FMSHRC 760 (May 1991). There, the regulation required all electric equipment to be provided with switches for lockout purposes. *Id.* at 768. The Commission held that this meant that the switches be installed with “functioning lockout devices.” *Id.* The end result is that the Commission requires what common sense dictates — that if a regulation requires a piece of equipment, such as brakes, then it follows that the equipment must be functional at all times, that is the brakes must work at all times.

Thus, when the regulation in our case requires two or more escapeways to the surface, it means two or more escapeways functional and available at all times!! Otherwise, the regulation would have to be read, that there must be two or more escapeways to the surface only some of the time or perhaps none of the time. This is a result that is antithetical to the purpose and intent of the Mine Act.³ Can one believe that a Congress and a President intended that miners were to

² Both dissenting colleagues fault the majority for adding an “at all times” requirement to section 57.11050(a). Slip op. at 21-22, 26 n.4. However, the dissenters overlook that section 57.11050(a) is written in mandatory terms, explicitly using the word “shall.”

³ In 1998, there were 80 fatalities in coal and metal and non-metal mines. As of July 31, 1999, 50 fatalities from mining have been reported. MSHA, *1999 Fatalgrams and Fatal Investigation Reports Metal and Nonmetal Mines* (visited Aug. 6, 1999) <<http://www.msha.gov/FATALS/FABM99.HTM>>; MSHA, *1999 Fatalgrams and Fatal Investigation Reports Coal Mines* (visited Aug. 6, 1999) <<http://www.msha.gov/FATALS/FABC99.HTM>>. Therefore, it remains critical to construe the Mine Act in a manner that promotes miner safety. As Mine Act Section 2(a) provides, “the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource — the miner.” 30 U.S.C. § 801(a).

have two functioning escapeways only part of the time and the rest of the time be left in a black hole in the ground without any means of escape, gambling that no roof would fall or no fire would start and snuff out their lives — as happened to those 21 miners in the Louisiana Salt Mine owned by Cargill back in 1968! In sum, the standard's plain terms require two functioning escapeways that are available AT ALL TIMES when miners are underground. To hold otherwise would be to disregard the plain meaning of section 57.11050(a) and denigrate the spirit and purpose of the Mine Act.

Therefore, I join the majority in reversing the judge and find a violation of section 57.11050(a). I also join the majority in its conclusion that, under the circumstances of this case, a remand for penalty assessment is not necessary.

A handwritten signature in black ink, reading "Marc Lincoln Marks". The signature is written in a cursive, flowing style with large, connected letters.

Marc Lincoln Marks, Commissioner

Commissioner Verheggen, dissenting:

I disagree with the majority's conclusion that the standard at issue, section 57.11050(a), is clear on its face and requires that two operable escapeways be available at all times.¹ I fail to see how the meaning of such a standard could be clear given the multiplicity of interpretations that were advanced in this case by Akzo and the Secretary. I would affirm the judge in result, however, and find no violation because the Secretary has failed to articulate a coherent or reasonable basis for the citation issued to Akzo. In reaching this conclusion, I am in accord with my colleague Commissioner Beatty.

As a threshold matter, I disagree with my colleagues that section 57.11050(a) clearly and unambiguously requires operators to "provide two means of escape *at all times*." Slip op. at 8 (emphasis added). Aside from the fact that the words "at all times" simply do not appear in section 57.11050(a), the regulation does require, among other things, that the two requisite escapeways be "properly maintained." This requirement begs two questions: (1) whether the two-escapeway requirement applies while escapeways are in the process of being serviced pursuant to a maintenance schedule; and (2) whether an operator would be in violation of the standard if an escapeway becomes unavailable as the result of an unplanned, unforeseeable event. It is up to the Secretary to fill this gap in the regulation, as she attempted to do in this case — unsuccessfully, as I explain further below. This case is before us because the Secretary, prompted by Akzo's counsel, attempted to provide guidance to the company on the meaning of the "properly maintained" element of section 57.11050(a). If this provision were clear on its face, this case — which Akzo brought and the Secretary defended as a "test case" (see 18 FMSHRC at 1955) — would never have arisen.

I find the Tenth Circuit's recent decision in *Walker Stone Co. v. Secretary of Labor* instructive on this point. 156 F.3d 1076 (10th Cir. 1998). In *Walker Stone*, the court had before it a case in which "[t]he administrative law judge and the Commission both relied on their own respective perception[s] of the plain language of the applicable regulation." *Id.* at 1081. The judge and Commission, however, "reached opposite results," which led the court to conclude that "[t]here is thus ambiguity *inherent* in the safety standard." *Id.* (my emphasis). The court noted that "[n]either the . . . judge's interpretation nor the contrary interpretation adopted by the Commission is either clearly required or clearly prohibited by the language of the regulatory safety standard." *Id.* Similarly, here, section 57.11050(a) does not explicitly require that two escapeways be available "at all times." Nor does the standard explicitly require that the Secretary make allowances for maintenance. Section 57.11050(a) is silent as to the issue presented by this case, and thus inherently ambiguous.

¹ In fact, the majority's ruling that two operable escapeways be available at all times has the effect of imposing a requirement that operators covered by section 57.11050(a) have *three* escapeways available. See slip op. at 16 (Commissioner Marks, concurring) (Akzo's "salt mine . . . had but two escapeways and it was going to [be expensive] to dig a third escapeway").

My colleagues, though, have unilaterally added an “at all times” element to section 57.11050(a), without addressing the practical problems posed by planned and unplanned escapeway maintenance, problems which Commissioner Beatty outlines in his dissent.² I find it significant that the Secretary did not advance the majority’s plain meaning interpretation of section 57.11050(a) at trial. Indeed, she flatly rejected such an interpretation in the instant appeal at oral argument. Oral Arg. Tr. 13, 38 (counsel’s disavowal of the “at all times” interpretation argued in the Secretary’s briefs). What emerges from the Secretary’s various interpretations of the standard is a desire to avoid an inflexible reading of the standard like that announced today by the majority, a reading that poses problems with both enforcement and compliance. Under the majority’s new interpretation of section 57.11050(a), the Secretary is faced with having to police *all* escapeway outages and, as the majority acknowledges, “carefully consider all of the facts surrounding the violative condition to properly characterize the nature of the violation.” Slip op. at 8 n.7. Moreover, operators can be cited for even the briefest of interruptions in escapeway accessibility, even interruptions occurring as a result of totally unforeseeable circumstances such as short power outages or minor mechanical problems. As the Secretary’s various interpretations of the standard suggest, she probably wanted to avoid problems such as these.

The Secretary simply did not intend that the standard be an absolute requirement that at least two escapeways be available at all times. Put another way, I find no indication in section 57.11050(a) that the Secretary “has directly spoken to the precise question in issue” in this case — i.e., how operators of metal and nonmetal mines must balance the escapeway requirement with their need to maintain such escapeways. *Cf. Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (in determining whether a “regulation is consistent with the [Mine Act],” the first inquiry is “whether Congress has directly spoken to the precise question in issue”) (citations omitted).

My colleagues find support for their interpretation in the requirement of Mine Act section 317(f) that coal mine operators must maintain “[a]t least two separate and distinct travelable [escapeways] . . . at all times.” 30 U.S.C. § 877(f) (emphasis added); *see* slip op. at 8-9. I view this, however, as an indication that the Secretary, in promulgating section 57.11050(a), may have opted not to include an “at all times” element in the regulation. Congress provided the Secretary a blueprint for such an approach in section 317(f), yet for whatever reason, the Secretary did not use this blueprint when promulgating the similar standard for metal and nonmetal mines. Instead, she has attempted to address the particular concerns and problems of the metal and nonmetal mining industry — and even more specifically, those mines with only two escapeways

² Commissioner Marks states that the “real issue [here] is whether or not production should be our first consideration or should the safety and health of our miners continue to take priority.” Slip op. at 14. I disagree. This case is about the meaning of section 57.11050(a). In fact, I believe that the majority’s precipitous approach, and the confusion that it could create, could very well *diminish* safety. I thus believe that it would be much better if the Secretary addressed this issue through additional study and promulgation of guidance or more formal rules.

— in guidance documents such as the Salois interpretation (*see* 18 FMSHRC at 2017-18, 2026) and Gomez letter (*id.* at 1955, 2019-20).³

Having found that section 57.11050(a) does not address the question of escapeway requirements during maintenance, the issue presented by this case, I next turn to the question of whether the Commission is required to “accord special weight to the Secretary’s view” of the regulation. *Helen Mining Co.*, 1 FMSHRC 1796, 1801 (Nov. 1979). Herein lies the central problem presented by this case: It is simply impossible to determine just what the Secretary’s interpretation of section 57.11050(a) is. The record contains a variety of Secretarial interpretations, including:

- (1) The Salois interpretation, or “end-of-shift rule.” *See* 18 FMSHRC at 2017-18, 2026.
- (2) The Gomez letter, or “one-hour rule.” *See id.* at 2019-20.
- (3) The various interpretations of section 57.11050(a) appearing in the pleadings, all of which indicate that no one appears to have known just what MSHA policy was or what the Gomez letter meant. *See id.* at 1958-83, 1990-93, 2021-22 (“there appears to be inconsistent, uncertain, and confusing enforcement practices among MSHA’s inspectors as to the interpretation and application of this regulation”).
- (4) The “at all times” interpretation argued in the Secretary’s briefs (*see* S. Br. at 17-20; S. Reply Br. at 2, 7), but later disavowed at oral argument (*see* Oral Arg. Tr. 13, 38).
- (5) The Secretary’s “one-hour rule” interpretation that was revived at oral argument, and upon which counsel elaborated, agreeing that there were two possible interpretations of the rule. *See* Oral Arg. Tr. 15-16.

³ The majority notes that sections 57.8518(a) and 57.8534(a) contain exceptions from what is essentially an “at all times” requirement for the operation of mine fans, arguing that the absence of such an exception from section 57.11050(a) reinforces their “conclusion that this standard contains no implicit exception for planned maintenance.” Slip op. at 9. My point, however, is that the absence of an *explicit* “at all times” requirement in section 57.11050(a) — unlike sections 57.8518(a) and 57.8534(a), which *explicitly* require mine fans to be run “continuously” — provides the Secretary enough regulatory flexibility to effectively administer the standard. Furthermore, the two regulations cited by the majority illustrate that when the Secretary promulgated the Part 57 regulations, she knew just how to say “at all times,” yet did not do so in section 57.11050(a).

- (6) A plain meaning interpretation advanced by the Secretary for the first time at oral argument — which amazingly differs from the majority’s plain meaning interpretation — deriving a one-hour rule from reading sections 57.11050(a) and 57.11050(b) together. *See* Oral Arg. Tr. 6, 13-14.

I find that the Commission need not “accord special weight” to the Secretary’s views here because she has failed to articulate any coherent interpretation of section 57.11050(a). On this ground alone, I would find no violation. Even assuming that the Secretary’s position is memorialized in the Gomez letter, which was, after all, the initial basis for the Secretary’s case, I agree with my colleagues that the letter is an unreasonable interpretation of section 57.11050(a). The Gomez letter states that “routine [escapeway hoist] maintenance is allowed with miners underground, if, at all times, a hoist can be reactivated and miners withdrawn from the mine within one hour.” 18 FMSHRC at 2020. As my colleagues point out, under this interpretation, an operator could have any number of escapeways laying dormant so long as they could be activated within an hour. *See* slip op. at 11. I find unreasonable any interpretation of section 57.11050(a) that would allow miners to remain underground without access to *any* escapeway indefinitely so long as the escapeway could be rendered operational in at least an hour. The Gomez letter — which served as the basis for the Secretary’s case — being unreasonable,⁴ I am not prepared to sanction the regulatory confusion apparent in the Secretary’s subsequent prosecution of the case by finding a violation. I therefore would affirm the judge’s decision in result.

In the absence of a clear interpretation of section 57.11050(a) from the Secretary, the Commission could offer its own interpretation — the solution my colleagues adopt in their plain meaning analysis. But the problem with their approach is that we, as members of the Commission, are not escapeway experts, and are not equipped to balance the problem of planned and unplanned escapeway outages with miner safety. I believe that in this case, the Secretary is in a better position to balance these concerns and promulgate an appropriate guidance document or rule that clearly and reasonably addresses these problems.⁵

⁴ The purpose of section 57.11050(a) is to ensure that miners working underground are provided escapeways. The Gomez letter is not “logically consistent” with this goal. *See General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995).

⁵ I disagree with the majority’s claim that this dissent, together with Commissioner Beatty’s dissent, “would leave the miners’ escapeway protection standard in legal limbo while [the] suggested rulemaking process occurs.” Slip op. at 11. This issue has been in litigation for several years now. There is no indication in the record that there is now suddenly a compelling need to rush to judgment and fashion a new rule imposing a brand new “at all times” requirement. Moreover, I fear that the majority’s course will be more unworkable than that urged in the dissents because the majority imposes a new solution on all concerned without the benefit of input from miners, operators, or even the Secretary’s experts.

I must also take issue with the majority's penalty assessment, which they make without considering the unequivocal requirements of section 110(i) of the Mine Act to make findings on the gravity of the violation, the effect of the penalty on the operator's ability to continue in business, and the operator's negligence, history of violations, good faith, and size. See *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983) (when a penalty is assessed under the Mine Act, "[f]indings of fact" must be made "on each of the statutory criteria"), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).⁶

For all of the foregoing reasons, I therefore join Commissioner Beatty in dissent.


Theodore F. Verheggen, Commissioner

⁶ The majority's reading of *Sellersburg* is incorrect. That case does not allow the Commission to eschew a remand "where there [is] no dispute between [the] Secretary and operator regarding [the] penalty." Slip op. at 12. Instead, under *Sellersburg*, "the Commission's entering of undisputed record information as findings [on the criteria is] proper under the [Mine] Act." *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1153 (7th Cir. 1984).

Commissioner Beatty, dissenting:

I respectfully dissent from the holding of my colleagues in the majority regarding their reading of the escapeway requirements of 30 C.F.R. § 57.11050(a). Slip op. at 7-9. Instead, I concur in Commissioner Verheggen's position in favor of affirming the judge's decision in result based on the Secretary's failure to articulate a consistent means of application of the standard. Further, it is clear that the Secretary has failed to offer a reasonable interpretation of the standard that warrants the Commission's deference. I write separately from Commissioner Verheggen to state my own separate additional views.

As a threshold matter, I disagree with my colleagues that the language of section 57.11050(a) is clear and unambiguous. To the contrary, I find the language of the standard inherently ambiguous and particularly difficult to reconcile given the facts of the instant case.¹

In my view, the language of the standard is ambiguous, particularly when applied to mining operations that employ a two-entry escapeway system. The relevant language of section 57.11050(a) states that, "[e]very mine shall have two or more separate, properly maintained escapeways to the surface from the lowest levels which are so positioned that damage to one shall not lessen the effectiveness of the others." 30 C.F.R. § 57.11050(a). It is unclear to me, from reading this language, precisely how the requirement for two escapeways *at all times*, as articulated by my colleagues in the majority, could possibly apply in the context of an underground mine that has only two escapeways. The standard explicitly requires that escapeways be "properly maintained" and "positioned so that damage to one shall not lessen the effectiveness of the *others*." *Id.* (emphasis added). Where only two escapeways are present, however, the use of the word *others*, when referring to the remaining escapeway, makes no sense unless the drafters envisioned that underground mining operations would always have more than two escapeways. Thus, an argument could be, and in fact has been, made that the standard requires at least three escapeways to comply.² Alternatively, the standard could be read, as the Secretary has suggested, to mean that in a two escapeway system, a single escapeway is permissible during brief periods of routine maintenance. See Vol. I, Doc. Tab S ("Gomez Response") at 4-5. The point to all of this, of course, is to illustrate that because of the standard's ambiguity, even my colleagues in the majority cannot agree on exactly what the regulation requires.

¹ It is also important to recognize that this case presents a rather unusual set of circumstances since, according to the representation of the Secretary's counsel at oral argument, most metal/non-metal underground mines have more than two means of escape. Oral Arg. Tr. 35.

² In his concurring opinion, Commissioner Marks states explicitly that an operator would need to "dig a third escapeway so that it would be in conformance with the requirement [of section 57.11050(a)]." Slip op. at 16; *see also* slip op. at 20 n.1 (dissent of Commissioner Verheggen).

Given the ambiguity in the language of the standard when applied to a mine with two escapeways, I do not agree with the majority that the standard is plain on its face. In my view, this ambiguity is the reason why neither of the parties in this litigation have advanced a reading of section 57.11050(a) that would require continuous access to two escapeways *at all times*. In fact, the Secretary, who drafted and promulgated the standard at issue, did not advance a plain meaning interpretation of the standard prior to oral argument before the Commission.³ Oddly, this leaves my colleagues in the majority as the driving force behind the adoption of a plain meaning interpretation⁴ of section 57.11050(a) that in theory appears to provide escapeway protection but which, in practical application, will seriously inhibit the ability to maintain escapeways in a manner that will assure miners of their readiness in the event of an emergency.

Aside from the analytical questions raised by the majority's position, my primary concern is that the majority does not address several problems that emerge from a practical application of its ruling. First, the majority does not address the question of how an operator can legally maintain an escapeway under their interpretation of section 57.11050(a). It is important to note that an escapeway is not limited to the hoist and shaft or slope areas of a mining operation, but instead encompasses the entire entryway from the shaft or slope bottom to the work area. *See* 30 C.F.R. § 57.4000. As the majority recognizes, "the nature of the mining industry presents numerous situations, other than the malfunctioning of a hoist, where an escapeway may become temporarily unavailable for a certain period of time." Slip op. at 10. Indeed, something as serious as a roof failure, or as common as an accumulation of water, could have the effect of rendering an escapeway unavailable. The unpredictable nature of underground mining conditions is undoubtedly one reason the standard requires "properly maintained" escapeways. Under the majority's approach to section 57.11050(a), however, neither maintenance, nor repair of these problems could ever be legally conducted in a mine with only two escapeways.

³ During oral argument, the Secretary did for the first time advance a plain meaning construction of section 57.11050(a), but it was one that supported her "one-hour rule" interpretation of that standard, rather than the interpretation adopted by the Commission majority. Oral Arg. Tr. 6.

