

SEPTEMBER AND OCTOBER 2007

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SEPTEMBER AND OCTOBER 2007

No cases were filed in which Review was granted during the months of September and October:

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Secretary of Labor, MSHA v. Speed Mining, Inc., Docket Nos. WEVA 2005-20-R, et al.
(Judge Weisberger, August 27, 2007)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 7, 2007

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

v.

PARKSTONE

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:
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:

Docket No. CENT 2007-273-M
A.C. No. 03-01875-62140

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On June 21, 2007, the Commission received from Parkstone a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

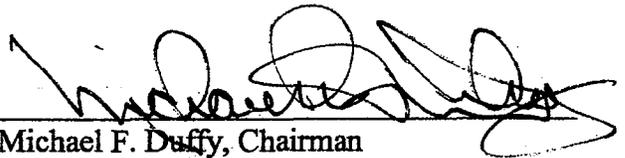
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On or about July 14, 2005, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued to Parkstone proposed penalty assessment No. 62140, which covered approximately 12 citations. In its letter, Parkstone alleges that it failed to respond to the penalty assessment because it mistakenly believed that the citations were dismissed as part of other litigation involving MSHA. Parkstone also asserts that MSHA lacks jurisdiction over the activities involved and that MSHA therefore was not entitled to issue the citations at issue. In response, the Secretary states that she opposes reopening the proposed penalty assessment because Parkstone failed to contest the assessment within one year after the assessment had become a final Commission order. S. Resp. at 2-3. She further asserts that, although a reopening request that is based on a claim of lack of jurisdiction may not be time barred by the one-year requirement, Parkstone’s jurisdictional claim is not meritorious. *Id.* at 3.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787.

Under Rule 60(b)(1), any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Here, Parkstone has requested reopening the proposed assessment nearly two years after the assessment became a final Commission order and thus would generally be time barred under Rule 60(b). Nevertheless, Parkstone’s additional claim that the final order is void due to lack of Mine Act jurisdiction is not time barred. Unlike other motions under Rule 60(b), there is no time limit with regard to requests to reopen void judgments on the basis of lack of jurisdiction. *Sea-Land Serv., Inc. v. Ceramica Europa II, Inc.*, 160 F.3d 849, 852 (1st Cir. 1998); *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994). Although the Secretary asserts that Parkstone has not asserted a colorable claim of lack of jurisdiction, we are unable to discern from the record before us whether, and to what extent, Parkstone’s activities bring it within the jurisdiction of the Mine Act.

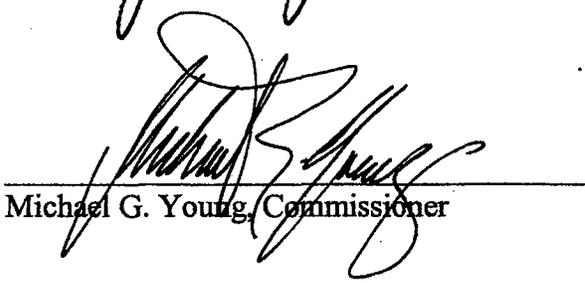
Accordingly, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether Parkstone is subject to the jurisdiction of the Mine Act with respect to the subject citations. Taking into account the circumstances of each citation, to the extent it is determined that Parkstone is subject to Mine Act jurisdiction, we instruct the judge to deny Parkstone's request to reopen the assessment as to those citations, as such reopening is time barred under Rule 60(b). Alternatively, to the extent it is determined that Parkstone is not subject to Mine Act jurisdiction, this proceeding must be reopened and the assessment vacated as to those citations that MSHA lacked jurisdiction to issue.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

September 13, 2007

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

v.

VULCAN MATERIALS COMPANY

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Docket No. KENT 2007-399-M
A.C. No. 15-00087-112716

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On August 1, 2007, the Commission received from Vulcan Materials Company (“Vulcan”) a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

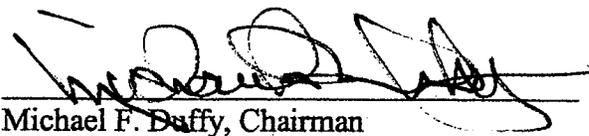
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On January 9, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation No. 6110605 to Vulcan. MSHA subsequently sent a proposed penalty assessment covering that citation to Vulcan. Vulcan states that it inadvertently paid the proposed penalty. The Secretary does not oppose the request to reopen the proposed penalty assessment.

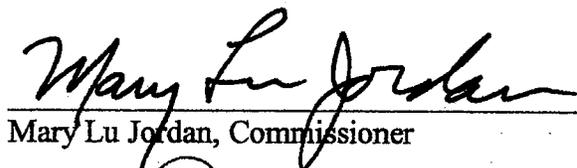
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) under which, for example, a party could be entitled to relief from a final order of the Commission on

the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

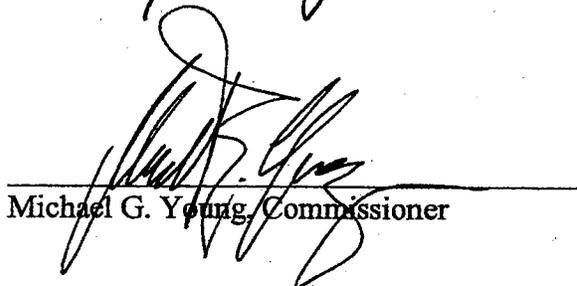
Having reviewed Vulcan’s request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Vulcan’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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

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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 20, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. YORK 2007-90-M
	:	A.C. No. 19-00040-104183
	:	
v.	:	
	:	
AGGREGATE INDUSTRIES,	:	
NORTHEAST REGION	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On August 8, 2007, the Commission received from Aggregate Industries, Northeast Region (“Aggregate Industries”) a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

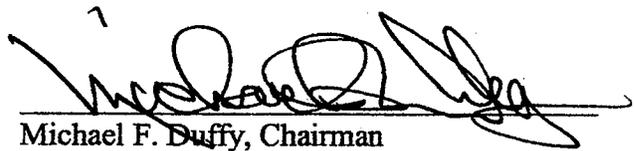
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On August 29 and 30, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation Nos. 6042056 and 6042063, respectively, to Aggregate Industries. Aggregate Industries timely contested the citations in Docket Nos. YORK 2006-99-RM and 2006-100-RM. MSHA subsequently issued to Aggregate Industries a proposed penalty assessment relating to the citations. In its motion, Aggregate Industries explains that the personnel responsible for reviewing proposed penalties “overlooked” its contest of the citations and inadvertently authorized payment of the proposed penalties. The operator further states that its failure to timely file its contest of the proposed penalty assessment was the result of inadvertence or a mistake and miscommunication within its operation.

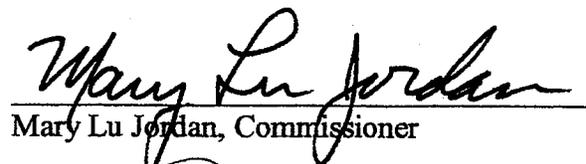
In her response to the motion to reopen, the Secretary states that Aggregate Industries' statement that the civil penalty proceeding should be reopened because payment of the penalties was inadvertent is only a conclusory statement that provides no explanation as to why its failure to contest the penalty proceeding should be excused. The Secretary requests that the Commission remand the matter to the judge to provide the operator an opportunity to satisfy the requirements for reopening.