⁴ My colleagues in the majority argue they are enforcing the plain meaning of the standard, yet they appear to base their interpretation on a requirement that two escapeways must be operational "at all times," language that does not appear anywhere in the regulation. As Commissioner Marks states in his concurring opinion: "It is well established that if a regulation's meaning is plain on its face, it must be interpreted to mean what it says (and not something different from its plain meaning)." Slip op. at 17.

Under the majority's approach, once miners are sent underground to correct an escapeway problem, or to conduct routine maintenance, the standard is violated. Logic dictates that if an escapeway is in the process of being maintained, miners will, out of necessity, be underground and involved in correcting the problem. Permitting miners underground, however, directly contradicts the majority's position that "two escapeways be provided and available *at all times when miners are underground.*" Slip op. at 10 (emphasis added).⁵ In effect, the majority's engrafting of an "at all times" requirement onto the language of section 57.11050(a) will impede the correction of escapeway problems, or place miners who have been chosen to correct the problem in the very position that the majority has identified as dangerous. In my opinion, such an interpretation does not promote "the primary purpose of the Mine Act ." *Id.* at 9. To the contrary, the majority's reading of section 57.11050(a), when carried to its logical extreme, can result in a situation that actually inhibits the ability to maintain escapeways.

The majority also fails to recognize the impact that their plain meaning construction of section 57.11050(a) will have on compliance with other standards designed to promote mine safety. Section 57.11050(a) does not exist in a vacuum, but instead is an integral part of a group of health and safety standards including, but not limited to, those relating to the testing and maintenance of shafts, hoists, and escapeways, whose collective requirements are crucial in assuring the availability of functional, properly maintained escapeways in an emergency.⁶ The majority's interpretation of section 57.11050(a) will make it difficult, if not impossible, to comply with these standards in a mine with only two escapeways.

⁵ My colleagues in the majority take issue with this criticism of their "plain meaning" interpretation, noting that persons necessary to abate a violative condition may remain in a mine even when other miners are required to be withdrawn under provisions of the Mine Act relating to withdrawal orders (section 104(c), 30 U.S.C. § 814(c)) and imminent danger (section 107(a), 30 U.S.C. § 817(a)). Slip op. at 9 n.9. These limited exceptions to the general evacuation requirement envisioned by the majority fail to effectively rebut my central point, however, since they would not apply to an operator which sought merely to perform routine maintenance work or to comply with any of the various maintenance and inspection requirements applicable to escapeways and hoists. *See infra* at 27 n.6. Under the majority's interpretation of section 57.11050(a), an operator with a two-escapeway system would thus be unable to take an escapeway out of service to perform such work, albeit temporarily, without the risk of being cited for a violation of this standard.

⁶ *See, e.g.*, 30 C.F.R. § 57.11051 (maintenance and inspection of escape routes); 30 C.F.R. § 57.11056 (requirements for inspecting, testing, and maintenance of emergency hoists); 30 C.F.R. § 57.19023 (mandating examination of wire ropes every 14 calendar days); 30 C.F.R. § 57.19132 (testing of safety catches); 30 C.F.R. § 57.19134 (inspection of sheaves in operating shafts); 30 C.F.R. § 57.19135 (lubrication of rollers in operating incline shafts).

Finally, the majority does not address the concerns associated with the inevitable evacuations that will result from its interpretation of section 57.11050(a). Under the majority's view, miners must be evacuated *anytime* a situation exists where two escapeways are not "provided at all times," regardless of the length of time the escapeway may be out of service. Slip op. at 9. In other words, even a momentary loss of power at an elevator would result in a requirement that the mine be evacuated immediately. In my view, this leads to several specific problems. First, it is important to recognize that evacuating an underground mine is quite different than the evacuation of an office building during a fire drill. Underground evacuation is an arduous task involving procedures that raise a variety of safety concerns beyond those associated with the temporary loss of an escapeway. Second, frequent calls to evacuate could result in miners developing a "fire drill" mentality whereby they actually begin to second-guess the need to evacuate.⁷

My colleagues in the majority characterize my concerns regarding the possible adverse consequences of a plain meaning reading of section 57.11050(a) as an extrapolation of "dire consequences" that is "hypothetical rather than supported by the record before us." *Id.* at 10. A close reading of the record, however, illustrates that many of these same concerns were previously raised by Akzo on the record in this proceeding. *See, e.g.*, A. Br. at 14-15 & n.11 (discussion of regulatory requirements for routine maintenance of hoists and escapeways); *id.* at 10, 12-13 (problems associated with mandatory evacuation requirement); Oral Arg. Tr. 20 ("there are a host of required maintenance and testing regulations for hoists [which] require that certain maintenance and testing activities be done on a regular basis."). While the record thus contains several references to the regulatory compliance problems I have mentioned, there can be little question that my criticism of the majority's interpretation of section 57.11050(a) must, by its very nature, be hypothetical, at least until the Secretary has had the opportunity to apply that approach in her future enforcement of that standard. Indeed, the majority's own criticisms of the Secretary's proposed interpretation of that standard (the "one-hour" rule) are also hypothetical.

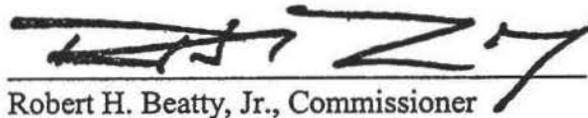
I find it particularly significant that, as noted above, the Secretary did not argue during this litigation for a strict construction of this standard, but instead argued strongly in favor of an interpretation of section 57.11050(a) that permitted some flexibility in its application. Why would the Secretary, who is charged with promulgating and enforcing health and standards, advance an interpretation of a regulation that resulted in a reduction in the level of protection provided to miners? It is obvious from the Secretary's position throughout this litigation that she wisely recognized that an unduly restrictive interpretation of section 57.11050(a) could impede

⁷ This evacuation requirement also appears to directly conflict with the requirement that a citation set forth a reasonable abatement period, which is set forth in section 104(a) of the Mine Act, 30 U.S.C. § 814(a).

compliance with other mandatory health and safety standards designed to insure that escapeways are properly maintained, and inhibit the ability to correct escapeways problems.⁸

Under the interpretation advanced by the Secretary in this case, miners could remain underground regardless of the length of time an escapeway is inoperable so long as it could be placed back in service and miners withdrawn from the mine within one hour. Slip. op at 11. I agree wholeheartedly with my colleagues on both sides of this issue that this interpretation of section 57.11050(a) does not merit the Commission's deference. I believe, however, unlike my colleagues in the majority, that mine safety would be better served by allowing the Secretary to engage both miners, and the regulated community, in an attempt to develop a uniform rule that provides clear guidance on this important matter. In the alternative, I believe that, at a minimum, we should allow the Secretary an opportunity to refine her interpretation of this standard.

Accordingly, for the reasons discussed above, I respectfully dissent.



Robert H. Beatty, Jr., Commissioner

⁸ In my view, the holding of the majority that the language of section 57.11050(a) is clear and unambiguous is further undermined by its statement that it "carefully considered the Secretary's arguments in favor of adopting a 1-hour rule." Slip op. at 11. If the language of the standard is indeed unambiguous, and can support only one interpretation, there would appear to be little need for a close examination of other alternative interpretations.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 16, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. PENN 99-218
	:	A.C. No. 36-00958-04210
EIGHTY FOUR MINING COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners¹

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 June 7, 1999, the Commission received from Eighty Four Mining Company ("Eighty Four") a Motion for Leave to File a Notice of Contest of Proposed Penalty Assessment out of time for three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). It has been administratively determined that the Secretary of Labor does not oppose the motion for relief filed by Eighty Four.

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, Eighty Four contends that it timely filed a hearing request to contest the proposed penalties related to Citation Nos. 3658055, 3658059, and 3658060. Mot. at 1-2. Eighty Four states that it received the proposed penalty assessments for nineteen citations on

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

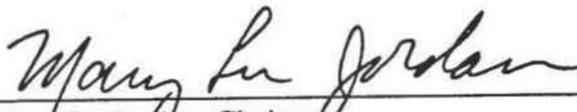
March 1, 1999. *Id.* at 1. The operator maintains that it indicated on the proposed assessment (“green card”) that it mailed to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) that it intended to contest the penalties related to Citation Nos. 3658055, 3658059, and 3658060, which totaled \$770.00, and that it intended to pay the penalties related to the remainder of the citations, which totaled \$2652.00. *Id.* at 1-2. Eighty Four paid the \$2652.00 in proposed penalties related to the citations it did not contest. *Id.* at 1. The operator subsequently received a notice from MSHA stating that \$770.00 in civil penalties was overdue and assessing additional charges of \$10.47. *Id.* at 2. Eighty Four then telephoned MSHA’s Office of Assessments, which advised the operator that it had not received the green card contesting the three subject proposed penalties. *Id.* By that time, however, the thirty-day deadline for submission of the request had already passed. Eighty Four believes that it timely mailed the green card and cannot explain why MSHA did not receive it. *Id.* at 2. Attached to the motion is a copy of the green card indicating the operator’s intent to contest the subject proposed civil penalties, a Notice of Contest of Proposed Penalty Assessment for Citation Nos. 3658055, 3658059, and 3658060, and copies of the citations here at issue.

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., Essayons, Inc.*, 20 FMSHRC 786, 788 (Aug. 1998) (remanding final order when operator misplaced proposed penalty notification); *Del Rio, Inc.*, 19 FMSHRC 467, 468 (Mar. 1997) (remanding final order when operator inadvertently misfiled hearing request card); *RB Coal Co.*, 17 FMSHRC 1110, 1111 (July 1995) (remanding final order when operator misplaced hearing request card). 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 Western Aggregates, Inc.*, 20 FMSHRC 745, 746-47 (July 1998) (remanding request to reopen penalty assessment where operator inadvertently sent request for hearing to MSHA’s payment lockbox); *Drummond Co.*, 17 FMSHRC 883, 884 (June 1995) (remanding request to reopen penalty assessment after hearing request was timely submitted but erroneously indicated that the operator did not wish to contest certain proposed penalties).

Here, the green card copy attached to the motion shows that the operator wrote an “x” next to the listings for Citation Nos. 3658055, 3658059, and 3658060. Handwriting on the bottom of the green card copy states “Appeal \$777.00” — the total amount for the proposed penalties for Citation Nos. 3658055, 3658059, and 3658060, and “Pay \$2652.00.” It is uncontroverted that MSHA received payment of \$2652.00, an amount equal to the total civil penalties proposed by the Secretary less \$777.00. While it is not clear why MSHA did not receive the green card, the record demonstrates the operator’s intent to contest the subject proposed penalties. Eighty Four’s failure to submit the green card can be reasonably 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, the interest of justice, we grant Eighty Four’s unopposed request for relief and reopen the penalty assessments that became final orders with respect to Citation Nos. 3658055, 3658059, and 3658060. 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

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 18, 1999

DISCIPLINARY PROCEEDING : Docket No. D 99-1

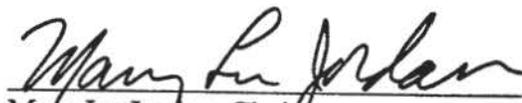
BEFORE: Jordan, Chairman; Marks, Riley, Verheggen and Beatty, Commissioners

ORDER

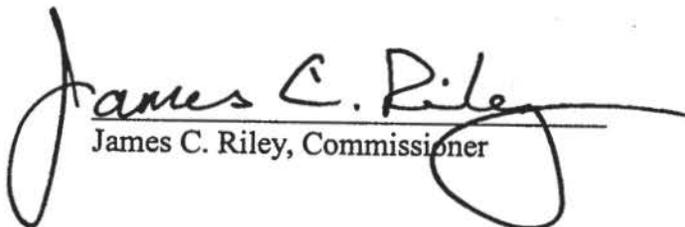
BY THE COMMISSION:

This matter was docketed by the Commission and assigned to Administrative Law Judge T. Todd Hodgdon following a Referral for Disciplinary Proceedings filed with the Commission by the Secretary of Labor. On July 2, 1999, the judge transmitted to the Commission an Application for Appointment of Prosecutor in this matter. The application states that, in response to a prehearing order, the Secretary of Labor asserted that she "is not a party to these proceedings and does not expect to participate at the hearing in this matter." Application at 1. The judge noted that, "[w]ith the withdrawal of the Secretary, there is no one to represent the interests of the Commission in insuring that individuals practicing before it 'conform to the standards of ethical conduct required of practitioners in the courts of the United States.'" *Id.* (quoting 29 C.F.R. § 2700.80(c)). The judge therefore requested "appointment of counsel to prosecute this matter at the hearing." *Id.*

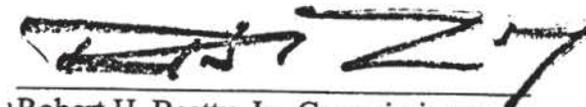
Upon consideration of the application, it is granted. The Commission has decided to utilize the services of a government trial attorney to serve as prosecutor, and has determined administratively that the National Labor Relations Board ("Board") is able to furnish a trial attorney to prosecute this matter. The attorney selected by the Board shall enter his or her appearance before Judge Hodgdon.


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

August 18, 1999

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 95-194-M
	:	WEVA 95-221-M
v.	:	WEVA 95-321-M
	:	
CAPITOL CEMENT CORPORATION	:	

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

DECISION

BY: Jordan, Chairman; Marks and Beatty, Commissioners

These civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), raise the issues of whether Administrative Law Judge Gary Melick denied due process to Capitol Cement Corporation (“Capitol”) by conducting a hearing in which a witness asserted the Fifth Amendment privilege against self-incrimination,¹ whether the judge properly concluded that violations of 30 C.F.R. §§ 56.12016² and 56.15005³ by Capitol resulted from its unwarrantable failure to comply with the standards, and whether the negligence of two supervisors is imputable to Capitol for civil penalty

¹ The Fifth Amendment to the United States Constitution provides that no person “shall be compelled in any criminal case to be a witness against himself.” U.S. Const. amend. V.

² Section 56.12016 states, in part:

Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it.

³ Section 56.15005 states, in part:

Safety belts and lines shall be worn when persons work where there is danger of falling

purposes. 19 FMSHRC 531 (Mar. 1997) (ALJ). For the reasons that follow, we reject Capitol's due process claim and affirm the judge's findings of unwarrantable failure and his penalty assessments.

I.

Factual and Procedural Background

This case involves two citations and a withdrawal order arising from two separate accidents at Capitol's Martinsburg Plant in Berkeley County, West Virginia. The Martinsburg Plant operates a limestone quarry and crushing facility and a cement manufacturing facility. Tr. 16-17.

A. Bonfili's Accident

On October 21, 1994, shift supervisor Gregory Bonfili was injured when he contacted the energized rail, or "hot rail," of an overhead crane while responding to a safety concern of the crane operator, Charlie Cook. 19 FMSHRC at 533. The rail provides 480-volt alternating current electrical power to the crane, which is used to move materials inside a 600-foot long, 80-foot wide, and 75-foot high storage building. *Id.* The crane runs across the building on a "craneway," under which the hot rail is located. *Id.*; Tr. 76. The height of the crane is adjustable and varies according to the amount of material below the crane. *Id.* At the time of the accident, the crane was suspended approximately 60 feet above the ground. 19 FMSHRC at 533. The crane is operated onboard and is usually accessed by one of several boarding platforms along the craneway, which have guardrails to protect against falling. *Id.*; Tr. 77, 160. The craneway also has a 3-foot-wide walkway, which does not have a guardrail but has a cable to which persons can tie off safety belts. 19 FMSHRC at 533; Tr. 77-78, 160-61. The crane can be deenergized in three ways: a circuit breaker onboard the crane deenergizes the crane only; a circuit breaker on the third floor of the building (which, at the time of the accident, was one level below the crane) deenergizes the crane and the rail; and a circuit breaker on the ground floor of the building deenergizes the entire section, including the crane and rail. 19 FMSHRC at 533; Tr. 78-79, 120.

Responding to Cook's concern that the crane was shaking, Bonfili boarded the crane and rode back and forth along the craneway to observe the crane's movement. 19 FMSHRC at 533, 534; Tr. 79. Bonfili then directed Cook to deenergize the crane and, without deenergizing the rail or wearing a safety belt, Bonfili went onto the craneway to examine the structure. 19 FMSHRC at 533. During the examination, Bonfili reached over the side and contacted the hot rail. *Id.*; Tr. 20, 79. In order to deenergize the rail, Cook ran along the craneway for a distance of approximately 40 feet and down a stairway to the circuit breaker located on the third floor of the building. 19 FMSHRC at 533; Tr. 154. Bonfili received severe burns to his forearm. 19 FMSHRC at 533; Tr. 20.

Following the accident, Edward Skvarch, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA"), conducted an accident investigation and, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), issued Capitol Citation No. 4294023 alleging a significant and substantial ("S&S")⁴ violation of section 56.12016 for Bonfili's failure to deenergize equipment before doing mechanical work and Order No. 4294024 alleging an S&S violation of section 56.15005 for Bonfili's failure to wear a safety belt when working where there is danger of falling. 19 FMSHRC at 532-33; Gov't Exs. 1 & 2. Both the citation and order were later modified to allege unwarrantable failure to comply with the standards under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). *Id.* The Secretary of Labor subsequently proposed civil penalty assessments of \$5,000 and \$2,500, respectively, for the alleged violations and Capitol challenged the proposed assessments.

B. Lozano's Accident

On March 15, 1995, shift supervisor Arthur Lozano was injured when he got caught in a conveyor belt while attempting to align, or "train," the belt. 19 FMSHRC at 536. Lozano removed the safety guard from the belt's head pulley, and directed general laborer Jeff Miller, who was working nearby, to observe him, stating: "Come here, I want to show you a trick." *Id.*; Tr. 47, 121, 129, 143. Then, with Miller standing a few feet away, Lozano held a roll of duct tape and, with his hands between the energized head pulley and the belt, touched the tape to the head pulley where it proceeded to unroll. 19 FMSHRC at 536; Tr. 143-44. When Lozano tried to tear the tape, however, it did not tear and he was pulled into the head pulley. 19 FMSHRC at 536; Tr. 144. Miller went to deenergize the belt, hollering to another employee standing beside the power switch who turned it off. *Id.* Lozano sustained injuries to his hand and arm. 19 FMSHRC at 536; Tr. 32, 144.