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

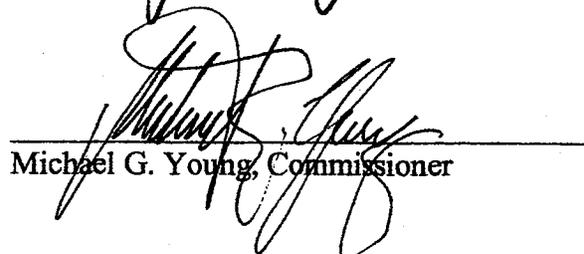
Having reviewed Aggregate Industries' motion and the Secretary's response thereto, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Aggregate Industries' failure to timely contest the penalty proposals and whether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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

September 26, 2007

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. LAKE 2007-161-M
 : A.C. No. 33-02518-103814 P100
v. :
 :
SHERMAN EQUIPMENT COMPANY, INC. :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On August 8, 2007, the Commission received a letter from Sherman Equipment Company, Inc. (“Sherman”) requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

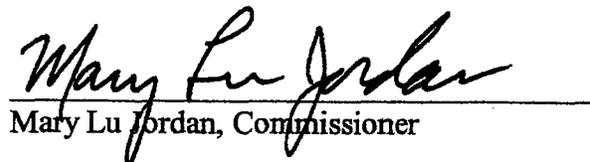
On May 24, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation No. 6167377 to Sherman. In its letter, the operator states that it believed that “this matter was closed a year ago,” and that, until it received a collection letter, it had “no idea” that there was an outstanding penalty. In response, the Secretary requests that the Commission direct the operator to provide an adequate explanation of why it did not contest the proposed assessment in a timely manner, particularly why it had “no idea” that it had an outstanding penalty. The Secretary explains that a proposed penalty assessment was sent to the operator’s correct address on November 21, 2006, but that the proposed assessment was later returned “unclaimed.” The Secretary further states that in April 2007, MSHA sent a notification to the operator’s correct address that the proposed penalty had become delinquent.

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

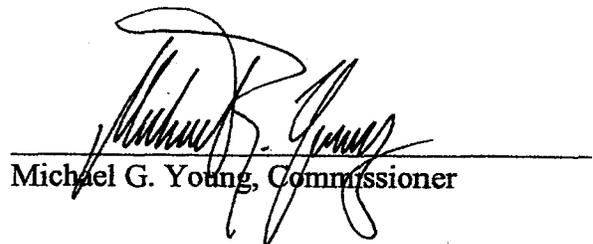
Having reviewed Sherman’s letter, we agree with the Secretary that Sherman must provide an explanation as to why reopening this matter is warranted. Accordingly, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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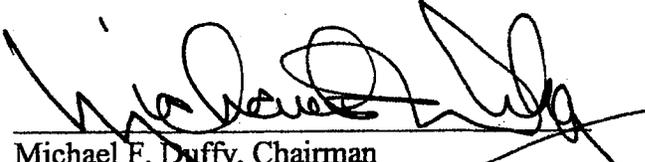
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Walter Res., Inc., 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could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

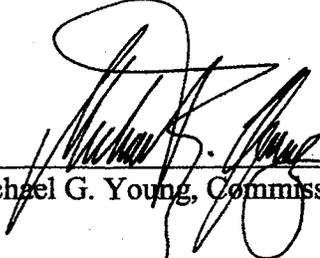
Having reviewed Rinker’s motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Rinker’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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

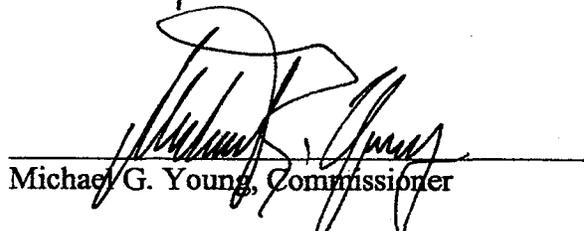
Upon review of the record, we have determined that the wording of the show cause order did not conform with the Commission’s Procedural Rules. Accordingly, in the interest of justice, we hereby vacate the order of default and remand this matter to the Chief Judge for further appropriate proceedings. See *Oak Grove Res., LLC*, 28 FMSHRC 809, 811 (Oct. 2006); *Paul F. Becker Coal Co.*, 28 FMSHRC 237, 238 (May 2006).



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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intent to contest the proposed penalties is evidenced by its actions in timely filing contests of the citations underlying those proposed penalties. It explains that “[i]t did not become apparent that the assessments had been paid until the Secretary filed the Motion to Dismiss.” Mot. at 3. The operator further notes that its counsel entered into an informal agreement with MSHA stating in part that when a Massey Energy subsidiary inadvertently pays a penalty that it intended to contest, MSHA would not object to the operator’s motion to reopen as long as the motion to reopen is filed within a reasonable time of the operator learning of its mistake or inadvertence. Attach. 5, at 1. It maintains that the instant matter is the type of circumstance identified in the agreement.

The Secretary opposes the operator’s motion to reopen in Docket No. WEVA 2007-663 on the basis that the operator failed to file its motion to reopen within a “reasonable time” after it learned of its mistake or inadvertence as required by Fed. R. Civ. P. 60(b). She disagrees that the operator was unaware of the mistaken payment until her motion to dismiss was filed, which occurred on June 29, 2007. The Secretary explains that she filed a status report on December 28, 2006, explicitly stating that 21 of the 22 proposed penalties had been paid and that the twenty-second had been neither contested nor paid. S. Resp., Attach B. On March 30, 2007, the Secretary filed a second status report referring to the prior status report and explicitly stating that the twenty-second proposed assessment had not been paid and had been referred to the Department of the Treasury. *Id.*, Attach. C. The Secretary asserts that the operator filed its request to reopen more than seven months after it was informed that it had failed to contest the proposed penalties, and that it has failed to explain this delay in its request to reopen. *Id.* at 3.

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

The status reports appear, from the limited information provided to us, to identify 21 of the 22 proposed penalties involved in Docket No. WEVA 2007-663 as paid, and the twenty-second as unpaid and uncontested and referred to the Department of Treasury. While the operator has failed to explain why it did not file its motion to reopen more promptly after receiving the status reports, we cannot determine from this record whether this constitutes “unreasonable” delay. However, we do conclude that Spartan must provide an explanation as to why reopening this matter is warranted in light of the status reports. Accordingly, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of

whether good cause exists for Spartan's failure to timely contest the proposed penalty assessment and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

B. Docket No. WEVA 2007-664

Spartan also requests the Commission to reopen another proposed assessment, No. 000113330, which was issued on March 13, 2007. As in the previous docket, Spartan asserts that its failure to timely contest the proposed assessment resulted from its safety director's mistaken payment of the proposed penalties relating to five citations. The Secretary does not oppose the request to reopen the penalty assessments in this docket.

In the interests of justice, we remand Docket No. WEVA 2007-664 to the Chief Administrative Law Judge for a determination of whether good cause exists for Spartan's failure to timely contest the penalty proposals and whether relief from the final order should be granted. If it is determined that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules.

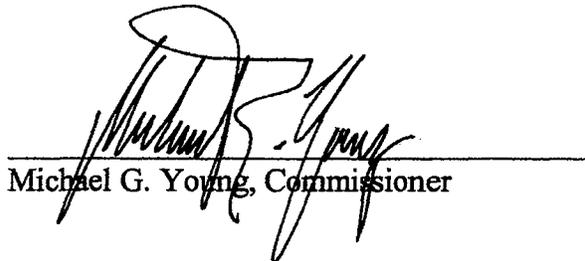
Accordingly, we remand Docket Nos. WEVA 2007-663 and 2007-664 for further proceedings as appropriate.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

Distribution

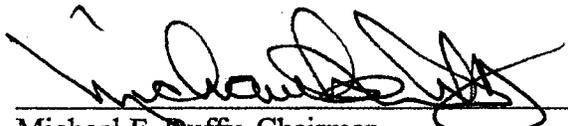
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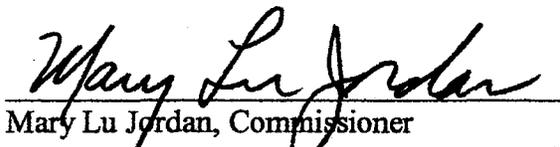
**Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021**

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

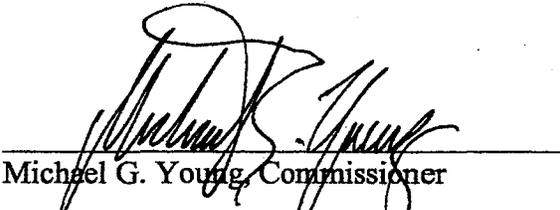
Having reviewed American’s motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for American’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 4, 2007

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

v.

OFFIELD MINING COMPANY

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Docket No. WEST 2007-804-M
A.C. No. 04-05567-117523

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On August 23, 2007, the Commission received from Offield Mining Company ("Offield") a letter requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

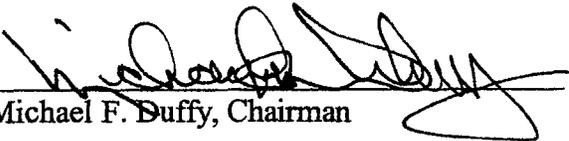
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On August 29, 2006, Offield was issued 23 citations by the Department of Labor's Mine Safety and Health Administration ("MSHA"), and on September 6, 2006, MSHA issued Offield an additional order. Penalties were proposed on May 8, 2007, by MSHA for the order and 19 of the citations in assessment No. 000117523. Offield states that it sent in its contest of the assessment within 30 days, but that it was lost. The Secretary states that she does not oppose Offield's request to reopen assessment No. 000117523.¹

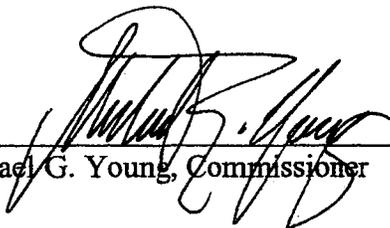
¹ As the Secretary points out, Offield in its reopening request also references Citation No. 6389681, which according to MSHA's public records was the subject of a separate assessment, No. 000115107, that apparently also became a final order. Accordingly, if Offield wishes to

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

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


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner

reopen that assessment, it will need to file an additional request to reopen with the Commission.

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 4, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2007-733
	:	A.C. No. 46-01433-121119
	:	
v.	:	
	:	
CONSOLIDATION COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

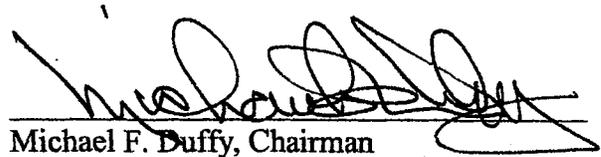
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On August 22, 2007, the Commission received from Consolidation Coal Company ("Consol") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On July 5, 2007, the Department of Labor's Mine Safety and Health Administration issued assessment No. 000121119 to Consol, proposing penalties for 27 citations and orders that previously had been issued at Consol's Loveridge mine. Consol states that its safety supervisor at that mine had retired in mid-June, and that his replacement was unfamiliar with the procedures for contesting proposed penalties. According to Consol, the new safety supervisor forwarded the assessment to Consol's headquarters after over 30 days had passed. Consol soon thereafter sought to contest 14 of the proposed penalties. The Secretary states that she does not oppose Consol's request to reopen the proposed penalty assessment.

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

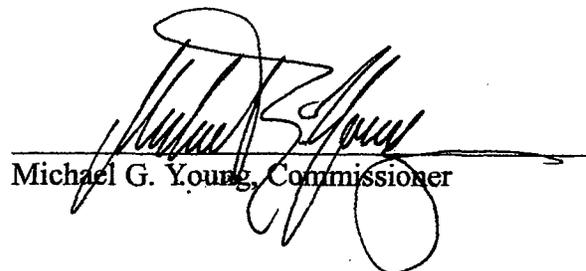
Having reviewed Consol’s motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Consol’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

October 4, 2007

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2007-843
	:	A.C. No. 46-01433-118871
v.	:	
	:	
CONSOLIDATION COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On September 17, 2007, the Commission received from Consolidation Coal Company ("Consol") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

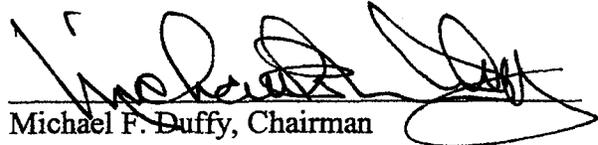
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On May 25, 2007, the Department of Labor's Mine Safety and Health Administration issued assessment No. 000118871 to Consol, proposing a penalty for an order that previously had been issued at Consol's Loveridge mine. Consol states that its safety supervisor at that mine, who normally processed proposed assessments, did not process the assessment for contest before he retired in mid-June. Instead, on June 6, 2007, the proposed assessment was forwarded to Consol's headquarters, and Consol paid the proposed penalty. According to Consol, the safety supervisor's replacement was unfamiliar with the procedures for contesting proposed penalties. The replacement's failure to timely process other proposed assessments led Consol to discover that it had failed to contest the instant assessment, as it now states that it had intended. Consol

submits that its payment of the assessment was in error. The Secretary states that she does not oppose Consol's request to reopen the proposed penalty assessment.

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

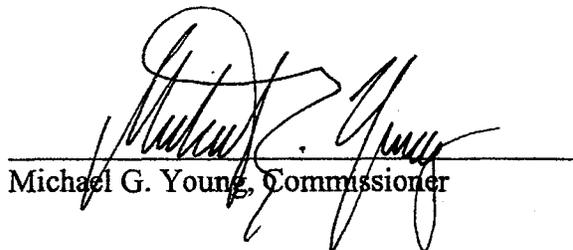
Having reviewed Consol's motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Consol's failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is determined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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 4, 2007

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

v.

G. S. MATERIALS, INC.

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Docket No. SE 2007-469-M
A.C. No. 31-01990-122706

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

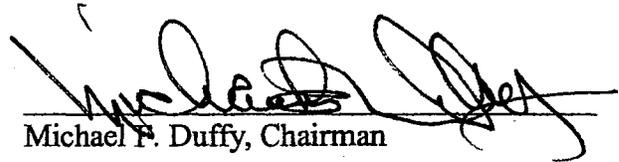
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On September 21, 2007, the Commission received from G.S. Materials, Inc. (“GSM”) a letter requesting reopening of a proposed penalty assessment which GSM believes had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On July 19, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued proposed penalty assessment No. 000122706 to GSM for seven citations that MSHA had issued to GSM during the previous month. GSM states that it did not contest the proposed penalties until August 20, 2007, because it misplaced the papers at the mine site. The Secretary states that case was timely contested, and she has assigned it to a Regional Solicitor’s office for hearing, so the request to reopen should be dismissed.

Having reviewed GSM’s request and the Secretary’s response, we conclude that the proposed assessment at issue has not become a final order of the Commission because GSM timely contested it. We deny GSM’s motion as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate pursuant to the Mine Act and

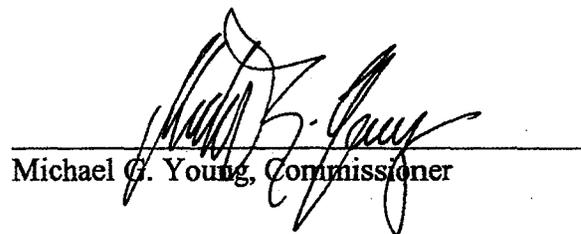
the Commission's Procedural Rules, 29 C.F.R. Part 2700. *See Lehigh Cement Co.*, 28 FMSHRC 440, 441 (July 2006).