Subsequently, while conducting a regular inspection, Inspector Skvarch learned of the accident. 19 FMSHRC at 536; Tr. 31-32. As the result of an accident investigation, Inspector Skvarch issued Capitol Citation No. 4294714, pursuant to section 104(d)(1) of the Mine Act, alleging an S&S and unwarrantable violation of section 56.12016 for Lozano's failure to deenergize equipment before doing mechanical work. 19 FMSHRC at 536; Gov't Ex. 3. The Secretary proposed a civil penalty assessment of \$3,000 for the alleged violation and Capitol challenged the proposed assessment.

C. Judge's Decision

On October 26, 1995, prior to the hearing, Capitol filed a motion to stay Docket Nos. WEVA 95-194-M and WEVA 95-221-M until possible criminal charges against Bonfili were resolved. On October 27, 1995, the judge stayed those dockets pending MSHA's completion of

⁴ The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

its related criminal investigation. On August 7, 1996, the judge lifted the stay in the two dockets involving Bonfili, as well Docket No. WEVA 95-321-M. On October 15, 1996, Capitol filed a motion to dismiss all three dockets based, in part, on MSHA's delay in bringing a criminal case against Bonfili or its failure to state that it would not do so, and its expectation that Bonfili would assert his Fifth Amendment privilege against self-incrimination if called to testify. On October 16, 1996, the judge denied the motion. On October 30, 1996, the judge conducted the hearing, at which Bonfili asserted his Fifth Amendment privilege. Tr. 95-97. Capitol's counsel then stated "we object for having to go forward at this time," asserting that Bonfili's testimony would assist it in defending the case. Tr. 97. We construe this objection as a renewed motion for a further stay of the hearing. However, after the judge learned that Capitol could provide other witnesses who could testify to what Bonfili had told them about the accident, and who could testify that Capitol had trained Bonfili, he implicitly overruled the objection. Tr. 97-98 (directing Capitol to "[g]o ahead"). On February 28, 1997, the judge held oral argument to clarify the legal theories presented by the parties in their post-hearing briefs.⁵

In his decision dated March 7, 1997, the judge noted that Capitol did not dispute the S&S violations but contested the unwarrantable failure allegations and the proposed penalties. 19 FMSHRC at 534. The judge concluded that all three violations resulted from Capitol's unwarrantable failure to comply with the standards. *Id.* at 534, 537. Regarding Bonfili's violation of section 56.12016, the judge found that, based on Capitol's training records, it was reasonable to infer that Bonfili knew that deenergizing the crane alone would not also deenergize the rail. *Id.* at 534. He further found that Bonfili failed to lock out any of the power sources. *Id.* The judge determined that the violation was obvious, extremely dangerous, and committed by a shift supervisor who is held to a high standard of care. *Id.* Regarding Bonfili's violation of section 56.15005, the judge found that, again based on Capitol's training records, it was reasonable to infer that Bonfili knew that failing to use a safety belt was a violation. *Id.* In assessing civil penalties for the violations, the judge imputed Bonfili's negligence to Capitol, determining that the defense established in *Nacco Mining Co.*, 3 FMSHRC 848 (Apr. 1981), was inapplicable because Bonfili not only placed himself at risk of injury, but also exposed Cook to risk. *Id.* at 534-35. The judge found that by running along the craneway to deenergize the rail, Cook was exposed to the hazard of falling and suffering potentially fatal injuries. *Id.* at 535. He also inferred that, had Bonfili fallen off the craneway, Cook could have attempted to rescue him, thereby exposing himself to a falling hazard with potentially fatal consequences. *Id.* However, the judge found that Capitol's conscientious hiring practices, training program, and safety rules

⁵ On September 17, 1996, the Secretary proposed a civil penalty assessment of \$500 against Bonfili, pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c), alleging that he knowingly authorized the violations. WEVA 97-5-M, Proposed Assessment. Bonfili challenged the proposed assessment. WEVA 97-5-M, Contest of Civil Penalties. On February 10, 1997, the Secretary filed a motion to withdraw the petition for assessment of civil penalty. WEVA 97-5-M, Mot. to Withdraw. On February 21, 1997, Judge Melick granted the motion and dismissed the section 110(c) case. WEVA 97-5-M, Order of Dismissal.

were mitigating circumstances. *Id.* at 535. Thus, the judge assessed civil penalties of \$2,500 and \$1,250. *Id.*

With regard to Lozano's violation of section 56.12016, the judge found that "it shows reckless disregard to do what [Lozano] did here." *Id.* at 537. The judge determined that the violation was obvious, dangerous, and committed by a shift supervisor who is held to a high standard of care. *Id.* In assessing the civil penalty for the violation, the judge imputed Lozano's negligence to Capitol, determining that the *Nacco* defense was inapplicable based on an inference that, had Lozano become further entangled in the belt, Miller might have attempted to rescue him, exposing himself to the hazard of the moving belt and suffering potentially serious injuries. *Id.* However, the judge found that Capitol's conscientious hiring practices, training program, and safety rules were mitigating circumstances. *Id.* Thus, the judge assessed a civil penalty of \$1,600. *Id.* The Commission granted the petition for discretionary review subsequently filed by Capitol challenging these determinations.

II.

Disposition

A. Due Process

Capitol argues that the judge denied it due process by requiring it to go forward after Bonfili asserted the Fifth Amendment privilege and refused to testify. PDR at 11-13; Reply Br. at 2-5. The Secretary responds that, although Bonfili asserted the Fifth Amendment privilege, the judge did not violate Capitol's due process rights by conducting the hearing. S. Br. at 9-12.

The Due Process Clause of the Fifth Amendment guarantees that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The fundamental requirement of procedural due process is the opportunity to be heard "at a meaningful time and in a meaningful manner" appropriate to the nature of the case. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The timing and manner of the hearing depend upon "appropriate accommodation of the competing interests involved." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (quoting *Goss v. Lopez*, 419 U.S. 565, 579 (1975)).

While a judge may stay a civil proceeding pending the outcome of a parallel criminal prosecution, such action is not required by the Constitution. *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980). *See generally United States v. Kordel*, 397 U.S. 1 (1970). In *Kordel*, the Supreme Court rejected the defendants' claim that the use of the civil discovery process in a Food and Drug Administration proceeding to compel answers to interrogatories that could be used to build the prosecution's case in a parallel criminal proceeding was so unfair as to require reversal of the criminal convictions. The Court

recognized the “[i]t would stultify enforcement of federal law to require a government agency . . . invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.” 397 U.S. at 11 (footnote omitted).

Capitol has not cited any case in which a court or agency was found to have violated the Due Process Clause by declining to stay a civil proceeding despite the anticipated assertion of the privilege against self-incrimination by a prospective witness. In the absence of circumstances “in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government,” parallel proceedings should not be prohibited. *Dresser*, 628 F.2d at 1377 (citing *Kordel*, 397 U.S. at 11-13).

The decision whether to stay a civil proceeding until completion of a criminal prosecution is within the judge’s discretion, and review of that decision is generally based on an inquiry as to whether it constituted an abuse of discretion. *Buck Creek Coal Inc.*, 17 FMSHRC 500, 503 (Apr. 1995). Here, however, Capitol has raised a due process challenge to the judge’s decision to lift the stay. As in *Buck Creek*, where the operator argued that a blanket stay denied it due process (17 FMSHRC at 501), we apply the test for abuse of discretion, as the relevant factors for this analysis are almost identical to those used by courts in applying a due process analysis to determine whether the granting or lifting of a stay was proper. See, e.g., *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995).⁶ For both claims, “[i]n essence, the test is one of balancing equities.” See *In re Phillips, Beckwith & Hall*, 896 F. Supp. 553, 558 (E.D. Va. 1995).

⁶ In *Keating*, the plaintiff claimed that his due process rights were violated when the Office of Thrift Supervision (“OTS”) refused to stay its civil proceeding until the conclusion of state and federal criminal proceedings, because the pending criminal case forced him to invoke his Fifth Amendment privilege during the OTS hearing, depriving him of the opportunity to present testimony on his own behalf. 45 F.3d at 324-25. The Court found no violation of due process and no abuse of discretion, applying the factors set out in *Federal Savings & Loan Insurance Corp. v. Molinaro*, 889 F.2d 899 (9th Cir. 1989), in which the Ninth Circuit reviewed a district court decision to refuse to stay a civil proceeding using an abuse of discretion analysis. *Id.* The *Keating* Court considered the extent to which the defendant’s Fifth Amendment rights were implicated, and applied the following additional factors: “(1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.” *Id.* These criteria are subsumed almost completely in the *Buck Creek* “abuse of discretion” standard set forth below.

In *Buck Creek*, the Commission set forth the following factors that are appropriate for consideration in determining whether a request for stay based on possible criminal prosecution should be granted:

(1) the commonality of evidence in the civil and criminal matters (see *Peden v. United States*, 512 F.2d 1099, 1103 (Ct. Cl. 1975), civil proceedings properly stayed if they “churn over the same evidentiary material” as the criminal case); (2) the timing of the stay request (see *Campbell v. Eastland*, 307 F.2d 478, 487-88 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963), imminence of indictment favors limiting scope of discovery or staying proceedings); (3) prejudice to the litigants (see *Peden*, 512 F.2d at 1103-04, failure to show prejudice undercuts claim that stay was improper; *Campbell*, 307 F.2d at 487-88, discovery that prejudices criminal matter may be restricted); (4) the efficient use of agency resources (see *Molinaro*, 889 F.2d at 903, including among stay factors “efficient use of judicial resources” in case involving defendant’s request for stay); and (5) the public interest (see *Scotia [Coal Mining Co.]*, 2 FMSHRC 633, 635 (Mar. 1980)], noting “the public interest in the expeditious resolution of penalty cases”).

17 FMSHRC at 503.

Applying these criteria in this case, we conclude that the judge did not abuse his discretion. In deciding to lift the stay order and conduct the hearing, he properly accommodated the competing interests involved by evaluating the prejudice to Capitol that would result from going forward without Bonfili’s testimony, versus the adverse impact on the public interest that would result from further delay. See *Keating*, 45 F.3d at 326 (public interest in a speedy resolution of the case and the agency’s concern for efficient administration would have been hampered if proceeding had been stayed). The record indicates that these civil penalty proceedings were stayed for almost a year. In denying Capitol’s pre-hearing motion to dismiss, the judge stated that “due to the age of these cases, a further continuance is inappropriate.” Unpublished Order dated Oct. 16, 1996.

Additionally, in overruling Capitol’s objection at the hearing, the judge considered the fact that Capitol could provide other witnesses to testify regarding what Bonfili had told them about the accident and the training that Capitol had provided to Bonfili.⁷ Tr. 97-98. In fact, Capitol provided four such witnesses (Gess, Tr. 70-81; Wolschleger, Tr. 100-10; Cottrell, Tr.

⁷ In Commission proceedings, hearsay evidence is admissible so long as it is material and relevant. 29 C.F.R. § 2700.63(a); *REB Enterprises, Inc.*, 20 FMSHRC 203, 206 (Mar. 1998); *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1135 (May 1984).

119-21, 123-25; Alexander, Tr. 127-28, 131-34, 136).⁸ Thus, Capitol has not convinced us that its inability to question Bonfili resulted in substantial prejudice.

Although the judge did not address the other *Buck Creek* factors, the record discloses that only one of the three remaining factors, the timing of the stay request, comes into play here, and that factor supports the judge's lifting of the stay.⁹ The Secretary represented that there had been no criminal investigation into the matter and, thus, it had not been referred to the U.S. Attorney for criminal prosecution. Tr. 93; *see also* Oral Arg. Tr. 35. This reduced the need for a reimposition of the stay. *See Dresser*, 628 F.2d at 1375-76 (need for stay was reduced because no indictment had been returned).

The basis for Bonfili's invocation of the privilege against self-incrimination was the possibility of criminal prosecution absent a grant of immunity from the U.S. Attorney. *See* Tr. 93; Oral Arg. Tr. 37-38. A stay continued on this basis alone, as the operator essentially requests, could be indefinite, as there is presumably small likelihood that a person whom the Department of Labor does *not* refer to the U.S. Attorney will nevertheless receive a grant of immunity. As the *In re Phillips* court noted, staying a civil case until there is no threat of criminal prosecution is problematic because "it is sometimes difficult to tell when, if ever, the possibility of criminal prosecution has passed." 896 F. Supp. at 557 n.4.

⁸ The judge correctly took into account the compelling fact that other witnesses could provide the testimony that Bonfili, because of his Fifth Amendment assertion, could not. In *United States v. Lot 5, Fox Grove, Alachua County, Florida*, 23 F.3d 359 (11th Cir. 1994), for example, the court, in the context of a forfeiture case (in which the question of staying civil proceedings until the completion of a related criminal matter arises frequently), held that:

Claimant's assertion that only her own testimony could vindicate her is groundless; other participants to the illegal acts that gave rise to the forfeiture were available to testify at trial. Claimant's failure to indicate with precision why she did not use other parties' testimony to substantiate her defense was fatal. As a result, Claimant's basis for a stay was nothing more than a blanket assertion of the privilege against self-incrimination, which . . . is an inadequate basis for a stay.

Id. at 364.

⁹ Because there was no criminal proceeding before or at the time of the hearing, and remote likelihood of an indictment in the future, the factor of commonality of evidence in the civil and criminal matters is not applicable. Similarly, the efficient use of agency resources is irrelevant here, given the absence of concurrent agency proceedings or anticipated judicial decisions that might affect the administrative litigation.

Based on the foregoing, we conclude that Capitol was afforded a meaningful opportunity to confront the evidence that was presented against it in this case and, therefore, was not denied due process. In light of the public interest in the expeditious resolution of penalty cases, and Capitol's ability to provide other witnesses to testify regarding what Bonfili had told them about the accident and Capitol's training of Bonfili, we conclude that the judge did not abuse his discretion in declining to stay the case further and conducting the hearing although Bonfili asserted the Fifth Amendment privilege.

B. Unwarrantable Failure

Capitol argues that substantial evidence does not support the judge's determination that Bonfili's conduct was unwarrantable. PDR at 14-17; Reply Br. at 5-7. It asserts that the judge imposed a strict liability standard for unwarrantable failure violations committed by supervisory personnel. PDR at 17-19; Reply Br. at 7-8. The Secretary responds that substantial evidence supports the judge's determination and that he did not impose a strict liability standard for supervisors. S. Br. at 13-19.

The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("R&P"); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission has recognized that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violative condition, the length of time that it has existed, the operator's efforts to eliminate the violative condition,¹⁰ and whether the operator has been placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992). The Commission has also considered whether the violative condition is obvious or poses a high degree of danger. *Midwest Material Co.*, 19 FMSHRC 30, 34-35 (Jan. 1997) (finding foreman's negligent conduct in the face of an obvious and dangerous hazard indicates a "serious lack of reasonable care"); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation aggravated and unwarrantable based on "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland*

¹⁰ In considering the operator's efforts to eliminate the violative condition, the Commission focuses on compliance efforts made prior to the issuance of a citation or order. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 17 (Jan. 1997).

Coals, Inc., 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were “highly dangerous”); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984) (conspicuous nature of the violative condition supports unwarrantable failure finding).

We conclude that substantial evidence¹¹ supports the judge’s determination that Bonfili’s failure to deenergize the rail and wear a safety belt constituted aggravated conduct. We agree with the judge that both violations were obvious and dangerous. 19 FMSHRC at 534. The record contains ample evidence that Bonfili had been trained to deenergize and lock out the crane and wearing a safety belt while working on the crane rails. Tr. 65-73, 75, 100-07, 115-18, 136; C. Exs. 5, 6, 10. It is undisputed that, despite his training, Bonfili began working on the craneway after directing Cook to deenergize the crane only and failing to lock out any of the power sources to the crane. 19 FMSHRC at 534. In addition, it is undisputed that Bonfili failed to wear a safety belt while working on the craneway, where there was a danger of falling. *Id.* Based on evidence that Bonfili had received safety training, we conclude that the judge reasonably inferred that Bonfili knew that deenergizing the crane alone would not also deenergize the rail, and that Bonfili knew that the failure to use a safety belt was dangerous. 19 FMSHRC at 534.¹² The Commission has emphasized that inferences drawn by a judge are “permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred.” *Mid-Continent*, 6 FMSHRC at 1138. Accordingly, we conclude that the obviousness of Bonfili’s violations and the high degree of danger posed support the judge’s unwarrantable failure finding.

In addition, the judge properly recognized that a high standard of care was required of Bonfili, who was a shift supervisor. 19 FMSHRC at 534 (citing *Midwest Materials*, 19 FMSHRC at 35 (“a foreman . . . is held to a high standard of care”)). The Mine Act places primary responsibility for maintaining safe and healthful working conditions in mines on operators, with the assistance of their miners. 30 U.S.C. § 801(e). “Managers and supervisors in high positions must set an example for all supervisory and non-supervisory miners working under their direction. Such responsibility not only affirms management’s commitment to safety but also, because of the authority of the manager, discourages other personnel from exercising

¹¹ 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)).

¹² We disagree with Capitol that the judge drew negative inferences based on Bonfili’s assertion of the Fifth Amendment privilege against self-incrimination. PDR at 17; Reply Br. at 7. At the post-hearing oral argument, the judge expressly found it inappropriate to make a negative inference based on Bonfili’s refusal to testify (Oral Arg. Tr. 50) and, in his decision, the judge did not mention Bonfili’s assertion of privilege.

less than reasonable care.” *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987). As a supervisor, Bonfili had been entrusted with augmented safety responsibility and was obligated to act as a role model for Cook, a subordinate, who was watching him. Thus, we conclude that, as a supervisor, Bonfili’s failure to deenergize the rail and wear a safety belt in the face of obvious and dangerous hazards further supports the judge’s unwarrantable failure finding.¹³

It is well established that a supervisor’s violative conduct, which occurs within the scope of his employment, may be imputed to the operator for unwarrantable failure purposes. *R&P*, 13 FMSHRC at 194-97. Here, Bonfili was acting as Capitol’s agent when responding to Cook’s safety concern. Citing *Nacco*, 3 FMSHRC at 849-50, Capitol asks the Commission to vacate the Secretary’s unwarrantable failure determination in light of Capitol’s conscientiousness in providing Bonfili with safety training. PDR at 18-22. In *Nacco*, the Commission declined to impute a supervisor’s negligence to the operator for the purpose of assessing civil penalties because it had taken reasonable steps to avoid an accident and the supervisor’s conduct did not expose other miners to risk of injury. 3 FMSHRC at 850. In this case, the judge determined that the *Nacco* defense was unavailable to mitigate Capitol’s negligence for the purpose of assessing civil penalties because Bonfili’s and Lozano’s violations did expose additional miners to a risk of injury. 19 FMSHRC at 535, 537. We conclude that the defense is unavailable for a different reason — we decline to extend the *Nacco* defense to violations that are the result of unwarrantable failure pursuant to section 104(d) of the Mine Act.