Michael P. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

Distribution

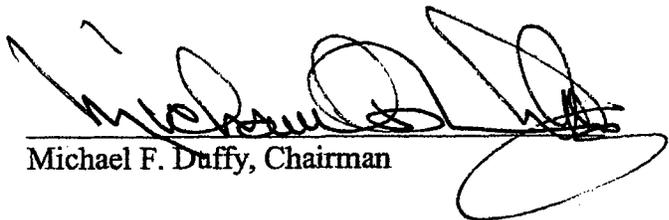
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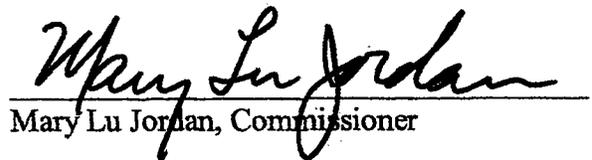
**Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001**

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

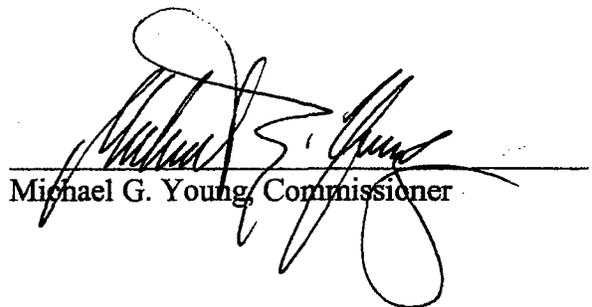
Having reviewed Progress’ motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Progress’ failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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October 31, 2007

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. CENT 2008-6-M
v. : A.C. No. 23-00765-120082
HUNT MARTIN MATERIALS, LLC :

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On October 2, 2007, the Commission received from Hunt Martin Materials, LLC (“Hunt Martin”) a motion requesting that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

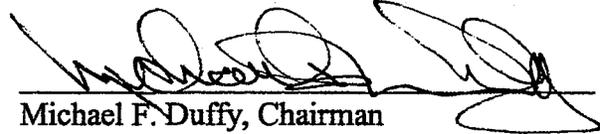
On June 12, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment to Hunt Martin covering citation No. 6239671. In its motion, Hunt Martin states that its Human Resources Manager believed he had timely filed a contest of the penalty but failed to do so due to mistake and inadvertence. Hunt Martin discovered this oversight when it received correspondence from MSHA stating that the case had

become a final order and that it owed an outstanding balance.¹ The Secretary states that she does not oppose Hunt Martin's request to reopen the penalty assessment.

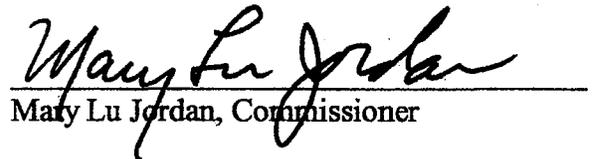
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the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

¹ In that correspondence, MSHA allegedly indicated that a partial payment of the penalty assessment had been made. Hunt Martin claims that it has not submitted any payment with respect to the proposed penalty at issue. Mot. at 2.

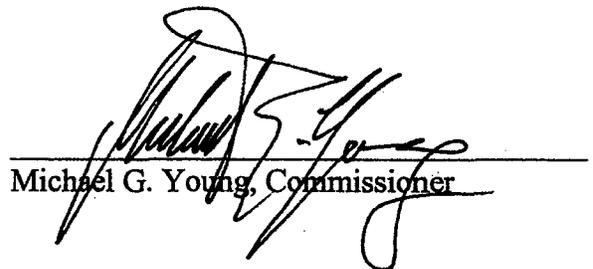
Having reviewed Hunt Martin's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Hunt Martin's failure to timely contest the penalty proposal and whether relief from the final order should be granted.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



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

Distribution

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Federal Mine Safety & Health Review Commission
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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 30, 2007

STEVEN C. COLLINS, : DISCRIMINATION PROCEEDING
Complainant :
 :
 : Docket No. KENT 2007-15-D
v. :
 :
 : Mine No. 4
NORTHFORK COAL COMPANY, : Mine ID 15-18340
Respondent :

DECISION

Appearances: Daniel F. Dotson, Esq., Whitesburg, Kentucky, on behalf of the Complainant;
Melanie J. Kilpatrick, Esq., Rajkovich, Williams, Kilpatrick & True, PLLC,
Lexington, Kentucky, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a complaint of discrimination filed by Mr. Steven Collins pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the “Act”, alleging that he was discharged by the Northfork Coal Company (Northfork) on August 8, 2006, presumably in violation of Section 105(c)(1) of the Act.¹ More particularly, Mr. Collins alleges in his complaint filed with the Department of Labor’s Mine Safety and Health Administration (MSHA) on August 9, 2006, as follows:

¹ Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act, because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to the Act, including a complaint notifying the operator or the operator’s agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

I made safety complaints several weeks about a grinder that I used daily, nothing was done. I was struck by a piece of steel on 8/8/06 from the grinder, complained again and was discharged.

A miner alleging discrimination under the Act establishes a *prima facie* case of prohibited discrimination by proving that he engaged in protected activity, that adverse action was taken by his employer and that the adverse action was motivated in any part by that protected activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-8000 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). For the reasons that follow, I find in this case that, while Mr. Collins did engage in protected activity, he suffered no adverse action from Northfork. Indeed, the credible evidence shows that Collins voluntarily resigned from his job with Northfork on August 8, 2006.²

There is no dispute that on August 8, 2006, as well as before that date, Mr. Collins complained about the brush portion of the grinder machine used by roof bolters to smooth the rough edges on their steel roof bolts. There is also no dispute that the brush had been worn down and on August 8, 2006, a piece of steel struck a can of snuff Collins had in his shirt pocket as he was using the brush. There is also no dispute that he then almost immediately complained to supply clerk Raymond Sturgill and shortly thereafter to mine manager Bill Robinson, about the worn brush and the fact that he had been struck by a piece of steel while using it.³

Collins testified that on August 8, 2006, he was working as a roof bolter. He had 11 years prior experience as a roof bolter and had worked for Northfork for two years. Collins testified that before entering the mine it was his practice to prepare extra "steel". On the morning at issue, he was using the grinder to take the edge off the steel that had been cut. According to Collins, all of the bolters used the grinder to clean slag off the steel. Slag is cleaned to facilitate the insertion of the steel into the mine roof. As he was using the brush portion of the grinder on that date, a piece of steel hit him. According to Collins, the brush was worn and the bristles were brittle. He told clerk, Raymond Sturgill, that a piece of steel hit him and asked Sturgill when he was going to get a new brush. Mine superintendent Bill Robinson then passed by and Collins asked him why he did not get a new brush. According to Collins, the following exchange then occurred:

² There is no claim in this case that Collins' departure was based on a "constructive discharge" theory. See *Dolan v. F&E Erection Co.*, 22 FMSHRC 171, 176 (February 2000).

³ While it is also undisputed that Collins also complained about the safety of the worn brush to state and federal mine inspectors, it is clear that those complaints were made after his employment had already been discontinued (Tr. 59-60, 155-156).

Q. All right. Tell me who you ran into that morning to complain about the grinder and the brush again?

A. First I had seen Raymond, like I said, he was the guy that ordered the stuff and I asked him, I said - - well, the piece of steel had flew up and hit me up underneath the arm and I had a can of Skoal in my pocket and it knocked it out.