The *Nacco* defense has been applied sparingly, in narrowly restricted circumstances. Contrary to Capitol’s assertion (PDR at 19), the Commission has never applied the *Nacco* defense to allow an operator to avoid a finding of unwarrantable failure under section 104(d). In *R&P*,¹⁴ the only case decided by the Commission in which the defense was invoked by an operator under such circumstances, the Commission held that the misconduct of a mine examiner, acting within the scope of his employment, was properly imputable to the operator for the purpose of assessing whether the operator had unwarrantably failed to comply with a

¹³ Commissioner Verheggen criticizes us for focusing on the obvious and dangerous nature of Bonfili’s violations and his status as a supervisor, and not relying on the extent of the violative condition, the length of time that it had existed, whether the operator had been placed on notice that greater efforts were necessary for compliance, and the operator’s efforts in abating the violative condition. Slip op. at 16-17. Consistent with Commission precedent on unwarrantable failure, we apply only those factors that are relevant to the facts of this case. *See Lafarge Constr. Materials*, 20 FMSHRC 1140, 1147 (Oct. 1998) (holding that for violations involving high danger of which a foreman should have been aware, other factors may be less relevant).

¹⁴ *R&P* involved two withdrawal orders issued pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging S&S and unwarrantable violations of 30 C.F.R. § 75.305, a mandatory underground coal mine safety standard requiring weekly examinations for hazardous conditions in specified areas of mines. 13 FMSHRC at 189-91.

regulation. *Id.* at 194-97. Although the Commission found *Nacco* inapplicable because the violation at issue in *R&P* put miners at risk, we also noted, in dictum, that *R&P* had not advanced “any convincing reasons why *Nacco* should be expanded to include unwarrantable failure.” *Id.* at 198.

The *Nacco* defense represents an exception to the common law rule that a principal is liable for actions committed by an agent acting within the scope of his apparent authority. See *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1561 n.12 (Sept. 1996) (citing 3 Am. Jur. 2d *Agency* §§ 78, 79 (1986)). As the Commission has noted, “operators typically act in the mines only through . . . supervisory agents.” *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982).¹⁵ Thus, extending *Nacco* to section 104(d) citations or orders could create a potentially large loophole for operators charged with unwarrantable conduct that could ultimately undermine the significance of that important mechanism for deterring aggravated violations of the Mine Act.¹⁶ Accordingly, we will not allow the *Nacco* defense where, as here, the supervisor’s conduct results in an unwarrantable violation under section 104(d) of the Mine Act, regardless of whether that conduct exposes other miners to risk.¹⁷

¹⁵ Of course, not all actions of a supervisor may be imputed to an operator, notwithstanding Commissioner Verheggen’s concern that an employer’s conduct might now be deemed unwarrantable “[n]o matter how unforeseeable, irrational, or ‘inexplicably reckless’ a supervisor’s actions might be.” Slip op. at 18 (citation omitted). In his dissent, Commissioner Verheggen raises a hypothetical involving a violation stemming from a supervisor’s suicide. *Id.* He suggests that, as a result of our decision, this violation would be impossible to defend against a charge of unwarrantable failure. *Id.* The dissent is wrong. Consistent with *R&P*, the operator in such a case could defend on the grounds that the supervisor’s actions were outside the scope of his employment. *R&P*, 13 FMSHRC at 196. As a leading commentator has explained, “[i]f [the employee] has no intention, not even in part, to perform any service for the employer, but intends only to further a personal end, his act is not within the scope of the employment.” W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 70, at 503 (5th ed. 1984) (footnote omitted).

¹⁶ Commissioner Verheggen suggests that, as a result of our refusal to extend the *Nacco* defense to violations that are the result of unwarrantable failure, operators may perceive a disincentive to take extra precautions in training miners if such precautions cannot be used to prove their lack of recklessness. Slip op. at 19. This view supposes that operators only train their employees in order to avoid liability, and not to avoid injuries and accidents.

¹⁷ We are troubled by a doctrine that exonerates an operator from responsibility for the negligent conduct of a supervisor who endangers only himself. It suggests that protecting the safety of supervisory personnel is a less significant concern under the Mine Act. But under section 3(g) of the Mine Act, 30 U.S.C. § 802(g), supervisors as well as rank-and-file employees may be “miners,” whose safety and health is a preeminent statutory concern. In our view, it makes little sense to resolve the question of whether a supervisor’s negligent conduct is properly

In conclusion, Bonfili's inexplicably reckless conduct is the kind of "serious lack of reasonable care" that constitutes unwarrantable failure. *See Midwest Materials*, 19 FMSHRC at 35-36 (experienced mine foreman's unexplained failure to follow safety procedures was "lapse of judgement or presence of mind . . . [which] qualifies as the type of 'indifference' or 'serious lack of reasonable care' that constitutes unwarrantable failure."). Substantial evidence supports the judge's conclusion that Bonfili's violations resulted from an unwarrantable failure to comply with the standards and we affirm his holding.¹⁸

C. Civil Penalties

Capitol argues that the *Nacco* defense applies to the violations at issue. However, it appears to confine this contention to the judge's unwarrantable failure determination, and does not explicitly raise a claim that the judge erred in holding that the *Nacco* defense was inapplicable to his determination of Capitol's level of negligence for purposes of his penalty assessment. *See* PDR at 14, 19-24; Reply Br. at 8-11. However, to the extent Capitol's brief can be read to imply a challenge to the judge's rejection of the *Nacco* defense for civil penalty purposes, we address it. Because we hold that the *Nacco* defense does not extend to cases involving unwarrantable failure under section 104(d), it follows that the defense is unavailable to mitigate Capitol's negligence for the purpose of assessing penalties here.¹⁹ We therefore find it unnecessary to pass on whether substantial evidence supports the judge's fact-based determination that *Nacco* does not apply to the violations at issue in this case.

Finally, in determining civil penalties under the Mine Act, the judge must make "[f]indings of fact on each of the [section 110(i)] criteria²⁰ [to] not only provide the operator with

imputable to an operator based on the fortuity of whether such conduct also exposes other miners to the risk of injury.

¹⁸ Contrary to the suggestion of Commissioner Verheggen (slip op. at 18), we are not adopting a presumption of unwarrantable failure in this case.

¹⁹ We disagree with Commissioner Verheggen's suggestion that we have "overturn[ed] *Nacco* as it formerly applied to penalties assessed for unwarrantable violations." Slip op. at 22. As indicated above, there is no reported decision in which the Commission has applied *Nacco* to reduce the penalty assessed for an unwarrantable violation.

²⁰ Section 110(i) of the Mine Act provides in pertinent part:

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

the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient.” *Sellersburg Stone Co.*, 5 FMSHRC 287, 292-93 (Mar. 1983), *aff’d*, 736 F.2d 1147. In this case, the judge, while stating that he “[c]onsider[ed] all the criteria under section 110(i) of the Act” (19 FMSHRC at 535), only made express findings concerning the negligence and gravity criteria. *See id.* at 535, 536, 537. However, there is undisputed evidence in the record concerning the remaining penalty criteria.²¹ Therefore, in the interest of judicial economy and based upon the circumstances presented here, we see no need to remand the judge’s penalty assessments for additional findings. Our decision in this case should not, however, be construed as an indication that in future cases we will not require strict compliance by our judges with *Sellersburg*, and remand when necessary for the requisite findings concerning all of the penalty criteria.

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

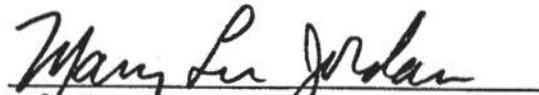
30 U.S.C. § 820(i).

²¹ Based on undisputed evidence in the record, we find that Capitol was a medium size operator with a total annual tonnage of 495,885 production tons and 354,287 tons for this mine. Tr. 54-57; Gov’t Ex. 5. We also find that in the 3 years preceding the issuance of the most recent citation at issue, Capitol had been charged with 88 violations. Tr. 54; Gov’t Ex. 4. With respect to Capitol’s good faith in attempting to achieve rapid compliance, we find that on October 25, 1994, the same date the relevant citation and order were issued, Bonfili, while still hospitalized, was reinstructed on the appropriate procedures for locking out and de-energizing equipment and the need to wear a safety belt and line in appropriate circumstances. Tr. 80; Gov’t Exs. 1 at 1, 2 at 1. In addition, the judge found that Capitol gave Bonfili a 5-day suspension and written warning for his violations of its safety rules, and advised him that future violations of safety rules would lead to more progressive discipline, including discharge. 19 FMSHRC at 535; Tr. 10-11. We also find that Lozano was reinstructed on the need to lock out equipment 5 minutes after his accident (Gov’t Ex. 3 at 1), and that Capitol gave him a 3-day suspension for violating its safety rules. 19 FMSHRC at 537; Tr. 12. Finally, although there was no evidence introduced concerning the “ability to continue in business” criterion, it is well established that in the absence of proof that the imposition of authorized penalties would adversely affect an operator’s ability to continue in business, the Commission presumes that no such adverse effect would occur. *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (Apr. 1994); *Sellersburg*, 5 FMSHRC at 294.

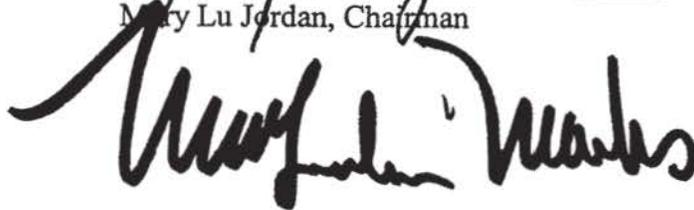
III.

Conclusion

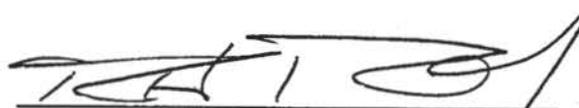
For the foregoing reasons, we reject Capitol's due process claim and affirm the judge's findings of unwarrantable failure and his penalty assessments.



Mary Lu Jordan, Chairman



Marc Lincoln Marks, Commissioner



Robert H. Beatty, Jr. Commissioner

Commissioner Verheggen, concurring in part and dissenting in part:

I concur with Part II.A of the majority opinion. I disagree, however, with the majority's conclusion that the judge properly found that Capitol Cement's violations of sections 56.12016 and 56.15005 were unwarrantable. To the contrary, I find the judge's unwarrantable failure analysis deficient as a matter of law, and I would vacate and remand the matter to him accordingly, including instructions to reconsider his penalty assessment based on any new findings regarding the operator's negligence. I would also vacate and remand all three of the judge's penalty assessments because he failed to properly consider the factors listed in section 110(i) of the Mine Act. I also disagree with the majority's holding that the *Nacco* defense cannot be asserted at all in a case involving an unwarrantable failure violation, and find that the judge properly considered the defense when assessing the three penalties. I find, however, that the judge's application of the defense is not clearly articulated and appears to lack record support. I would thus remand the penalty assessments for the judge to reconsider and more fully explain.

I therefore dissent from Parts II.B and II.C of the majority's opinion.

A. Unwarrantable Failure

In Part II.B of their decision, the majority "decline[s] to extend the *Nacco* defense to violations that are the result of unwarrantable failure." Slip op. at 11. The *Nacco* defense essentially shields an operator, under limited circumstances, from having its agent's negligence imputed to it for purposes of assessing a penalty. In one sense, I agree with the majority: as I explain further below, I do not believe that an operator should be able to assert a *Nacco* defense as an absolute bar to liability for an unwarrantable failure to comply with the Mine Act. But I strongly disagree with the effect of the majority's decision, which is essentially to bar judges from considering evidence on each of the *Nacco* elements (i.e., reasonable steps taken to avoid a particular class of accident and whether the violative conduct at issue exposed other miners to any risk of injury) in determining whether an operator's conduct is unwarrantable. Indeed, since this is precisely what the judge did, I find his unwarrantable failure analysis legally flawed. He failed to consider all the relevant facts and circumstances relating to the level of Capitol's negligence, which I find not only contrary to Commission precedent, but inequitable as well.

The judge's findings of unwarrantable failure are based solely on his consideration of four factors: that Bonfili knew or should have known that his actions were violative, and that "[t]he violation was also obvious, extremely dangerous and committed by a foreman held to a high standard of care." 19 FMSHRC at 534. This approach, which is endorsed by the majority, is at odds with Commission precedent, under which our judges must look at all the relevant facts and circumstances of a case when determining whether a violation is unwarrantable,¹ including

¹ See *Jim Walter Resources, Inc.*, 21 FMSHRC 740, 745 (July 1999) (remanding case to judge for full consideration of facts and circumstances relevant to unwarrantable failure determination).

the extent of the violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, and the operator's knowledge of the existence of the violation. See *Cyprus Emerald Resources Corp.*, 20 FMSHRC 790, 813 (Aug. 1998); *Midwest Materials Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). It thus stands to reason that proving the elements of a *Nacco* defense should not be an absolute defense to an unwarrantable failure allegation, since this would preclude the Commission from considering any other facts and circumstances surrounding a particular violation.

The body of Commission law on unwarrantable failure clearly stands for the proposition that we must consider *all* facts and circumstances relevant to determining an operator's negligence, and whether any such negligence rises to the level of aggravated conduct, *including exculpatory as well as incriminatory evidence*. Here, the operator introduced exculpatory evidence as to (1) the extent of the violative condition by alleging that Bonfili's actions placed no one else in harm's way, and (2) Capitol's good faith efforts to be in constant compliance and to avoid the sort of accident that occurred here, as evidenced by what the judge found to be their "responsible training program," as well as the company's work rules and measures taken to discipline Bonfili (19 FMSHRC at 535).

The judge failed to consider this exculpatory evidence in his unwarrantable failure analysis, but did consider it when he assessed penalties for the two violations committed by Bonfili. This makes no sense. I find absurd the notion that evidence tending to prove or disprove negligence and aggravated conduct can somehow change character and become relevant or not based on the statutory rubric under which it is considered.² I fail to see how a company can be found to have engaged in aggravated conduct (i.e., high negligence) under section 104(d), but at the same time be found to have been less negligent for purposes of assessing a penalty.

My colleagues in the majority also fail to consider all the relevant facts and circumstances of this case in their unwarrantable failure analysis. While they mention several "factors" in their recitation of the law (slip op. at 9), by their own admission they ignore the exculpatory evidence adduced by Capitol, focussing instead exclusively on "the obvious and dangerous nature of Bonfili's violation and his status as a supervisor." Slip op. at 11 n.13. Cf. *Lafarge Constr. Materials*, 20 FMSHRC 1140, 1156 (Oct. 1998) (Comm'r Verheggen, dissenting) ("The majority . . . fails to apply the Commission's traditional unwarrantable failure test. Instead, . . . they collapse the test into a single dispositive factor: whether a "high degree of danger [is] posed by a

² I note that nothing in sections 104(d) and 110(i) of the Mine Act suggests that analyses of an operator's negligence under each section should be somehow different, or should focus solely on aggravating factors to the exclusion of any facts and circumstances tending to mitigate the operator's level of negligence. See 30 U.S.C. §§ 814(d), 820(i).

violation.”). In support of its approach, the majority states, “we apply only those factors that are relevant to the facts of this case.” Slip op. at 11 n.13 (citing *Lafarge*). I fail to see how the exculpatory evidence here is not relevant to determining the level of Capitol’s negligence.

Under the majority’s ruling, judges will look only to incriminatory evidence, and will be excluded from considering exculpatory evidence capable of being pigeon-holed under the *Nacco* defense. I find this result singularly inappropriate and inequitable. The majority’s holding essentially precludes operators from mounting any defense to allegations of unwarrantable failure based upon either of the *Nacco* elements. No matter how unforeseeable, irrational, or “inexplicably reckless” (slip op. at 13) a supervisor’s actions might be, his employer’s conduct will now be characterized as “aggravated conduct constituting more than ordinary negligence,” “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care” — even if the operator has taken every reasonable step possible to avoid such conduct and even if the conduct imperils only the supervisor. Just how unfair the majority’s sweeping new rule is can be seen in the simple hypothetical case of a supervisor who apparently commits suicide in a mine in the presence of others who are not placed at risk by the supervisor’s act. Let us assume that the supervisor electrocutes himself by intentionally grabbing onto a live wire in violation of any number of the Secretary’s regulations, and that the operator has in effect an extensive training program aimed specifically at avoiding electrocution. Under the majority’s new rule, if the Secretary’s allegation of unwarrantable failure in this hypothetical case³ came before a judge, he or she would be precluded when ruling on this allegation from considering evidence that the supervisor may have committed suicide, that his act placed no one else at risk, or that the operator took every reasonable measure to avoid such an incident. The majority may as well announce that, henceforth, any violation with any resemblance to my hypothetical — or even to the facts of this case — will be considered to be presumptively unwarrantable.

The majority raises the alarums that extending *Nacco* to unwarrantable cases will “exonerate[] an operator from responsibility for the negligent conduct of a supervisor who endangers only himself.” Slip op. at 12 n.17. The majority is overstating its case here. Even in my hypothetical case, the operator would be strictly liable for the supervisor’s violation, *Asarco, Inc. v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989), under which regime it would be well within the judge’s discretion to adjust the penalty assessed to account for the gravity of the violation. In no way would reliance upon *Nacco* evidence to mitigate an operator’s unwarrantable failure somehow “exonerate” operators or place less significance on the safety of supervisory personnel. Instead, I do not believe that an operator should be penalized for doing everything within its power to avoid a particular type of accident when such an accident unexpectedly and

³ It appears that the Secretary operated under a theory similar to the one I posit here when she assigned special investigators to probe Bonfili’s accident. He was charged under section 110(c) with *intentional*, aggravated misconduct for disregarding safety standards. See slip op. at 4 n.5. Even though the Secretary ultimately dropped this charge (*id.*), such an allegation, along with the Secretary’s refusal to rule out criminal (i.e., wilful) charges from the beginning, could only have been predicated upon a theory that Bonfili deliberately acted to hurt himself.

unforeseeably occurs due to the irrational act of one of its agents. Indeed, I believe that under the majority's holding, operators could unfortunately perceive a disincentive to take extra precautions in the training of their workers if such extra precautions cannot be used to prove their lack of recklessness. As the Commission stated in *Nacco*:

Where as here, an operator has taken reasonable steps to avoid a particular class of accident and the erring supervisor unforeseeably exposes only himself to risk, it makes little enforcement sense to penalize the operator for "negligence." *Such an approach might well discourage pursuit of a high standard of care because regardless of what the operator did to insure safety, a negligence finding would automatically result.*

3 FMSHRC at 850 (emphasis added). I would regret that any pronouncement by this Commission might discourage operators from being as careful as Capitol apparently was in this instance.