I asked him, I said, Raymond, when are you all going to get us a brush. He started cussing and stuff and he said I told you I can't get you one.

I said well - - and Bill come out there, just right after that.

Q. Who is Bill?

A. He's the superintendent.

Q. What is his last name?

A. Robinson.

Q. Okay. Go ahead.

A. And I asked Bill, I said, Bill, I said why don't you get us a brush, buddy. I said we've got the have one; I said that makes two or three times that piece of steel has flew up and hit me. I said it's wore out; somebody is going to get killed. I said it could have flew up and hit me in the face which it probably would have if it hadn't hit me underneath the arm.

And he said what do want me to do, and which he said a bunch of bad words.

JUDGE MELICK: Well you will have to say the words that were used.

BY MR. DOTSON:

Q. We are over 18, Stevie. Tell him what he said to you.

A. He said what do you want me to do, shit one out. I said, well, I said the only thing I want is one. He said, well, he said I can't get one. That's the exact words he said.

Q. What happened next?

A. So then I stood in there a minute and I said, well, I'm going to talk to him, then we had an inspector there. He was in the other - - he walked over to the other building.

JUDGE MELICK: Mr. Robinson left at that point?

THE WITNESS: Yes, he left. And so I didn't want to cause any trouble, you know, around the inspector. I didn't want to get you know the inspector to know, you know, get him in any kind of trouble.

So I called him outside, I said, Bill, I said why don't you go, you know, get us a brush.

JUDGE MELICK: Wait a second. Are you talking to the inspector now?

THE WITNESS: No, I'm talking to Bill.

JUDGE MELICK: Why did you say he left the scene?

THE WITNESS: Yeah, he left out the one building and walked over to the other building.

JUDGE MELICK: I see. And then you followed him?

THE WITNESS: Yeah. I followed him over there. He walked in the building. I walked over there and I said, Bill, I said come out here a minute and let me talk to you. So he walked outside and I said, Bill, I said all I want is a brush. I said, you know, I said I've got to work; I've got a family to take care of.

He said I told you once I can't get no damn brush. I said, well, it's been like that for over two months. He said, I know he said it's been like that for two damn months but he said like I told you I can't get one.

I said well - - he said furthermore he said if you don't like the way I run - - or I asked him, I said, well, I said if you can't get me one I said give me Ross Kegans' phone number. He wouldn't do it.

And the way he got things over there you are supposed to go to your boss, then to your superintendent and they go to the main one which is Ross Higgins.

JUDGE MELICK: Ross Higgins, what is his position?

THE WITNESS: He was the main one over the company.

JUDGE MELICK: He was over Mr. Robinson?

THE WITNESS: Yes. yes.

JUDGE MELICK: Higher management?

THE WITNESS: Yes.

JUDGE MELICK: Do you know what his exact title was?

THE WITNESS: He's over the whole company I do believe. I'm not for sure.

MR. DOTSON: Your Honor, for the record, he's referring to a fellow by the name of Ross Kegan. It's not Higgins.

JUDGE MELICK: Is that stipulated?

MS. KILPATRICK: How do you spell his name?

MR. DOTSON: As best I remember, Your Honor, It's K-E-G-A-N OR K-E-AG-A-N?

MS. KILPATRICK: I think it's one N and one A. K-E-G-A-N.

JUDGE MELICK: Okay. Kegan it's stipulated that his name is Ross Kegan.

THE WITNESS: And I asked him for his phone number and he said I ain't giving you his damn phone number; you don't need it. I said, well, Bill, you know I said we've got a chain of command I said they us [sic] whenever I got hired on here I said that's what we're supposed to do, you know, we go to our boss first, to you, I said then if you don't satisfy our needs then we go to Kegan.

He said, well, you are not getting his phone number. I said well. He said if you don't like the way I run things here he said there's the damn road hit it. He said, as a matter of fact, there's the damn road and you can hit it anyhow.

(Tr. 23-29)

Only later, under cross examination did Collins claim that Robinson also told him at this time that "you're fired, just find yourself another job" (Tr. 58-59). Collins claims that Robinson told him that he was fired before he talked to the state inspector (Tr. 59-60). The alleged adverse action would also have occurred before Collins requested the telephone number for MSHA (Tr. 155-156).

William McFern, another Northfork roof bolter who also worked with Collins, testified that he too had used the brush after cutting some steel that morning and agreed that the brush needed to be replaced. That same morning he saw Collins after a piece of steel knocked a can of snuff out of Collin's pocket. Contrary to the Complainant's testimony, McFern testified that Raymond Sturgill and possibly mine manager Robinson, also told the Complainant that they had ordered a new brush but that it had not come in yet. According to McFern, Robinson also told Collins that he just

“couldn’t shit one”. McFern testified that, while the brush makes it easier to clean the steel, it is not necessary to use the brush and you can use alternative methods to get the steel inserted.

Barry Honaker was also a roof bolter operator on the Complainant’s shift on August 8, 2006. He too had used the grinder and brush to clean burrs off the steel to make it easier to insert. He too had asked Sturgill several times before that date to get a new brush. Honaker testified that Sturgill told him that a new one had been ordered. Honaker observed that after the piece of steel struck Collins, Collins asked Sturgill if he was going to replace the brush and Sturgill told him not to use the “damn thing”. Honaker recalled that Robinson also told Collins not to use “the damn thing”.

Mine superintendent Billy Ray Robinson testified that, at the beginning of the shift on the morning of August 8, 2006, the Complainant approached him asking for a layoff slip to take to the employment office to draw unemployment benefits (Tr. 96). Robinson testified that he told Collins that they were not laying off and refused to give him a layoff slip. Collins was complaining also at that time that the third shift had not been loading the roof bolts correctly. Robinson described these and subsequent events in the following colloquy at hearings:

A. [Robinson] I said [to Collins] I’m not going to jump on the third shift over the way they load a roof bolter because some nights you’re lucky even if they’re loaded because of just things going on on the shift. And I’m definitely not going to jump onto them about the way they turn the bolt heads on a bolter, when they load the pinner.

Well, he went off, he got frustrated at that point and he walked off. Well a few minutes later he come back and said - - exactly how was it he said it? He said you’re going to have to do something about that grinder out there.

I didn’t know that him and Raymond [Sturgill] had done had an interaction inside the shop.

Q. Okay.

A. And he said I got hurt on that grinder out there a minute ago. I said what do you mean you got hurt. He said I was trying to clean my steel up, dress my steel up and he said it flew up. He said we told you that it needs a brush put on it.

I said, Thirty-eight [Collins’ nickname], we’ve got one ordered. That’s all I can tell you; it’s ordered. The one that came in was not the proper brush for it. Earl had to - - the guy we ordered it from, Electric Motor, Earl Booher is the salesman. I said he had to order another brush; that brush does not work. It won’t work on that grinder.

And he said, well, I got hurt on it. He said it flew up and hit me in the arm and he said - - then he started going on about how I didn’t know how to manage a coal mines.

He said this is the most mismanaged place that I’ve ever worked in I mean there is nothing else I can do, my hands are tied. I’ve got the parts ordered.

But when he told me that I didn’t know how to manage a coal mines, I got pretty frustrated and I looked at him and I said, now listen, if you don’t like the way I manage this coal mine, then the best thing I can tell you is you need to find you another job. And that was my words, if you don’t like the way I manage this mines.

Q. Did you tell him that he was fired?

A. No, ma’am. That was never uttered out of my mouth. And he turned and went into the changing room - - now I guess at that point because I had other guys coming to me and

talking to me about a number of different things, so you know as far as the time frame I can't precise chronological - - but then he came back and he handed me his - - he had his rescuer in this hand.

I said put it in the office. He went on in - - he went on in the foreman's office while I was talking to some else. A few minutes later he came back and he said - - no, he didn't say nothing to me.

He went back in the changing room and I guess he talked to some of them boys over there. I don't know. Then a few minutes later, I don't know how many minutes it was, it was probably - - the mantrips I guess had done left at that time.

I saw him back his truck down there and he had a tote that he carried his stuff in. He kept his stuff, a lot of guys keep a tote just like a Rubbermade tote. They keep their stuff locked up in it rather than haul it back and forth in their vehicle.

Q. Where did they keep the tote?

A. In the changing room.

Q. At the mine?

A. Yeah. It's just a little ole trailer there where everybody changes clothes in. And then as he was leaving, he said I'm going to get to this bottom of this. He said I'm going - - I'm going, I'm going to get to the bottom of this somehow.

Q. I'm sorry. What did he do with his tote?

A. He put it in the back of his truck and left.

Q. Took it out of the changing room?

A. Yeah. Put it in the back - - he backed his truck down there to the office. They normally park up the hill. He went up and got his truck and brought it down thee and backed it in there to load his tote in.

Well he said something to the effect I'm going to get to the bottom of this. Well during that time I get phone calls every morning from my bosses. They want to know what the previous day's productions were.

Q. Let me stop you and go back on something. When he gave you his self-rescuer and when you saw him load up his tote out of the changing room, how did you interpret that action?

A. He quit. I mean normally when a guy goes and gets his rescuer and brings it and hands it to you that's a pretty good sign that he's quit, you know.

JUDGE MELICK: Has that been done before? Have you had other employees just hand you their self-rescuers?

THE WITNESS: Yes, I mean get their stuff, hand you the rescuer and never say nothing. I had a guy one day just never said anything to me. He got his payroll check, went over in the shop - - I mean over in the office got his stuff, came over and laid his rescuer on the desk and went up the hill and never said nothing to nobody.

JUDGE MELICK: What is the practical effect of leaving your rescuer? Is that mine property?

THE WITNESS: Yes.

JUDGE MELICK: Self rescuers?

THE WITNESS: Yes, yes. That's something we issue to the employees. Self contained self-rescuers.

JUDGE MELICK: All right. You need that and it's required by law to take that into the mine with you; correct?

THE WITNESS: Yes, it is. Uh-huh. Yeah.

JUDGE MELICK: And if you don't have that are - -

THE WITNESS: You can't go underground.

JUDGE MELICK: All right. So for all practical purposes you interpret that as what?

THE WITNESS: As he quit. He turned it in.

(Tr. 97-103)

Northfork mine clerk Raymond Sturgill testified that he, as mine clerk, was in charge of ordering supplies. He observed the confrontation on the morning of August 8, 2006, and described it in the following colloquy:

Q. Okay. Tell us if you would go back and tell us about your first contact with Mr. Collins on that day?

A. On that day that morning I was in the shop, I was doing inventory to see what we needed for parts that day. Mr. Collins was over there at the grinder where they grind their steel off. I heard a loud thump. I turned around, he had grinding on his steel and he told me, he said you all are going to have to fix this damn thing.

Q. Okay. Are those the exact words that he said?

A. That's the exact words he said.

Q. Okay. And what was your response?

A. I told him, I said, Steve, we've got the parts ordered for the grinder and you was not supposed to be using it.

Q. Okay. Had you previously told Mr. Collins not to use the grinder?

A. I don't specifically remember if I told him specifically but they knew.

Q. Okay. Who is they?

A. All the pinner men that use the grinder to grind their steel off.

Q. How did they know?

A. We had told them not to - - not to use it until the part come in.

Q. Okay. Had you told all of them not to use the brush - - first of all, are we just talking about the brush side of the grinder or - -

A. The brush side, yes.

Q. Had you told all the pinner men not to use it?

A. To the best that I can remember, I don't know if I told them all or not.

Q. So you say the parts had been ordered for the grinder?

A. Yes, we had ordered - - we had ordered the part prior to this and they had sent the wrong brush and we had to send it back because it was the wrong part. It wouldn't fit the - - it wasn't the right size.

Q. Okay. And as of August 8, 2006, the day that this happened had the new brush, the correct brush come in yet?

A. No, it hadn't.

Q. Was it still on reorder?
A. Yes, ma'am.
Q. An what happened next?
A. You know after I told him that we had the part ordered for it, they wasn't supposed to be using it, Bill come into the shop and he started on Bill.
Q. Okay. What did he say to Bill?
A. He just told him, said he was going to have to fix the grinder, you know, and Bill told him we had the part ordered for it.
Q. What - - what was Mr. Collins' tone of voice?
A. He was very loud.
Q. In your opinion was it an appropriate way to speak to the boss?
A. No, ma'am.
JUDGE MELICK: In what way was it inappropriate?
THE WITNESS: He just about screaming, Your Honor.
JUDGE MELICK: He was what?
THE WITNESS: He was very loud?
BY MS. KILPATRICK:
Q. And what was Mr. Robinson's response? Do you recall exactly what Mr. Collins said to Mr. Robinson?
A. I don't know. I walked out and went back to my office.
Q. Okay. You didn't hear any of the exchange between Mr. Collins and Mr. Robinson?
A. No.
Q. Okay. Did you see Mr. Collins again that day?
A. Yeah, it was probably about five minutes later they was out on the porch of my office. What brought it to my attention they was real loud.
Q. Mr. Robinson and Mr. Collins were talking again?
A. Yes.
Q. Okay. And did you hear what was being said this time?
A. Mr. Collins told Bill that he didn't know how to run a mines. And Bill told him if he didn't like the way he run the mine, you know, to find him another job.
So he just a few minutes later he come in the office where we store our self-rescuers and threw his rescuer on the desk.
Q. Mr. Collins did?
A. Yes.
Q. Okay.
A. And then he went and got in his truck and come down to where the changing room is and he got his belongings and he left.
Q. How did you interpret that action?
A. To me I thought he quit.
Q. Okay. Was that the last time that you saw Mr. Collins that day?
A. No, ma'am.
Q. Okay. When - - when else did you see him?

A. Probably ten minutes later, maybe ten minutes later he come back down to the office again.

Q. And what happened?

A. He come in there demanding - - he wanted the phone numbers to the president of the company.

Q. Did he mention that person by name?

A. Ross Kegan.

Q. Okay. Who was he asking for the phone number from?

A. Bill I guess. You know, there was three or four of us still in the office.

Q. And what else did Mr. Collins say?

A. I don't know exactly - - he was asking for the MSHA's number and all this stuff. Bill just told him that, you know, the was through talking to him.

Q. Okay.

A. And he asked me to escort him off the property.

Q. And what did you do?

A. I told Steve that he was going to have to leave. I escorted him to his truck. I told him if he come back we would call the law on him and have him charged with trespassing.

(Tr. 142-148)

On cross examination Sturgill testified that, during the confrontation, Collins was "loud" and that Robinson was "normal". He noted that Collins did not request the telephone numbers of vice president Kegan and MSHA until he had already quit, had departed, and then returned. Sturgill denied that he had ever touched Collins but only told him that he would have to get off mine property or that he would have to call the Sheriff's department.