Nor do I find credible the majority's alarum that "extending *Nacco* to section 104(d) citations or orders could create a potentially large loophole for operators . . . that could ultimately undermine the significance of that important mechanism for deterring aggravated violations of the Mine Act." Slip op. at 12. Under my approach, which would require judges to include evidence on each of the *Nacco* elements in weighing allegations of unwarrantable failure, but not to assign the elements dispositive weight, no such loophole would be created. But even if I were in favor of a pure *Nacco* defense to unwarrantable failure, I fail to see how such a defense, which by its very nature could be "applied sparingly, in narrowly restricted circumstances" (slip op. at 11), could ever lead to the dire consequences of which the majority warns. To the contrary, I believe that their ruling, which creates in effect a per se class of unwarrantable violations, waters down the graduated enforcement scheme of the Mine Act under which additional sanctions beyond strict liability are brought to bear against operators whose conduct is aggravated. See *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) ("The Mine Act's use of different terms within the same statute demonstrates that Congress intended the different terms to censure different types of operator conduct within a graduated enforcement scheme."). I find this particularly true in light of our judges' discretion to impose additional sanctions on particularly grave violations when assessing penalties under section 110(i) of the Act.

I find one other aspect of the majority's opinion particularly troubling. Although they confidently "decline to extend the *Nacco* defense to violations that are the result of unwarrantable failure" (slip op. at 11), I find no indication in the judge's opinion that he ever actually reached, much less analyzed this issue. Nowhere in his opinion does the judge mention the *Nacco* defense in the context of analyzing the Secretary's allegations of unwarrantable failure. Instead, he limits his discussion of *Nacco* to his analysis of Capitol's *negligence*, one of the six statutory factors the Commission must weigh in assessing penalties. 19 FMSHRC at 534-35. Indeed, his discussion of unwarrantable failure is separate and apart from his discussion

of negligence. He first states unequivocally that “the Secretary has clearly sustained her burden of proving the necessary aggravating circumstances to justify ‘unwarrantable failure’ and high negligence.” *Id.* at 534. Only then does he turn to addressing Capitol’s assertion of the *Nacco* defense, and nowhere in the ensuing discussion does he mention in any relevant sense “unwarrantable failure” or any of the terms normally associated with the concept, such as “aggravated conduct constituting more than ordinary negligence,” “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 534-35. I find particularly significant that the judge, after finding that Bonfili’s actions put crane operator Cook at risk, states that “[i]n assessing a civil penalty herein I do consider, *however*, [Capitol’s] training program.” *Id.* at 535 (emphasis added). His use of the word “however” clearly indicates that the foregoing discussion relates to penalties, not unwarrantable failure.

The judge did not discuss extension of the *Nacco* defense to unwarrantable failure even though the issue was briefed (S. Post-Hearing Br. at 12-13, C. Post-Hearing Br. at 14-18) and orally argued before him (Oral Arg. Tr. at 8-16, 58-60) by both parties. From this, one could conclude that he rejected sub silentio Capitol’s argument that the defense be extended. Insofar as he reached such a conclusion, however, I reject it on the ground that, as explained above, it is at odds with the Commission’s traditional approach to unwarrantable failure which considers the totality of facts and circumstances of each case. At any rate, I question the wisdom of using his decision as the basis for as broad and sweeping a pronouncement as the majority makes limiting the *Nacco* defense.

For the foregoing reasons, I would therefore vacate and remand the judge’s decision, and would direct him to consider any exculpatory evidence in determining the validity of the Secretary’s allegations of unwarrantable failure as to the two violations committed by Bonfili.

Regarding my remand, I would specifically direct the judge to reconsider his finding rejecting Capitol’s argument that Bonfili’s actions placed no one else at risk (a finding the judge made solely in the context of determining the company’s negligence for penalty purposes). I do not believe that this finding is sound. Only one witness (Weber) testified that Bonfili’s actions endangered more than one person; in fact, the citations at issue show only one person affected. *See* Gov’t Exs. 1 at 1, 2 at 1 (each noting “001” under Section 10.D, “Number of Persons Affected”). The judge also did not address the evidence contradicting Weber’s testimony. Nor did the Secretary introduce any evidence of any actual risk Cook encountered as a result of Bonfili’s actions. I am reluctant, however, to reverse the judge’s findings given the deferential substantial evidence standard of review under which I must review them. I would thus direct that he reconsider his findings and, at the very least, explain why he apparently credited Weber even though the overwhelming weight of the evidence appears to contradict his testimony.

B. Penalties

In light of my disposition regarding the two violations committed by Bonfili, I would vacate and remand the judge’s penalty assessment for reconsideration of the negligence involved.

Specifically, although the judge concluded that the *Nacco* defense was inapplicable because he found that Bonfili's violations placed others at risk (19 FMSHRC at 535), I would direct him to reconsider this finding because, as stated above, I believe it may not be supported by the record. I would also direct the judge to make "findings of fact on the statutory penalty criteria," which it is well settled "must be made." *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Even my colleagues concede that the judge's penalty assessments fail to meet the requirements of *Sellersburg*. Slip op. at 13-14.

I would also vacate and remand the penalty the judge assessed for Lozano's violation of section 56.12016.⁴ The judge also concluded that the *Nacco* defense did not apply to this violation because he found that Lozano's actions imperiled others. 19 FMSHRC at 537. I find, however, that the judge drew an unreasonable inference in finding that Lozano's actions exposed Miller to risk of injury based on speculation that, had Lozano become further entangled by the belt, "Miller may then have attempted to extract Lozano from the belt thereby also exposing himself . . . [to] potentially serious injuries." *Id.*

The judge based his inference on testimony given by Weber, who as part of MSHA's accident investigation, interviewed Lozano and Miller. Tr. 155-56. Weber testified that "[i]f Mr. Lozano had been pulled in to the belt in a more serious manner, the possibility that Mr. Miller may have reached up and tried to extricate him from that pulley may have put him in a more serious position of jeopardy himself. . . . If he had reached out and tried to grab Mr. Lozano, he may have been pulled in too." Tr. 156-58. Weber admitted, however, that his opinion on Miller's exposure to harm was purely speculative, and that Miller's actual response was to notify a fellow miner to pull the emergency shut down switch. Tr. 159-60. The judge posited a rescue attempt under circumstances not in the record. Moreover, there is nothing in the record to suggest that Miller would have responded by attempting to rescue Lozano in the manner described by Weber.

Thus, I find the judge's inference that Miller might have been injured as a result of a hypothetical rescue attempt not rationally related to the underlying facts. I would therefore reverse the judge's conclusion that the *Nacco* defense was inapplicable here,⁵ vacate the judge's penalty assessment, and remand with instructions to apply *Nacco* in mitigation of Capitol's

⁴ The penalty assessed by the judge for Lozano's violation of section 56.12016 gets all but lost in the majority's opinion. I would also note in passing that I find the Secretary's case against Capitol for this violation problematic because it is directly at odds with the decision of the Ninth Circuit in *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982). *Cf. James Ray*, 20 FMSHRC 1014, 1024-26 (Sept. 1998). The underlying violation is not, however, at issue in this appeal.

⁵ The judge essentially held that Capitol established the other *Nacco* element when he found "absence of negligence in Lozano's hiring, the operator's training program, and the fact that Lozano was disciplined." 19 FMSHRC at 537.

negligence. I would also direct the judge to make the necessary “findings of fact on the statutory penalty criteria” which, again, he neglected to make.

Finally, I must take strong exception to the majority’s disposition of the penalties at issue in this appeal. In a sweeping statement, the majority states:

Because we hold that the *Nacco* defense does not extend to cases involving unwarrantable failure under section 104(d), it follows that the defense is unavailable to mitigate Capitol’s negligence for the purpose of assessing a penalty here.

Slip op. at 13. This pronouncement goes far beyond the issue of whether *Nacco* can be asserted as a defense to an allegation of unwarrantable failure and, in one stroke, rules out any operator from asserting *Nacco* as a defense to findings of high negligence serving as the basis for any penalty assessed for an unwarrantable violation. The majority uses this radical departure from long standing Commission precedent as the basis for not reaching the issue of whether substantial evidence supports the judge’s findings that the *Nacco* defense did not apply to the three penalties he assessed. *See id.* I am deeply troubled by the majority’s holding in which they overturn *Nacco* as it formerly applied to penalties assessed for unwarrantable violations, and I find especially troubling the fact that they announce their holding with little, if any explanation.


Theodore F. Verheggen, Commissioner

Commissioner Riley, dissenting:

I write separately in order to comment on due process questions that yet linger over this case. The question of whether Capitol Cement should have had to go forward to put on its case without Bonfili as a witness is inextricably linked with the granting and subsequent lifting of a stay of the proceeding during the supposed pendency of a criminal investigation.

As the majority states, the question of granting or lifting a stay under such circumstances is within the sound discretion of the judge whose decision on such matters is to be reviewed for abuse of discretion. Drawn from several court cases — *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980), *U.S. v. Kordel*, 397 U.S. 1 (1970), *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995), *In re Phillips, Beckwith & Hall*, 896 F. Supp. 553, 558 (E.D. VA 1995) and others — the applicable test for determining whether a request for a stay based on possible criminal prosecution should be granted (or lifted) was set out by the Commission in *Buck Creek Coal, Inc.*, 17 FMSHRC 500, 503 (Apr. 1995), and contains a comprehensive list of factors the judge must consider:

(1) the commonality of evidence in the civil and criminal matters (*see Peden v. United States*, 512 F.2d 1099, 1103 (Ct Cl. 1975), civil proceedings properly stayed if they “churn over the same evidentiary material” as the criminal case); (2) the timing of the stay request (*see Campbell v. Eastland*, 307 F.2d 478, 487-88 (5th Cir. 1962), *cert denied*, 371 U.S. 955 (1963), imminence of the indictment favors limiting scope of discovery or staying proceedings); (3) prejudice to the litigants (*see Peden*, 512 F.2d at 1103-04, failure to show prejudice undercuts claim that stay was improper; *Campbell*, 307 F.2d at 487-88, discovery that prejudices criminal matter may be restricted); (4) the efficient use of agency resources (*see Molinaro*, 889 F.2d at 903, including among stay factors “efficient use of judicial resources” in case involving defendant’s request for stay); and (5) the public interest (*see Scotia*, 2 FMSHRC at 635, noting “the public interest in the expeditious resolution of penalty cases”).

On the question as to whether the judge complied with the Buck Creek factors, the majority states,

[A]pplying these criteria in this case, we conclude that the judge did not abuse his discretion.

Slip op. at 7.

I commend my colleagues for at least wanting to apply the Buck Creek factors, although to what they applied them remains a mystery, because it is abundantly clear from the record that the judge made no such attempt when he granted the stay.

Upon the unopposed motion of the Respondent further proceedings in the captioned cases are hereby stayed pending the completion by the Secretary of a related criminal investigation. The Secretary is directed to report to the undersigned in writing regarding the status of the related investigation on December 1, 1995, and on the first day of each month thereafter.

Unpublished Order dated Oct. 27, 1995 (complete text). The only factor the judge appears to have applied to the request for a stay is expediency in granting it.

With respect to lifting the stay, the majority is more explicit in justifying the judges actions under the *Buck Creek* criteria:

In deciding to lift the stay order and conduct the hearing, he properly accommodated the competing interests involved by evaluating the prejudice to Capitol that would result from going forward without Bonfili's testimony, versus the adverse impact on the public interest that would result from further delay.

Slip op. at 7.

How did the judge "properly accommodate [] the competing interests?" How did he "evaluat[e] the prejudice to Capitol?" How did he consider the "public interest that would result from further delay?" How, in other words did the judge apply the Buck Creek factors to assure due process for Capitol? He did it all in a single sentence:

The Stay Orders previously issued in these cases are hereby lifted.

Unpublished Order Lifting Stay/Notice of Hearing and Prehearing Order dated Aug. 7, 1996.

It is possible the judge improvidently granted the stay in the first place. Having made no attempt to apply the *Buck Creek* factors, the judge made no further requests for information from the parties to supplement the minimal amount of detail presented by the petitioner. It is not even clear from the record that there ever was a criminal investigation. The nature of the accident in which Bonfili was severely injured, an inadvertent act that, according to the experienced inspector who wrote the citation, put only himself at risk, is hardly the type of situation that warrants investment of precious MSHA resources on a section 110(c) special investigation of a corporate officer "who knowingly authorized, ordered or carried out such violation." 30 U.S.C.

§ 820(c). The obviousness of this reasoning is borne out by the fact that such charges were eventually dropped before trial. That MSHA would squander even more scarce agency resources on a section 110(d) criminal investigation of Bonfili for a "wilful" violation does not seem credible, given that agency's usual efficient allocation of assets. Since any "wilful" criminal charge would have had to be predicated on a bizarre legal theory that Bonfili deliberately intended to maim or kill himself, I find it hard to believe that MSHA wasted any time, money or personnel on such a questionable errand. *Buck Creek* obligated the judge to inquire into the commonality of evidence, the timing of the stay request, prejudice to litigants, the efficient use of agency resources and of course the public interest. 17 FMSHRC at 503. Had he done so, the judge may well have determined that no serious effort to bring criminal charges against Bonfili was ever initiated and thus there was no need for the stay requested by Capitol Cement. Since no such scrutiny was ever applied to the request for a stay there is no record to review on appeal to determine whether the judge abused his discretion in granting the stay. When a judge's action is arbitrary, unsupported by record evidence and unexplained, it ought not to be upheld.

Once the judge granted the stay, whether or not it was improvidently granted, he was under an equal obligation to apply the *Buck Creek* factors before lifting the stay. Upon granting the stay, the judge lent the mantel of governmental authority to what may have been mere suspicion on the part of the petitioner. Even if an abortive criminal investigation had inexplicably been ordered, the judge's *Buck Creek* scrutiny would likely have forced the investigating agency to reassess the wisdom of that decision once it was forced to justify the impact of the criminal investigation on the civil proceeding by disclosing "the commonality of evidence" to the judge. Because this was not done before the stay was granted, the unverified criminal investigation became an operable fact in the matrix of the case, necessitating Capitol Cement's invocation of due process rights.

Unable to review the judge's stay order because it was not included in Capitol's petition for discretionary review, I have to assume, as the majority does, that the stay was justified and properly granted. See 30 U.S.C. § 823(d)(2)(A)(iii). Thus Capitol's due process rights could only be protected if the judge properly applied *Buck Creek* to insure that Capitol would fairly be able to put on an adequate defense without Bonfili as a witness. The document upon which Capitol had to rely in determining if its due process rights had been fairly considered was the single sentence offered by the judge in lifting the stay. Without question, the judge's order falls far short of the Commission's standard for procedural due process set out in *Buck Creek*. As to the question of whether I have elevated form over substance, it is worthwhile to note that many countries make much more grandiose constitutional promises of rights and entitlements than our venerable Constitution. What we have that many do not is the means to exercise our rights. That means is procedural due process.

Accordingly, I would vacate the judge's decision and remand for the judge to reconsider whether the stay order should be lifted based upon his application and analysis of the factors set forth in *Buck Creek*, 17 FMSHRC at 503. See *Peabody Coal Co.*, 17 FMSHRC 508, 512 (Apr. 1995) (vacating and remanding for application of correct legal standard); *Energy West Mining Co.*, 15 FMSHRC 1836, 1839-40 (Sept. 1993) (same).



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

August 19, 1999

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. CENT 99-153-RM
 :
REINTJES OF THE SOUTH, INC. :

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

ORDER

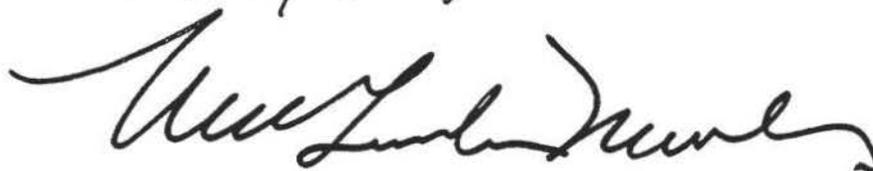
BY THE COMMISSION:

On June 24, 1999, the Commission granted a petition for discretionary review filed by Reintjes of the South, Inc. ("Reintjes") challenging Administrative Law Judge Avram Weisberger's Order of Dismissal in which he granted the Secretary of Labor's motion for summary decision, denied Reintjes' motion for summary decision, and dismissed Reintjes' notice of contest with respect to Citation No. 7867335, as modified. Order at 3-4 (May 17, 1999) (unpublished).

On August 12, 1999, pursuant to Commission Procedural Rule 11, 29 C.F.R. § 2700.11, Reintjes filed an unopposed motion to withdraw its petition for discretionary review. At the time Reintjes filed its petition for discretionary review, a civil penalty had not been proposed for Citation No. 7867335. A civil penalty of \$100.00 has now been proposed for the citation and Reintjes has agreed to pay the penalty in full, without modification of the citation. Reintjes states that the Secretary has no objection to its motion to withdraw its petition. Upon

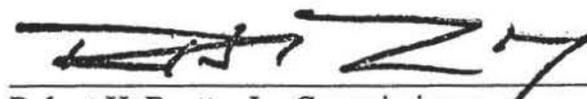
consideration of Reintjes' motion to dismiss the appeal, we grant it. Accordingly, the Commission's direction for review in this matter is vacated and Reintjes' appeal is dismissed.