Another Northfork roof bolter, Glen Sizemore, was also present during the confrontation on the morning of August 8, 2006. He recalled that there was indeed a problem with the brush in that it was worn. Sizemore testified that Sturgill had previously told him not to use the brush and that he was "pretty sure" that Collins had been told this. Sizemore observed Collins using the brush that morning and observed that he was not using it correctly and that he put the steel straight into the brush. He noted that following the initial argument between Collins and Sturgill, mine superintendent Robinson walked in. He observed that Collins did not proceed underground as he did but followed Robinson into his office and spoke in a "hateful" voice which he felt was not an appropriate way to talk to your boss.

Northfork personnel director, Richard Raleigh, testified that he heard of the incident on August 8, 2006, and was told by vice president Kegan and safety director Cohelia, to offer Collins his job back. Raleigh testified that his notes confirmed that he called Collins at 6:00 p.m. on August 8, 2006, and offered him his job back without any loss of pay. Collins told him that Bill and Ray would "make it hard on him" and that he wanted their certification revoked so that they would never work again, apparently as a condition for his return.

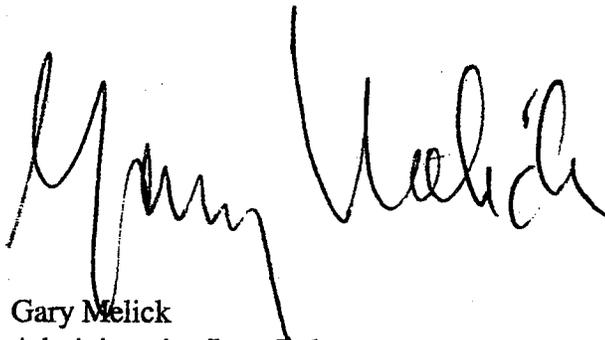
In evaluating the evidence in this case, I conclude that the testimony of mine superintendent, Bill Robinson that Collins resigned and was not discharged by Northfork as the most credible. His testimony is also corroborated in significant respects by the credible testimony of Northfork mine clerk, Raymond Sturgill. The absence of animus toward the Complainant is also apparent from the willingness of both Robinson and Sturgill, later on the same day the Complainant resigned, to offer the Complainant his job back with no loss of pay (Tr. 189). The response of the Complainant to this offer also suggests that he resigned only because of his unhappiness with Robinson and Sturgill and not for any safety concerns (Tr. 182) Collins admitted that he wanted both Robinson and Sturgill fired, apparently as a condition of his return to Northfork (Tr. 45, 53-57).

In reaching my conclusions herein, I have not disregarded the decision of the referee in Mr. Collins' case before the Kentucky Division of Unemployment Insurance in which it was determined that Collins "was discharged for reasons other than misconduct and [was] not disqualified from unemployment insurance benefits" (Exh. C-1). I am unable to give the referee's decision any weight, however, since it is clear on the face of the decision that the referee misconstrued the sequence of events. The Complainant himself testified under oath at the Commission hearings at bar that he was terminated before he talked to the state inspector and by inference therefore, also before he had threatened to call vice president Kegan and MSHA. It is also apparent from the decision that critical witnesses for Northfork did not testify and that the referee had only Collins' version of events from which to reach his conclusions. In addition, without a complete record, including a transcript of the proceedings before the referee, the referee's decision could be given but little weight. *See Pasula 2 FMSHRC at 2795.*

Within the above framework of law and evidence, I conclude that Mr. Collins voluntarily resigned his position with Northfork and, accordingly, the discrimination complaint herein must be dismissed.

ORDER

Discrimination proceeding Docket No. KENT 2007-15-D is hereby dismissed.

A handwritten signature in black ink, appearing to read "Gary Melick", written in a cursive style.

Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (Certified Mail)

Daniel F. Dotson, Esq., 178 Main Street, Suite 1, Whitesburg, KY 41858

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Plaza, Suite 310, Lexington, KY 40517**

/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 5, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2006-531
Petitioner	:	A.C. No. 05-03836-94203
	:	
v.	:	
	:	Foidel Creek Mine
TWENTYMILE COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor;
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Twentymile Coal Company.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Twentymile Coal Company (“Twentymile”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). An evidentiary hearing was held in Steamboat Springs, Colorado. The parties introduced testimony and documentary evidence, presented oral argument, and filed post-hearing briefs.

I. BACKGROUND AND FINDINGS OF FACT

This case involves the alternate escapeway in the 20 Right continuous miner development section. The citation at issue alleges that the alternate escapeway was not being maintained in a safe, travelable condition. The section had three entries, also called gate roads, that were being developed for longwall mining. The No. 1 entry was the alternate escapeway and was ventilated with return air. The No. 2 entry was the primary escapeway and was ventilated with intake air. This entry was used as the travelway for mine vehicles. The No. 3 entry was the belt entry.

As the 20 Right section was developed, mining progressed downhill into a syncline until the 65+00 crosscut and it proceeded back uphill with some flat areas along the way. Any water in the area tends to flow toward the bottom of the syncline. In the 20 Right section, the lowest point was in the No. 1 entry at the 65+00 crosscut. The mine had developed a pumping system to handle the water. First, a series of French drains were established in the crosscuts of the No. 2

entry to permit the collection of water for removal. Pumps operated with compressed air (“air pumps”) were installed to remove the water from the drains. Because there is frequent vehicular traffic in the No. 2 entry, the presence of water creates difficult and muddy driving conditions. Twentymile also installed a series of electric pumps and water tanks in the No. 1 entry to remove water. A pump at the bottom of each tank pumps water through a hose to the next outby tank for removal from the mine. These tanks are known as “shark tanks.”

Todd Croft, a fire boss, conducted the required weekly examination of the No. 1 entry on Wednesday, March 15, 2006. He testified that he did not see any significant or hazardous accumulations of water in the No. 1 entry during his examination. (Tr. 133-34). The area was muddy. He also testified that water tended to collect in areas where the syncline was present in other development panels.

On Friday, March 17, 2006, the power was turned off in the 20 Right section to advance the section. The power center was moved in an inby direction and the auxiliary fans in the No. 1 entry were moved from 67+00 to a point outby 72+50. The electric pumps in that entry did not operate during the time that the power was off. As a consequence, water began to accumulate in the No. 1 entry. In addition, the pump in the shark tank at crosscut 42+00 malfunctioned with the result that water entering the tank overflowed and ran back down to the 65+00 crosscut. Twentymile installed an electric pump at crosscut 65+00 on Friday evening to lower the water level. (Tr. 127, 131, 146). The belt in the No. 3 entry was advanced about 250 feet on Saturday, March 18.

On Sunday, March 19, MSHA Inspector Jeff Fleshman inspected the No. 1 entry. Doug Curtis, a fire boss, accompanied the inspector. They encountered some water in the entry at 65+00. They continued walking further inby up to 70+00. The area at 70+00 was flat and water was present there as well. Inspector Fleshman testified that the water extended a distance of 700 feet along the entry between 65+00 and 72+50. (Tr. 24). The inspector measured the water just outby the fans. He testified that the average depth was seven inches. He testified that the ground under the water was uneven with tire ruts throughout the area. The inspector did not measure the depth of the water in the ruts but Mr. Curtis estimated that the water was 13 to 15 inches in some locations. (Tr. 25, 129). The water in the entry did not extend rib-to-rib in all locations. A person could walk on a “meandering cow path” and stay relatively dry. (Tr. 25). The water was silted and murky. The inspector testified that there was “[n]o real distinct path to travel the escapeway in a reasonable and hasty fashion.” (Tr. 28). He stated that as he approached the auxiliary fans, he “got a big piece of No. 9 wire wrapped around [his] feet” that was under the water and he tripped on it. *Id.* In addition, he stated that there were about six pieces of ventilation tubing in the entry that were each about 10 feet long.