Mary Lu Jordon, Chairman


Marc Lincoln Marks, Commissioner


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner


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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FALLS CHURCH, VIRGINIA 22041

August 18, 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	:	

DECISION ON REMAND

Before: Judge Feldman

These discrimination matters were remanded by the Commission on March 31, 1999. 21 FMSHRC 265. The initial determination concluded that, Lonnie Bowling and Everett Darrell Ball, upon being recalled to work on March 23, 1995, after they had been discharged on March 7, 1995, in violation of 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c), acted in concert in an effort to provoke their discharges in order to perfect their discrimination complaints. *Decision on Liability*, 19 FMSHRC 166 (January 1997). Fundamental to this conclusion was Bowling and Ball's admitted refusals to work the 12 hour work shift they had previously accepted as a condition of their employment. *Id.* at 177, 194, 197; 21 FMSHRC at 275. In its remand decision, the Commission determined, in a divided opinion, that the evidence leads to only one conclusion - - that Bowling and Ball were the victims of a constructive discharge. 21 FMSHRC at 281. Consequently, the Commission remanded these matters for a recalculation of the proper relief to be awarded for the constructive discharges of Bowling and Ball.

With respect to Walter Jackson, the Commission determined that Jackson's failure to seek reopening of his temporary reinstatement application after a protracted period without employment, alone, was not sufficient evidence to conclude that Jackson had failed to mitigate his damages. *Id.* at 285. Accordingly, the Commission remanded this matter for a recalculation of the backpay and interest due Walter Jackson.

The pertinent period for calculating damages begins the date of the initial discriminatory discharges. With respect to Bowling and Ball, the beginning date is March 8, 1995. With respect to Jackson, the beginning date is February 18, 1995. The period for relief ends on June 21, 1996, the date the respondents ceased hauling coal for Lone Mountain Processing, Inc. *Supplemental Decision*, 19 FMSHRC 876, 878-79 (May 1997).

With respect to the backpay issue, it has been determined that the appropriate calculation for backpay is eight loads per day @ \$13.00 per load, constituting wages of \$104.00 per day, or \$520.00 per week.¹ *Id.* at 878.

As a result of the Commission's remand, on April 23, 1999, an Order was issued requesting the complainants to submit proposed orders for relief. The complainants were instructed to specify the amount of lost wages less any deductions for earnings from other employment, or less deductions for periods during which time any complainant was not available for employment. The complainants were also requested to specify any incidental damages claimed.

¹ Backpay of \$104.00 per day is calculated based on an average delivery of eight truck loads that occurred during the course of the normal 12 hour work day, although, as noted *infra*, both Bowling and Ball refused to work more than 10 hours when they were called back to work by Mountain Top Trucking on March 23, 1995.

Lonnie Bowling and Darrell Ball

On June 4, 1999, Lonnie Bowling filed a Proposed Order for Relief with supporting documentation seeking gross back wages of \$35,152.00 for the period March 8, 1995, through June 21, 1996, less earnings from other employment during this period totaling \$8,595.00. Consequently, Bowling seeks net relief of \$26,557.00, plus interest. Bowling is seeking no additional incidental damages.

On June 4, 1999, Darrell Ball filed a Proposed Order for Relief with supporting documentation seeking gross back wages of \$35,152.00 for the period March 8, 1995, through June 21, 1996, less earnings from other employment during this period totaling \$17,915.00. Consequently, Ball seeks net relief of \$17,237.00, plus interest. Ball is seeking no additional incidental damages.

On June 4, 1999, the respondents filed their Response to the Order Requesting Proposed Orders for Relief. With respect to Bowling and Ball, despite the Commission's decision in this matter, the respondents contend that Bowling and Ball are only entitled to backpay from March 8, 1995, until they were called back to work on March 27, 1995.²

The respondents have presented no evidence to rebut the backpay awards sought by Bowling and Ball. Consequently, I shall award Bowling and Ball backpay of \$26,557.00, plus interest, and \$17,237.00, plus interest, respectively.

Walter Jackson

On June 4, 1999, Walter Jackson filed a Proposed Order for Relief with supporting documentation seeking gross back wages of \$36,400.00 for the period February 18, 1995, through June 21, 1996, less earnings from other employment during this period totaling \$3,758.00. Consequently, Jackson seeks net relief of \$32,642.00, plus interest. Jackson is seeking no additional incidental damages.

With respect to Jackson, during an April 22, 1999, conference call with the parties, the respondents claimed they had information that Jackson had removed himself from the workforce in August 1995 when he enrolled in Union College as a full time student. In support of their assertion, the respondents subsequently provided a copy of a report dated October 27, 1995, prepared by Luca E. Conte, a Vocational Rehabilitation Consultant. The vocational evaluation, performed on October 11, 1995, as a consequence of Jackson's product liability suit docketed as Civil Action 92-112, U.S. Dist. Ct., Eastern District of Kentucky, sought to determine the impact, if any, of Jackson's alleged eye impairment on his ability to work. *Resp.'s May 10, 1999, Response Concerning Jackson's Availability for Work*, Ex. 1.

² The evidence reflects Bowling and Ball were called back to work effective March 23, 1995.

Conte reported Jackson had received an Associate in Arts degree from Southeast Community College in December 1991. 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. 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.

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.

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." Jackson stated he had previously failed a physical examination for a truck driving position at Manalapan Mining Company although no further details were given. Although Conte concluded Jackson retained "his pre-injury capacity to access the labor market," Jackson's statements to Conte reflect he may have been pursuing his education in order to change careers because of his physical complaints.

In response to the information provided by the respondents concerning Jackson's availability for employment, Jackson now admits he was a full time student at Union College beginning the fall semester of 1995. Additional information furnished by Jackson, including an affidavit filed on July 30, 1999, reflects Jackson was enrolled from August 29 through December 13, 1995, as a student taking 12 credits at Union College in Barbourville, Kentucky. Jackson's classes required his attendance on Tuesdays and Thursdays.³ In his affidavit, Jackson stated that he would have stopped attending college if he had found a job that required him to do so.⁴ Jackson further stated that he did not return to Union College in the spring semester of 1996 because he could not afford to continue with his education.

³ The consolidated temporary reinstatement hearing concerning Jackson's discrimination complaint was convened on August 23, 1995, in Pineville, Kentucky. Jackson did not appear at the hearing. Instead, the Secretary's counsel moved to withdraw Jackson's temporary reinstatement application because Jackson reportedly was working. 17 FMSHRC 1695, 1696 (October 1995). I am troubled by Jackson's full time college attendance on Tuesdays and Thursdays that began on August 29, 1995, only five days after Jackson's temporary reinstatement application was withdrawn. Jackson's college attendance would have precluded reinstatement at his former position at Mountain Top Trucking that required his work attendance from approximately 6:00 a.m. until 6:00 p.m., Mondays through Fridays.

⁴ Jackson had a job opportunity that interfered with his college attendance and required him to leave college - - reinstatement at Mountain Top Trucking.

The Secretary argues the Commission's decision is *res judicata* on the issue of whether Jackson failed to mitigate his damages. The Commission's decision did not conclude that Jackson did, in fact, make efforts to mitigate his damages. Rather, the Commission concluded that the record evidence did not "show a failure to mitigate damages on the part of Jackson." 21 FMSHRC at 284-85. However, the record considered by the Commission failed to reflect Jackson's full time college attendance because Jackson was not forthcoming about his college studies despite the fact that the initial decision on liability explicitly directed Jackson to disclose any "periods when Jackson was not available for employment." 19 FMSHRC at 204.

Moreover, during these proceedings, Jackson was specifically asked by the Administrative Law Judge 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). Jackson filed his response to the Order on April 22, 1997, asserting that Jackson had not claimed any physical impairment and referred to a portion of a March 21, 1997, correspondence from his counsel to Judge Feldman, that 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).

Although this statement was presumably made in good faith by Jackson's counsel, it is contrary to information provided by Jackson in his October 11, 1995, vocational evaluation, and this statement apparently is 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 in an apparent 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).

Thus, consideration of Jackson's college attendance is not precluded by the doctrine of *res judicata*. Moreover, misstatements concerning Jackson's 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.⁵ In addition, Counsel have an

⁵ In relevant part, Rule 60(b) provides:

Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . (6) any other reason justifying relief from the operation of a judgment . . .

obligation to correct any misleading evidence and misstatements presented in Jackson's behalf. See *Model Rules of Professional Conduct*, Rule 3.3 (4).⁶ Consequently, the Secretary's request for interlocutory review with regard to the issue of the propriety of the admission of evidence into this proceeding concerning Jackson's student status is denied.

I am concerned about the apparent inconsistencies in Jackson's position, *i.e.*, asserting in his civil suit that his decision to attend college was related to an eye impairment that interfered with employment as a truck driver -- while asserting in this proceeding that he was looking for work as a truck driver, and that he would have left college to obtain full time employment. Although I have concluded Jackson's full time student status is relevant evidence that should be considered, I am constrained by the Commission's remand decision that "limited [me] to a recalculation of backpay and interest owed Jackson consistent with [the Commission's] conclusion that it was not shown that Jackson failed to mitigate his damages." 21 FMSHRC 285. Absent further direction from the Commission, I construe the Commission's decision as a finding that Jackson was available for work. Accordingly, I shall award the net backpay of \$32,642.00, plus interest, sought by Jackson in this matter.

As a final matter, the respondents' motion to compel answers to its interrogatories, that were not material to the issue of Bowling and Ball's damages, is denied. Additionally, in view of the denial of the Secretary's request for interlocutory review, the respondents' August 12, 1999, request for an extension of time to respond to the Secretary's interlocutory review request is also denied.

ORDER

In view of the above, consistent with the determination with respect to joint liability in the Decision on Liability issued in these matters on January 23, 1997, **IT IS ORDERED** that the respondents are jointly and severally liable for:

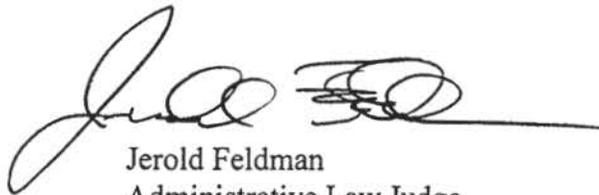
- (1) Payment of \$26,557.00, plus interest to the date of payment, less applicable Federal and State and local tax deductions, if any, to Lonnie Bowling, constituting payment for net lost wages from March 8, 1995, the day following Bowling's discriminatory discharge, through June 21, 1996.

⁶ 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).

(2) Payment of \$17,237.00, plus interest to the date of payment, less applicable Federal and State and local tax deductions, if any, to Everett Darrell Ball, constituting payment for net lost wages from March 8, 1995, the day following Ball's discriminatory discharge, through June 21, 1996.

(3) Payment of \$32,642.00, plus interest to the date of payment, less applicable Federal and State and local tax deductions, if any, to Walter Jackson, constituting payment for net lost wages from February 18, 1995, the day following Jackson's discriminatory discharge, through June 21, 1996.

Interest shall be calculated in accordance with the formula adopted in the Commission's decision in *Secretary of Labor o/b/o Bailey v Arkansas-Carbona Company*, 5 FMSHRC 2042, 2049-52 (December 1983). **IT IS FURTHER ORDERED** that payment to the above named individuals shall be made within 40 days of the date of this decision.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 18, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 98-308
Petitioner	:	A. C. No. 15-07475-03560 A
v.	:	
	:	
ROGER RICHARDSON,	:	
Respondent	:	No. 1 Mine

DECISION

Appearances: Keith E. Bell, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Petitioner;
Billy R. Shelton, Esq., Baird, Baird, Baird & Jones, P.S.C., Lexington, Kentucky, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," charging Roger Richardson as an agent of corporate mine operator Solid Energy Mining Company (Solid Energy) with "knowingly authorizing, ordering, or carrying out" a violation on February 28, 1999, of the mandatory standard at 30 C.F.R. § 75. 370(a)(1). The general issue before me is whether Mr. Richardson indeed knowingly authorized, ordered or carried out the noted violation and, if so, what is the appropriate civil penalty to be assessed considering the relevant criteria under Section 110(i) of the Act.

Section 110(c) provides that, whenever a corporate operator violates a mandatory health or safety standard, an agent of the corporate operator who knowingly authorized, ordered, or carried out such violation shall be subject to an individual civil penalty. The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1982), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). *Accord, Freeman United Coal Mining Co., v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law. *Warren Steen Constr. Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). An individual acts knowingly when he is "in a position to protect employee safety and health [and] fails to act on the basis of information that gives him knowledge or reason to

know of the existence of a violative condition.” *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

It is undisputed that, during relevant times, Mr. Richardson was an agent of corporate operator Solid Energy. The underlying violation as set forth in Citation No. 4495489, is also undisputed. Those charges are set forth as follows:

The operator failed to comply with the approved ventilation plan for the 003 mm bleeder system in that the coal pillars that were required to be left to control the airflow direction through the pillared area and to provide a safe travel-way for examinations have been second mined. The bleeder block in the 4th Southwest Submain starting one break outby spad 4128 and continuing outby one break from spad 3938 have been second mined. The bleeder block in the G-5 panel starting at spad 4718 and continuing inby 5 breaker have also been second mined. The second mining of these bleeder blocks requires the mine examiner to go inby pillared areas to perform weekly examinations.

The only issue remaining for disposition then is whether Richardson, as an agent of Solid Energy, knew or had reason to know of the violative condition before it was cited.

At the time of the violation, the subject underground coal mine had two portals, the Turkey Creek portal and the Long Fork Portal. The Long Fork Portal was originally developed in the 1970's and was reactivated as a separate mine in 1994 or 1995. The Turkey Creek Portal, located six miles away, was opened as a separate mine with its own Mine Safety and Health Administration (MSHA) identification number. The Turkey Creek Portal was later connected with the Long Fork portal and, in late 1995, they had a common identification number. Once connected, the portals shared one ventilation system. The relevant legal identification report filed with MSHA (Gov. Exh. No. 2) identifies the Respondent, Roger Richardson, as superintendent and as the “person at mine in charge of health and safety (superintendent or principal officer).”

During relevant times the day-to-day management and operation of the Turkey Creek Portal, with one active section, was the responsibility of mine foreman Gary Goff. At the Long Fork Portal, with two active sections, Roger Richardson was in charge. Richardson, as mine superintendent, also had the overall responsibility for common issues or problems overlapping the two portals. In this regard, even Richardson himself acknowledged that the violative conditions cited herein would have been the type of problem for which he should have been advised and for which he would have taken corrective action had he known of their existence.

The Secretary implies that, because of Richardson's position as mine superintendent, he should have known of the violative condition. The Secretary also maintains that when interviewed on March 26, 1998, at a “Part 100” closeout conference after charges were brought

against Richardson, he made incriminating admissions. Richardson was unrepresented at this conference and appeared against the advice of counsel. The interview was not recorded by tape or verbatim transcription. Some notes were apparently taken by MSHA Special Investigator Michael Belcher of the interview conducted by MSHA District Manager South and those notes were given to South who subsequently prepared a report. Neither Belcher's notes nor Mr. South were present at trial.

Testifying from his recollection and with the assistance of the "conference worksheet" prepared by South, Belcher testified that Richardson stated at this closeout conference that he learned from the mining engineer (presumably Billy Smith) several days after the fact, that Gary Goff had been mining the bleeder blocks. Richardson purportedly then told Gary Goff that this practice must be stopped but purportedly also admitted that he did not follow up on these purported orders to Goff. Belcher acknowledged that he did not know the whereabouts of his notes of the closeout conference interview. Belcher also acknowledged that Richardson was never shown these notes nor the report containing his purported statement to attest to their accuracy.

Richardson testified credibly at hearing however, that he was relating to the MSHA representatives at this closeout conference only what he was told about a meeting and conversation between Larry Robinette, the underground general mine manager, and Billy Smith, the mine engineer and the telephone conversation between Smith and Goff in the presence of Robinette. Richardson maintains that he was not a part of, nor privy to, those conversations and credibly testified that he had no knowledge before the issuance of the citation, that the bleeder blocks had been mined. Richardson's testimony is corroborated by the credible testimony of other witnesses, including Larry Robinette, Billy Smith and Gary Goff.

Robinette testified that in mid February, about two weeks before the citation was issued, he learned that the bleeder blocks were being second mined in the Turkey Creek Portal. He was present when Billy Smith, the mine engineer called Goff and told him to stop cutting the bleeder blocks. Robinette himself did not tell Richardson of the problem and did not know whether Richardson was aware of it at that time. He did not tell Richardson because Goff reported directly to him and not Richardson. Gary Goff, mine foreman at the Turkey Creek Portal, testified that he never told Richardson about cutting the bleeder blocks and did not believe Richardson had any knowledge of that fact.

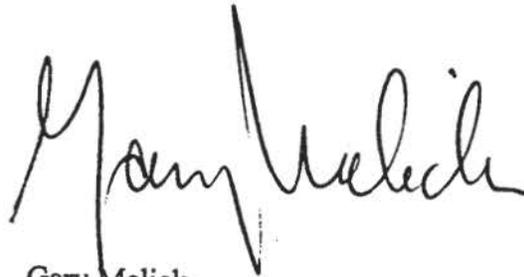
Finally, Billy Smith testified that he first became aware on February 14, at a mid-month markup meeting, that the bleeder blocks had been cut. Reports of the mine map that had been transmitted to him showed that secondary mining had been done on two of the bleeder blocks. According to Smith, he then called Gary Goff at the Turkey Creek Portal and told Smith that they had no approved plans to mine the bleeder blocks and that they should stop that procedure. According to Smith, Goff agreed to tell his men and to stop the procedure. Smith later learned after the citation had been issued that additional blocks had been mined even after this conversation. Smith also testified that he had never notified Richardson of the problem before

the citation was issued and, at a subsequent meeting, agreed with Richardson that he should have told Richardson at the time.

Under all the circumstances I conclude that the MSHA representatives attending the closeout conference misunderstood Richardson's statement. There is indeed no credible evidence that Richardson in fact knew of the violative practice prior to the issuance of the citation. MSHA's failure to have recorded or transcribed Richardson's statement is most unfortunate and has caused unwarranted hardship to Richardson. In this case MSHA failed to even follow its customary past practice of summarizing a witness statement in writing and having the cooperating witness then sign and attest to its accuracy. In any event, the Secretary has failed to sustain her burden of proving that Richardson knew or had reason to know of the cited violative condition prior to the issuance of the citation.

ORDER

Docket No. KENT 98-308 is dismissed.

A handwritten signature in black ink, appearing to read "Gary Melick". The signature is written in a cursive, flowing style with a large initial "G" and "M".

Gary Melick
Administrative Law Judge

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\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

August 20, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. YORK 98-53-M
	:	A.C. No. 19-00020-05530
	:	
BARDON TRIMOUNT, INC., Respondent	:	Swampscott Quarry
	:	

DECISION

Appearances: David L. Baskin, Esq., Office of the Solicitor, U. S. Department of Labor, Boston, Massachusetts, for the Secretary;
Richard D. Wayne, Esq., Hinckley, Allen & Snyder, Boston, Massachusetts, for Respondent.

Before: Judge Weisberger

Statement of the Case

In this civil penalty proceeding, the Secretary of Labor ("Secretary") seeks the imposition of civil penalties against Bardon Trimount, Inc., ("Bardon") for allegedly violating 30 C.F.R. §§ 56.14131(a) and 56.9300(b). Pursuant to notice, the case was heard in Cambridge, Massachusetts, on May 4-5, 1999. On June 25, 1999, the Secretary filed a Post Hearing Brief, and the Respondent filed Proposed Findings of Fact and a Post Hearing Brief.

Introduction

On July 25, 1997, Daniel F. English, Jr., a truck driver with 28 years experience, was driving a 50 ton truck down the haulage road located at Bardon's Swampscott Quarry in Swampscott, Massachusetts. His truck ran against concrete blocks located long the side of the road to his right.¹ These concrete blocks, uniform in size, are 4,000 pounds each, and each block is 30 inches high, 36 inches long, and 24 inches wide. The concrete blocks are held together by cables that are inserted in eyes drilled in the blocks. After English's truck was driven parallel to

^{1/} English was sitting in the left side of the truck (the driver's seat), as it traveled parallel to the blocks.

these blocks, it ended up with its front wheel on top of the blocks. There were tire marks for 57 feet along the blocks. The undercarriage of the truck struck the top of the concrete blocks and knocked off several of the blocks. After English struggled with the truck it fell 45 feet over the outside of the blocks and English was killed.

Subsequent to an investigation conducted by William C. Jensen, an MSHA Inspector and Accident Investigator, which commenced on July 26, 1997, Jensen issued a citation alleging a violation of section 56.14131(a), which required that seatbelts be “. . . provided and worn in haulage trucks,” and another citation alleging a violation of section 56.9300(b), which provides, as pertinent, that “[b]erms . . . shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.”

I. Violation of Section 56.14131(a), supra

In order to meet its burden of establishing a violation under section 56.14131(a), supra, the Secretary must establish either that a seatbelt was not provided in the vehicle at issue, or was provided but not worn. It is not controverted that the vehicle was equipped with a seatbelt. The Secretary argues, in essence, that it has established that English was not wearing his seatbelt in that before English's truck went over the berm, English was observed struggling to control the truck, that subsequent to the accident the two sections of the seatbelt were found behind the driver's seat, that Marty McKenney, the site superintendent, told MSHA Field Office Supervisor Inspector Randall Gadway² that after the accident, English was found lying on the ground, that a Mr. Lindsey, a truck driver, told Gadway that he saw English fall out of the truck window, that an autopsy report indicated that English had substantial right side trauma to the head and upper torso, and that according to MSHA Inspector William Jensen,³ the inside of the truck windshield was damaged on the right side. For the reasons that follow, I find that the Secretary has not met its burden of establishing that English was not wearing a seatbelt.

Although Jensen found the two sections of the seatbelt behind the driver's seat, I note that when Jensen made this observation the truck had already been turned upright, had been hoisted by a crane onto a flatbed truck, and had been transported from the site of the accident to the location where it was observed by Jensen. In this connection, the Secretary refers to an order issued on July 25, 1997, by MSHA Inspector John Newby under section 103(k) of the Act, “. . . prohibit[ing] personnel from entering the accident site pending an investigation” (Ex. G-6). The Secretary argues, in essence, that accordingly it should be found that no one entered the cab until Jensen examined it. The Secretary did not offer any evidence that would tend to establish that no one had, in actuality, entered the truck cab in spite of the section 103(k) Order, from the time of the accident until the time the truck was observed by Jensen. Also, the Secretary did not proffer the testimony of any witnesses having personal knowledge of the

²/ Gadway was involved in investigating English's fatal accident.

³/ Jensen investigated English's fatal accident, and issued the citations at issue.

position of the seatbelt immediately after the accident. Thus, there is insufficient evidence to support a conclusion that the two sections of the seatbelt were positioned behind the driver's seat at the time of the accident before the truck had been moved and placed upright.

The Secretary's assertion that English had been observed "standing up" in the cab struggling to control the vehicle does not find support in the record. The Secretary has cited the following testimony of Jensen as support for its assertion:

Q. Your investigation also revealed that the driver was struggling to keep the truck on the road; isn't that correct?

A. Through eyewitnesses, yes, sir (Tr. 163).

I note that Jensen's testimony does not contain the words "standing up." Further, Jensen's testimony is not accorded much weight in that his answer was in response to a leading question, and consists of uncorroborated hearsay. Jensen did not identify the eyewitnesses. Nor did the Secretary indicate why any eyewitnesses were not called to testify.

Although the autopsy report does indicate that English had suffered trauma to the right side of the head and upper torso, there is no medical expert opinion in the record that would tend to establish whether or not these injuries would be consistent with the wearing or not wearing of a seatbelt. In this connection, I note that Jensen opined if English was wearing a seatbelt, then his abdomen would have been bruised in the accident as a result of the restraining effect of the seatbelt. In this connection, I note that the autopsy report indicates as follows: "blue contusions lower abdomen," (Ex. G-7), which, according to Jensen, would be consistent with the wearing of a seatbelt.

The Secretary argues, in essence, that since the autopsy report indicates that English suffered trauma to the right side of his head and torso, and the windshield was cracked on the inside opposite the passenger seat as testified to by Jensen, it should be found that English had not been wearing a seatbelt. I do not accept the Secretary's argument. There is no evidence in the record to base a conclusion that the crack had occurred at the time of the accident, and not either before or after. There is no evidence as to the condition of the windshield prior to the accident. Also, there is no evidence that the windshield, when observed by Jensen, was in the same condition as it was at the time of the accident, i.e., before the truck had been turned upright, and moved to the location observed by Jensen. Also, the record does not contain either any physical evidence or expert opinion testimony, that English's head could have come in contact with the windshield, only if he had not been wearing a seatbelt.

Further, in evaluating the probative weight to be accorded the Secretary's evidence, I note that the Secretary did not proffer the testimony of any eyewitnesses to the events at issue, nor did it present the testimony of any eyewitnesses who came upon the scene immediately after the accident. I do not assign much weight to Gadway's hearsay testimony regarding statements made

to him by McKenny and Lindsey. The Secretary did not adduce any written statements made by these individuals, nor did it offer any explanation why it did not call these individuals to testify. It thus might reasonably be inferred that the Secretary had concluded not to call these witnesses, as it was concerned that the weight of their direct testimony would have been effectively diluted or impeached on cross-examination. Also, the record does not contain any corroboration of either McKenny's, or Lindsey's statements. Indeed, upon cross-examination, Jensen conceded that he had reviewed a report of the Swampscott Police Department which contained a statement that David Wyckoff had reported that he had observed the accident at issue, and had stated that he had run to the truck and started pulling rocks off the driver ". . . that had fallen into the cab" (Tr. 156). This hearsay statement would tend to establish that, after the accident occurred, English was still in the truck. Hence, this hearsay statement would tend to contradict the hearsay statements of Lindsey and McKenny upon which the Secretary relies. For these reasons, I assign little probative weight to the Secretary's hearsay evidence.

Therefore, for all the above reasons, I conclude that the Secretary has failed to establish that a seatbelt had not been worn by English. Thus I conclude that the Secretary has failed to establish that Bardon violated section 56.14131(a), supra.

II. Violation of Section 56.9300(b), supra

Section 56.9300(b) provides as follows: "[b]erms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." Thus, the language of section 56.9300(b), supra, is clear and unambiguous in mandating only one criteria of a berm in order to satisfy its requirements, i.e., it should, "[b]e at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." It is not contested by Bardon that the height of the concrete berm that was in place was less than the mid-axle height of the caterpillar 773-B which English had been driving, and which is the largest piece of mobile equipment which usually traveled on the road in question. Bardon argues, nonetheless, that the berm in question did satisfy section 56.9300(b), supra, in that it fulfilled the purpose of section 56.9300(b), supra, as set forth in a statement made by the Secretary in the Federal Register, as including "alert[ing] the equipment operator of the hazardous situation, moderat[ing] the force of the equipment, provid[ing] time for corrective action, and assisting the operator in regaining control of the equipment." (53 Fed. Reg. 32496, 32501, (August 25, 1998)). Bardon argues, in essence, when the instant accident occurred, the purposes of section 56.9300(b), supra, were fulfilled, in that the berm held firm upon impact, which would have alerted English that he was in a hazardous situation, and that it slowed down the truck providing English with adequate time to apply his brakes and control the truck. I find no merit to Bardon's argument. The manner in which the berm functioned in the instant peculiar accident, is not relevant in determining whether the berm satisfied the requirements of section 56.9300(b), supra. Since the berm did not meet the only unqualified mandatory requirement of section 56.9300(b), supra, i.e., its height was less than the mid-axle height of the largest truck which usually travels the roadway, I find that Bardon did violate section 56.9300(b), supra.

A. Significant and Substantial

The citation at issue alleges that the violation was significant and substantial.

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).

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).

The record clearly establishes that the first and second factors set forth in *Mathies*, supra, as Bardon did violate a mandatory standard, and this violation contributed to the hazard of a vehicle going off the road and overturning. The road at issue was at an incline, and the 773-B truck, the largest truck that usually traveled the roadway at issue, made 25 round trips per shift. Also, a Caterpillar 992 truck, whose tires were higher than those of the 773-B truck, also traveled the roadway one round trip daily. Gadway testified he has investigated haulage road accidents involving vehicles traveling a haulage road, and assessed the effect inadequate berms. Gadway opined, based upon his investigation of the instant accident, and upon studies and tests

that he did not identify, that if the berm is below mid-axle height, it “. . . act[s] just like a stair and lift[s] th[e] truck” (Tr. 203). In this connection, I note that the mid-axle height of the truck, at 40 inches, was 10 inches higher than the 30 inch high berm. It also is clear, as evidenced by the accident at issue, that should a vehicle have over traveled the berm as a consequence of the inadequate height of the berm, it is reasonably likely that a serious injury would have resulted. Therefore, for all the above reasons, I conclude that the third and fourth elements set forth have in Mathies, supra, have been met. I thus conclude that it has been established that the violation was significant and substantial.

B. Penalty

The cited violation was abated in a timely fashion, and in good faith. Although Bardon is controlled by Aggregate Industries, PLC, the Swampscott Quarry at issue, during the 12 month period immediately proceeding the accident at issue, employed approximately 26 employees who worked approximately 60,000 hours at the quarry. The Assessed Violation History report, relied upon by the Secretary, indicates, that in the period from June 16, 1996, through the date to instant citations at issue in this proceeding were issued, Bardon received 16 citations excluding the two at issue in these proceedings. A Mine Inspection and Violation History report proffered by Bardon indicates that Bardon was issued 32 citations in the period from December 12, 1995 through the date the citations at issue were issued. This report indicates it covers the period from April 1993 through May 1998, but there were no citations listed prior to December 12, 1995. Bardon has conceded that the imposition of the penalty will not effect its ability to remain in business. Based on the testimony of Gadway, and considering that a fatality occurred herein, that the roadway along which the berm was located was regularly used, and was at an incline, that there was a 10 inch difference between the height of the berm and the mid-axle of the truck at issue, and that there was a drop off beyond the berm, I conclude that the violation herein was of a high level of gravity, as the violative condition could have resulted in a fatality or serious injuries.

Regarding Bardon's negligence, I find that the existence of the berm was most obvious as it ran along a regularly used roadway. Therefore, Bardon reasonably should have been aware of the berm, and reasonably should have measured it to ascertain if it was in compliance. Hence, Bardon should reasonably have been expected to know that the berm was less than the mid-axle height of the largest truck used on the road and hence was not in compliance with section 56.9300(b), supra. The record is not clear as to the precisely how long the violative berm was in existence prior to its being cited. Douglas Gallant, Bardon's lead laborer on the site, testified at the hearing on May 5, 1999, that he had installed the berm at issue in the summer of 1996. On the other hand, MSHA Inspector Carl Onder testified that in his inspection in December 1996, the area in question, the west side, was bermed only with oversized bolders which he indicated to be at eye level.⁴ This would appear to confirm the hearsay statements of McKenny to Newby and Jensen that the berm was installed in January 1997. It would also

⁴/ Onder testified that he is 68 inches tall.

confirm a statement made by Cristos Sarhanis, Bardon's safety risk manager, that he made in a letter to James R. Petree, the Northeast District Manager of MSHA on May 29, 1998, as follows: "[s]peaking with various people at the Swampscott Quarry, the berm was placed at the location in January of 1997" (Ex. G-4). Hence, at a minimum, the violative berm had existed for over 6 months and until it was cited. Bardon, argues, in essences, that any negligence on its part should be greatly mitigated by considering Gallant's testimony that in the summer of 1996, during an MSHA inspection, an MSHA inspector told him to replace the existing stone berm, that varied from 3 to 5 feet in diameter, with concrete blocks to be at a height of half the distance of the wheel base of the highest object in the quarry. According to Gallant, approximately a month later, an MSHA official returned, and recommended that he tie the blocks together. However, Gallant was unable to identify the MSHA official who provided these instructions. On the other hand, MSHA Inspector Robert Dow testified in rebuttal, that Gallant did not participate in an inspection of the site that he (Dow) made in July 1996. Dow also indicated that he did not tell Bardon or Gallant to install concrete blocks as a berm. I accept Dow's version over Gallant's. I observed Dow's demeanor and found him to be a very credible witness. Further, the record does not contain even a scintilla of evidence to provide Dow with a motive for telling Bardon to remove an existing berm, whose height was never considered to be out of compliance, and instead to install concrete blocks, that were in violation of section 56.9300(b), supra. Also, Gallant could not identify the MSHA person who instructed him to install the violative berm. There is no evidence that any inspector other than Dow inspected the site on the dates in question until December 1996. Further, I note Sarhanis' testimony that on May 3, 1999, two days before Gallant testified at the hearing, he (Gallant) had told him (Sarhanis) that he had been instructed by McKenny to install the concrete blocks. Within this context, I consider the level Bardon's negligence to have been relatively high.

Considering all the above factors set forth in section 110(i) of the Act, and giving considerable weight to Bardon's negligence and the gravity of the violative condition, I find that a penalty of \$35,000.00 is appropriate for this violation.

ORDER

It is **ORDERED** that Citation No. 7707459 be **DISMISSED**. It is further **ORDERED** that, within 30 days of the date of this decision, Bardon shall pay a total civil penalty of \$35,000.00.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 25, 1999

BHP COPPER, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 98-189-RM
v.	:	Citation No. 7922328; 3/13/98
	:	
SECRETARY OF LABOR,	:	San Manuel Mine
MINE SAFETY AND HEALTH	:	ID No. 02-00151
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-415-M
Petitioner	:	A.C. No. 02-00151-05646
	:	
v.	:	San Manuel Mine
	:	
	:	
BHP COPPER, INC.,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Manning

By decision dated June 23, 1998, I granted BHP Copper's motion for summary decision in WEST 98-189-RM and vacated Citation No. 7922328. 20 FMSHRC 634. The Commission, on its own motion, directed review of my decision. On July 30, 1999, the Commission reversed my decision and remanded that case to me to impose an appropriate penalty. In its decision, the Commission determined that BHP Copper violated section 103(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(a) (the "Act"), as alleged in the citation.

I was assigned the civil penalty case that contains the contested citation on October 23, 1998, Docket No. WEST 98-415-M. In that case, the Secretary proposed a penalty of \$60 for Citation No. 7922328. The civil penalty case also contains Citation No. 7922329. On March 22, 1999, I approved the parties' proposed settlement of Citation No. 7922329 in WEST 98-415-M. In the settlement, BHP Copper agreed to pay a civil penalty of \$29,000 for that citation and to comply with the terms of an agreement executed by the parties that was attached to the motion

for approval of settlement. Consequently, the only issue before me on remand in these cases is the assessment of an appropriate civil penalty for Citation No. 7922328.

By order dated August 3, 1999, I consolidated the above proceedings and stated that I would assess the \$60 penalty proposed by the Secretary unless BHP Copper provided reasons, on or before August 20, 1999, why the penalty should be different, taking into consideration the penalty criteria in section 110(i) of the Act. BHP Copper responded to my order by stating that it anticipates appealing the Commission's ruling to the U.S. Court of Appeals and, to preserve its right to appeal, it objects to the assessment of a penalty for Citation No. 7922328.

Under the Act, a penalty must be assessed for any violation of the Act or the Secretary's safety and health standards. Consequently, I assess a penalty based on the information contained in the citation and the Secretary's petition for assessment of penalty filed with the Commission. The Secretary specially assessed the citation under 30 C.F.R. § 100.5.

1. History of Previous Violations

The Secretary's petition for penalty states that the San Manuel Mine was issued 158 citations during the 24 months preceding March 13, 1998, during 377 inspection days.

2. Size of the Mine Operator

Both BHP Copper and the San Manuel Mine are large operations.

3. Negligence of the Mine Operator

Inspector Richard Laufenberg determined that BHP Copper's negligence was high.

4. Effect of Penalty to Continue in Business

The penalty proposed by the Secretary will not have any effect on BHP Copper's ability to continue in business.

5. Gravity of the Violation

Inspector Laufenberg determined that the violation was not serious because there was no likelihood of an illness or injury as a result of the violation; the violation would not be expected to result in any lost workdays; and the violation was not of a significant and substantial nature.

6. Good Faith Abatement

The citation shows that BHP Copper abated the citation by providing the address and phone number of Mr. Ronald Byrd within 30 minutes after the citation was issued. The

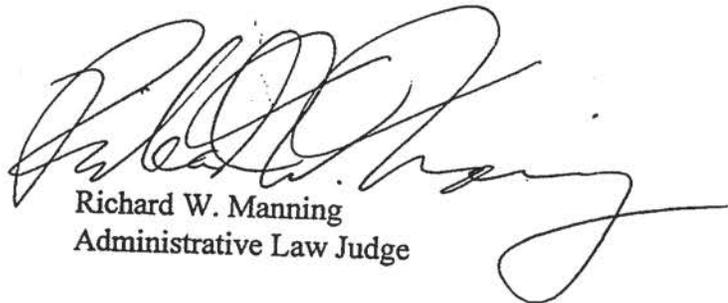
Secretary's narrative findings for a special assessment states that the violation was abated within a reasonable period of time.

7. Assessment of an Appropriate Penalty

In assessing a penalty, I take into consideration the information of record for the penalty criteria as set forth above. I find that the Secretary's proposed penalty is appropriate under the penalty criteria. Accordingly, I assess a penalty of \$60 for BHP Copper's violation of section 103(a) of the Act as set forth in Citation No. 7922328.

ORDER

Citation No. 7922328 is **AFFIRMED** and BHP Copper, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$60.00 within 40 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

August 26, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-38-M
Petitioner	:	A.C. No. 03-00681-05508
v.	:	
	:	Blocker Lean No. 4
RON COLEMAN MINING, INC.,	:	
Respondent	:	

DECISION

Appearances: David Q. Jones, Esq., Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, for the Secretary;
Kevin Coleman, Vice President, Ron Coleman Mining, Inc., Hot Springs, Arkansas, for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Penalty filed by the Secretary of Labor ("Secretary") alleging that Ron Coleman Mining, Inc. ("Coleman") violated 30 C.F.R. §§ 56.14130(i) and 56.14130(g). Pursuant to notice, the matter has heard in Malvern, Arkansas, on July 27, 1999.

Finding of Facts and Discussion

I. Citation No. 7865573 (violation of 30 C.F.R. § 56.14130(i)).

On July 22, 1998, Donald Ratliff, an MSHA inspector, inspected Coleman's Blocker Lead No. 4 Mine, a surface quartz mine. He inspected a Caterpillar D5 Dozer that was not in operation. He observed that the seatbelt, which was under the seat and bolted to the floor, had saturated oil on it, and that the fabric of the belt was covered with mud or dirt. He stated that "... from the way the mud had set up, it was apparent to me that they hadn't been used in some time (Tr. 23). He stated that "... Caterpillar stipulates in the maintenance of their seatbelts is that they not become soiled because of the fabric nature ... [i]f they get grease, oil, hydraulic fluid or anything of the nature on the webbing, it will break down the webbing of the seatbelts" (sic) (Tr. 27). He opined that because the belt buckle was "imbedded" with dirt it

had become inoperable (Tr.27). Ratliff stated that the female end of the belt had been impacted with dirt which he described as consisting of hard crusty material. He did not recall if he had touched it. According to Ratliff, a miner who accompanied him, Henry Rogers, told him that the bulldozer in question was used to push material over an embankment that was composed of material that was not compacted, at a 35 degree angle, and approximately 200 feet high. Ratliff opined that since the bulldozer was being used to push material over the embankment, and since the embankment was comprised of material that was not compacted and at a steep angle, there existed the possibility that the bulldozer could travel over the embankment and possibly turn over. He issued a Citation alleging a violation of 30 C.F.R. § 56.14130(i), supra, which in essence provides as follows: “[s]eat belts shall be maintained in functional condition, and replaced when necessary to assure proper performance.”

In general, Ratliff described the violation as significant and substantial, and indicated that Kevin Coleman, the vice president and safety coordinator of Coleman, had driven the bulldozer the day before, and should have noted the condition of the belt, and should have been aware that it was not being maintained properly. In this connection, Ratliff testified that it was “very apparent” when he walked up to the bulldozer that the seatbelt was not maintained (Tr. 43).

Coleman does not dispute the condition of the belt as testified to by Ratliff. However, the issue for resolution is whether Coleman’s failure to have remedied the belt’s condition as testified to by Ratliff made the belt inoperable, or any way interfered with its use. It is significant that Ratliff did not attempt to attach the end of the belt and so determine whether there was any impairment in its operation or use. As explained by Coleman, and not contradicted or rebutted by the Secretary, one end of the belt had a hook- like device, which is inserted into a hole at the end of the other piece of the belt, and is then secured. There is no evidence in the record that attaching the end of the belt in this fashion was not possible, or in any way made difficult to do as a consequence of the conditions observed by Ratliff.

I do not assign much probative weight to Ratliff’s testimony that Caterpillar “stipulates” that a seatbelt should not become soiled, and that if it gets oil on it, it will break down. Ratliff did not identify the source of this stipulation. The Secretary did not proffer any written statement by Caterpillar to prove the terms of what it stipulates. Nor did the Secretary proffer the testimony of any Caterpillar agent having personal knowledge of this stipulation. Thus, Ratliff’s testimony, by itself, under these circumstances is not sufficiently reliable to be accorded any significant probative value.

Accordingly, since it has not been established that the materials on the belt would have in anyway impeded the use of the belt and its effective functioning as a safety seatbelt, I conclude that the Secretary has not met its burden of establishing a violation under section 14130(i), supra. Accordingly, Citation No. 7865573 shall be dismissed.

II. Citation No. 7865574 (a violation of 30 C.F.R. § 56.14130(g), supra

According to Ratliff, Coleman informed him that when he had operated the bulldozer on July 21, 1998, he had not been wearing the seatbelt. Ratliff issued a section 104(d)(1) order alleging a violation of section 56.14130(g), supra, which in essence, requires the wearing of a seatbelt when operating certain equipment, which includes the bulldozer in question. Coleman does not dispute this violation, and according I find that Coleman did violate section 56.14130(g), supra.

A. Significant and Substantial

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).

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).

The record establishes the first two elements set forth in *Mathies, supra*, in that Coleman does not dispute that it violated a mandatory standard, i.e., section 56.14130(g), *supra*. Also, Ratliff's uncontradicted testimony establishes that the failure to wear a seatbelt would have contributed to the hazard of the operator becoming injured if the bulldozer would have overturned. According to Ratliff, MSHA studies have concluded that the wearing of a seatbelt is a top priority to prevent serious injuries in haulage situations. In essence, he opined, that based on MSHA's studies and his personal experience, a serious injury was highly likely to have occurred, because the bulldozer was being operated in a manner that rendered an injury occurring event, i.e., the bulldozer overturning, to have been highly likely to have occurred, since the bulldozer was being used to push material over a steep embankment that was 200 feet high, and made out of material that was not compacted. On the other hand, Coleman testified that the bulldozer at issue had never been used at the mine site until July 21, and that he used it on that date because the customary equipment, a front-end loader, was broken. He indicated that he used bulldozer for about 30 to 45 minutes, and that there was a mound of dirt between him and the edge of the highwall.

It appears from photographs of the site, (Respondent's Exhibits 1 and 2), that the area in which Coleman operated the bulldozer was flat. However, since the bulldozer was located at the site at issue, it was available for use in the manner described by Ratliff. Hence, given continued mining operations, and the bulldozer operator not wearing a seatbelt, I find that within the framework of the above evidence, the third and fourth elements of *Mathies, supra*, have been met, and that the violation was significant and substantial.

B. Unwarrantable Failure

According to Ratliff, he considered the violation to have been an unwarrantable failure in that, Ron Coleman, who is the safety coordinator, and is responsible for providing safety training, should have noted, in an examination of the bulldozer prior to its operation, that it was provided with a seatbelt, and should have worn the seatbelt. Ratliff asserted that Coleman, as safety coordinator, should set a good example for other miners. Also, Ratliff indicated that the seatbelt was visible, and that it was not necessary to remove the seat of the bulldozer in order to see it.

I accept Coleman's testimony inasmuch as it was not contradicted or impeached, that he always instructs his miners to wear their seatbelts, always wears a seatbelt when operating a vehicle that he knows to be equipped with a seatbelt, and that when he operated the bulldozer on the date in question, he could not have been seen by the other miners on the site due to the spatial difference between their locations. In addition, Coleman, asserts that he did an examination of the bulldozer before he operated it, and no seatbelt was visible, and hence he did not wear one. Although Coleman may not have observed the seatbelt, I find that he reasonably should have seen the belt, as Ratliff's testimony that the seatbelt was visible and he did not have to remove the seat in order to see it, was not contradicted or impeached. Moreover, since Coleman was a safety coordinator and responsible for safety training, and since a seatbelt was visible to Ratliff,

he (Coleman) should have looked for and been able to have seen the seatbelt, and thus should have worn it. In these circumstances, I find that failure to do so, constituted more than ordinary negligence and reached the level of aggravated conducted, and thus was an unwarrantable failure. (See, *Emery Mining Corporation* 9 FMSHRC 1997 (1987)).

C. Penalty

According to Ratliff's uncontradicted testimony, a serious injury or fatality could have resulted from the violation herein, i.e., failure to wear a seatbelt, should the bulldozer have turned over. Thus, I find that the level of gravity of the violation was high. I also find, as set forth above, that the level of Coleman's negligence was high, in that Coleman should have observed the presence of a seatbelt, and should have worn it. On the other hand, I find that the penalty to be assessed herein should be mitigated by the fact that Coleman is not a large operation, having produced only 24 tons of mined material in 3,384 man-hours in 1998, had demonstrated good faith in abating the violations within a reasonable period of time after notification of the violations, and, importantly, had no assessed violations in the past 24 months. Also, Coleman's tax returns for the year 1997, the most recent year available, indicated a loss of \$74,121.00 which tends to indicate that a penalty may have a negative impact upon its ability to continue in business. Therefore, for all these reasons, I find that Coleman shall be assessed the penalty of \$1,000.00.

ORDER

It is **ORDERED** that Citation No. 7865573 be **DISMISSED**. It is further **ORDERED** that Order No. 7865574 be **AMENDED** to a section 104(d)(1) Citation,¹ and that Coleman pay a total civil penalty of \$1,000.00 within 30 days of this Decision.


Avram Weisberger
Administrative Law Judge

^{1/} Since Citation No. 7865573 which was issued as a section 104(d)(1) Citation is dismissed, and there is no evidence of the issuance of any other section 104(d)(1) Citation within the previous 90 days prior to the issuance of Order No. 7865574, the latter must be reduced to a section 104(d)(1) Citation.

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dcp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

August 26, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. YORK 98-75-M
	:	A. C. No. 43-00509-05501
v.	:	
	:	Car-O-Lin Mine
CAR-O-LIN, Respondent	:	

DECISION

Appearances: Kathryn A. Joyce, Esq., Office of the Solicitor, U. S. Department of Labor,
Boston, Massachusetts, for the Secretary;
Lester Corwin II, Esq., South Royalton, Vermont, for the Respondent.

Before: Judge Weisberger

I. Statement of the Case

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (Secretary) alleging that CAR-O-LIN violated 30 C.F.R. §§ 56.14107(a) and 56.14132(a). Subsequent to notice, a hearing was held in Burlington, Vermont, on August 3, 1999.

II. Findings of Fact and Discussion

A. Background

CAR-O-LIN operates a sand and gravel pit in Turnbridge, Vermont. On June 18, 1997, Edward M. Blow, an MSHA inspector, presently retired, inspected the site at issue and issued a backup alarm notice for an Allis-Chalmers 645-B wheel loader. He told Lincoln Chambers, who had informed him that he was working for Brent Lindstrom, that it would be at least 4 weeks before someone would be back to reinspect the premises. Blow informed Lindstrom, CAR-O-LIN's owner, that he was issuing only notices, not citations, in order to give him (Lindstrom) time to comply. On May 7, 1998, Kathleen Robinson, an MSHA inspector, inspected the site. She testified that a backup alarm, that had been installed in a Fiat Chalmers front-end loader was not working. Robinson issued a citation alleging a violation of section 56.14132(a), supra. In addition, according to Robinson, there were not any guards in place on a

crusher that was not in operation. She testified that several guards were on the ground. Robinson testified that Chambers told her that there was no guard for the chain drive. She issued a citation alleging a violation of section 56.1417(a), supra.

B. Jurisdiction

CAR-O-LIN asserted, in its closing argument, that it is not subject to the jurisdiction of the Act, as no coal is extracted from the site. There is no merit to this argument. Sections 103 and 104 of the Federal Mine Safety and Health Act of 1977 ("the Act") authorizes the Secretary of Labor to inspect, and issue citations to operators of "coal or other mines." Section 3(h)(i) of the Act defines "coal or other mine" as pertinent, as ". . . (A) an area of land from which minerals are extracted in nonliquid form" The common meaning of the term "mineral," as defined in *Webster's New Collegiate Dictionary*, as pertinent, is as follows: ". . . broadly: any of various naturally occurring homogeneous substances (as stone, coal, salt, sulfur, sand, petroleum, water, or natural gas) obtained for man's use usu. from the ground" Hence, it is clear that CAR-O-LIN's operation is a mine as defined in the Act.

In essence, CAR-O-LIN further argues that since its products are not sold outside Vermont, it is not involved in interstate commerce, and is not subject to the Act. In this connection, Lindstrom testified that CAR-O-LIN's permit from the State of Vermont allows it to sell only 15,000 cubic yards of sand and gravel a year, that it sells this material only to customers living in Turnbridge and the surrounding towns, and that it uses only one delivery truck and it can only be operated in the State of Vermont.

In *Jerry Ike Harless Towing, Inc., and Harless, Inc.*, (16 FMSHRC 683 (April 11, 1994)), the Commission analyzed the scope of the Commerce Clause of the Constitution as follows:

The Commerce Clause of the Constitution has been broadly construed for over 50 years. Commercial activity that is purely intrastate in character may be regulated by Congress under the Commerce Clause, where the activity, combined with like conduct by others similarly situated, affects commerce among the states. *Fry v. United States*, 422 U.S. 542, 547 (1975); *Wickard v. Filburn*, 317 U.S. 111 (1942) (growing wheat solely for consumption on the farm on which it is grown affects interstate commerce). Congress intended to exercise its authority to regulate interstate commerce to the "maximum extent feasible" when it enacted Section 4 of the Mine Act. *Marshall v. Kraynak*, 604 F.2d 231, 232, (3d Cir 1979), cert. denied 444 U.S. 1014 (1980); *United States v. Lake*, 985 F.2d 265, 267-69 (6th Cir. 1993). In *Lake*, the mine operator sold all its coal locally and purchased mining supplies from a local dealer. 985 F.2d at 269. Nevertheless, the court held that the operator was engaged in interstate commerce because "such small scale efforts, when combined with others, could influence interstate coal pricing and demand." *Id.* *Harless, supra* at 686.

Based on the broad principles enunciated by the Commission in *Harless Towing*, supra, and based upon the authority of the Sixth Circuit in *Lake*, supra, I am constrained to find that although CAR-O-LIN's operation is small, and no products are sold outside Vermont, it was engaged in interstate commerce "because such small scale efforts, when combined with others could influence interstate [sand and gravel] pricing and demand" *Harless*, supra, at 686. I thus find that CAR-O-LIN's operation is a mine subject to the Act's jurisdiction.

C. Violation of Section 56.14132(a), supra

Section 56.14132(a) provides as follows: "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

According to Robinson, the backup alarm on the Fiat Chalmers front-end loader was in place, but was not working. CAR-O-LIN did not impeach this testimony, nor did it offer a witnesses to contradict it, and accordingly I accept it. I thus find that since the backup alarm on the loader did not function, it was not maintained in a functional condition, and thus was in violation of section 56.14132(a), supra.

The record does not contain any clear convincing evidence as to the length of time the backup alarm had not been working, and the length of time CAR-O-LIN should have known of this functional defect. Blow testified that when he had inspected the subject site in June 1997, a year prior to the inspection at issue, he issued a "backup alarm notice" for an Allis-Chamlers 645-B wheel loader. However, he did not testify as to whether the loader's alarm was not functioning, or whether an alarm had not been installed.¹ Neither did the Secretary proffer in evidence the written Notice given to CAR-O-LIN which might contain a description of the specific condition that provided the basis for the Notice. Lindstrom testified that Chambers, who was not an employee of his and who just did repair work for him, had disconnected the alarm in order to locate a noise in the transmission. Robinson testified that Chambers had told her that the alarm had worked the day before the inspection. However, neither the Secretary nor CAR-O-LIN produced Chambers to testify. I thus find that it has not been established that the level of CAR-O-LIN's negligence was more than low. The Secretary did not adduce any evidence as to the gravity of this specific violation. Hence I conclude that the it has not been established that the level of the gravity was more than low. The record establishes that the violation was abated timely, and in good faith. Also the record establishes that CAR-O-LIN does not have any history of violations. Additionally, based upon Lindstrom's uncontradicted and unimpeached testimony, I conclude that the size of CAR-O-LIN's operation is small. Considering all the above factors, I find that a penalty of \$25.00 is appropriate for this violation.

^{1/} Lindstrom testified that when Blow inspected the front-end loader, it had not been provided with a backup alarm.

D. Violation of 30 C.F.R. § 56.14107(a)

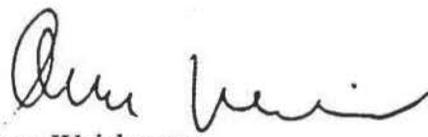
Section 56.14107(a) provides as follows: "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

In essence, according to Robinson, there was no guard for the chain drive area of the crusher. CAR-O-LIN did not impeach this testimony, nor did it proffer any testimony or evidence that would tend to negate Robinson's testimony that on the date in question, the chain drive area of the crusher was not guarded. I thus find that CAR-O-LIN did violate section 56.14107(a), supra.

According to Robinson, Chambers told her that the guard for the area at issue did not exist, and that the crusher had last been operated a week prior to the inspection. She asked Chambers why the guard had not been "repaired." According to Robinson, Chambers stated that "they had not gotten around to it" (Tr. 35). The Secretary did not call Chambers to testify, nor did the Secretary indicate why it had failed to do so. There is nothing in the record to establish that Chambers would have had personal knowledge as to why a guard had not been installed. Therefore, this hearsay testimony was accorded little weight. On the other hand, Lindstrom testified that the area in question was provided with a guard, and that approximately a week prior to Robinson's inspection, the guard had been removed in order for a defective chain to be removed and a new one to be installed. He also testified that the crusher had not been run without a guard in place, and that the guard had been installed immediately after Blow's inspection in June 1997. This testimony has not been impeached or contradicted by the Secretary and accordingly I accept it. Within this context, I find that the level of CAR-O-LIN's negligence was no more than low. The Secretary did not offer any evidence specifically detailing the gravity of the instant violation. I thus find that it has not been established that the gravity of the violation was more than low. The remaining factors set forth in section 110(i) of the Act are as set forth above (II(C) (infra)). Based upon all these factors, I conclude that a penalty of \$25.00 is appropriate for this violation.

ORDER

It is **ORDERED** that CAR-O-LIN shall, within 30 days of the date of this decision, pay a total civil penalty of \$50.00.


Avram Weisberger
Administrative Law Judge

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