Inspector Fleshman issued Citation No. 7636848 under section 104(d)(1) of the Mine Act alleging a violation of section 75.380(d)(1) as follows:

The alternate escapeway (Entry 1 Return) for the 20-Right development working section was not being maintained in a safe travelable condition. Water accumulations, measured up to 7-inches deep, from rib to rib, existed from 40 feet outby crosscut No. 65+00 to 72+00 in Entry No. 1.

In the termination notice issued by Inspector Fleshman on March 21, 2006, he stated:

This 104(d)(1) citation is modified to include that mine examiners should have seen this condition which expressed more than ordinary negligence in failing to recognize the drowning hazard which existed immediately outby the auxiliary fans on the working section.

Inspector Fleshman determined that an injury was highly likely and that any injury could reasonably be expected to be permanently disabling. He determined that the violation was of a significant and substantial nature ("S&S") and that the negligence was high. The safety standard provides that "[e]ach escapeway shall be maintained in a safe condition to always assure passage of anyone, including disabled persons." The Secretary proposes a penalty of \$7,800.00 for this citation. Twentymile constructed two bridges over the areas of concern to Inspector Fleshman to abate the cited condition, one over the area around 65+00 and the other around 70+00.

II. DISCUSSION WITH ADDITIONAL FINDINGS AND CONCLUSIONS OF LAW

A. Brief Summary of the Argument

The Secretary contends that the conditions found in the No. 1 entry would hinder miners when trying to escape the mine in an emergency. Miners should not face tripping hazards and should not have to find a cow path through water when there is an emergency. Miners carrying out a disabled person would be particularly impeded by the accumulation of water. The violation was S&S because it was reasonably likely that someone would be seriously injured in the event of an evacuation during an emergency. She argues that the facts in this case are quite similar to those in *Maple Creek Mining, Inc.*, 27 FMSHRC 555 (August 2005).

The Secretary argues that Twentymile knew that water would naturally accumulate in the syncline and that it was not doing enough to control this water. A similar citation was issued on the 16 Right development section. In addition, in the 19 Right development section, muddy conditions were found in the same area. As a consequence, Twentymile had notice of the problem and knew that more needed to be done. Twentymile's failure to act amounted to an unwarrantable failure to comply with the safety standard.

Twentymile argues that the safety standard does not require an escapeway be free of normal mining conditions. A mine floor is never smooth or free of ruts. It may contain debris and other tripping hazards. The term "passable" means "capable of being traveled." (T. Br. 7). A person could get out of the mine in an emergency, including disabled miners. The citation states that the only impediment to passage was water that was up to seven inches deep. Water that is so shallow that it does not go over the tops of miners' boots does not impede travel.

The citation does not mention ruts or other obstructions in the escapeway. In addition, there was no evidence that muck was present under the water. There was a lifeline along the escapeway, but the Secretary presented no evidence that water was present along the lifeline. Twentymile argues that the testimony of its witnesses clearly establishes that the escapeway was more than adequate for travel, including travel during an emergency for disabled persons.

In addition, Twentymile argues that the cited conditions were not S&S because Inspector Fleshman only said that the water in the escapeway *could* slow egress or cause someone to stumble. The remainder of his testimony addressed the nature of any injuries if such an event were to occur. Consequently, the Secretary did not establish the third element of the *Mathies* test. In addition, it was not reasonably likely that anyone would use the alternate escapeway in the event of an emergency.

Finally, Twentymile contends that it did not unwarrantably fail to comply with the safety standard. Twentymile installed drains and air pumps in the 20 Right Section as the section was developed. It installed the system of electric pumps with shark tanks to remove any water that was not removed by the air pumps. When water began accumulating on the evening of March 17, the company installed an additional electric pump in the lowest area. The water had not been present in the No. 1 entry for a significant length of time and it was not deep enough to create a hazard to miners.

B. Analysis of the Issues

1. The Violation

The safety standard requires that *each* escapeway be maintained in a *safe condition to always assure passage of anyone*, including disabled persons. Thus, both escapeways must be in a safe condition and must be travelable by anyone, including disabled persons, at all times. *Maple Creek*, at 561. I find that the Secretary established that the alternate escapeway was not in a safe condition and was not travelable by everyone who might need to use it in an emergency. Although the water was not extraordinarily deep and it did not extend from rib to rib in all areas, it would slow people down if they were trying to exit the mine using this escapeway. Any ruts that were obscured by the water would be stumbling hazards that would also slow people down trying to escape in the event of an emergency. Finally, the extra ventilation tubes, which are normally hung from the roof until needed, were in the water along with some of the wire used to hang these tubes. These obstructions would also tend to slow people down as they attempt to

exit the working section. I find that the alternate escapeway was not in a safe condition and, as a consequence, the passage of persons during an emergency could not be assured.

I reject Twentymile's argument that to "assure passage of anyone" only means that the escapeway must be "passable" in the sense of "capable of being traveled." There is no question that the alternate escapeway was capable of being traveled because Inspector Fleshman and Doug Curtis walked through the cited area. It is clear from the language of the safety standard itself, the purposes of the standard, and Commission precedent that an escapeway must be more than just "passable." *Maple Creek*, at 560. Miners would "likely need to move expeditiously through the area in order to seek safe passage away from what could be a dangerous underground environment." *Id.* The water and other obstructions would likely cause the miners, especially stretcher bearers or others assisting disabled persons, to slow their egress, to slip and fall, or to drop the stretcher. Consequently, I find that the Secretary established a violation.

2. Significant and Substantial

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

The Secretary established the first two elements of the test. It is the third element of the *Mathies* test that requires the most careful analysis. The Commission has held that judges should ordinarily not rely on presumptions when analyzing the third element. *Manalapan Mining Co.*, 18 FMSHRC 1375, (Aug. 1996). Nevertheless, it would be too simplistic to hold that the violation was not S&S because it was unlikely that there would have been an emergency evacuation of the section or it was unlikely that the miners would need to use the alternate escapeway in an emergency. The escapeway requirements in section 75.380 were promulgated to make sure that both escapeways are safe and readily available in the event of an emergency evacuation. As a consequence, I must analyze whether there was a reasonable likelihood that the hazards *contributed to* by the violation would result in an injury in emergency situations.

On one hand, the water was not so deep as to make the entry impassable. There is no evidence that the inspector or Mr. Curtis became mired in muck as they walked through the entry. Wire and ventilation tubing was present only at the extreme inby end of the alternate escapeway just outby the auxiliary fans at 72+50. It only took a few minutes for these obstructions to be moved to the side of the entry. The No. 1 entry is the alternate escapeway. Miners would always use the No. 2 intake entry to evacuate the section, either in vehicles or on foot, if that entry were available. The No. 2 intake entry was clear of water and other obstructions. On the other hand, the No. 1 entry had ruts under the water that could not be seen. Miners would have to meander through the entry to find those areas that were clear of water. Inspector Fleshman tripped over some wire in the water as he inspected the entry. (Tr. 28). The inspector saw water flowing under a stopping from the No. 2 entry into the No. 1. (Tr. 26).

I find that the preponderance of the evidence establishes that it was reasonably likely that the hazards present in the cited areas of the No. 1 entry would contribute to an injury in the event of an emergency evacuation. I rely on the testimony of Inspector Fleshman and Mr. Curtis in reaching this conclusion. (Tr. 33-34, 129-30). When Inspector Fleshman was asked to discuss the hazards that he believed were present in the escapeway, he testified:

The tripping hazards. The blocked escapeway. Basically, you would have to move all the tubing out of the way coming out from the section. Tripping, slipping, falls. Not being able to see where you were walking in the muddy water if you are coming out of there in haste. You need a clean place to take off, not just guess where you are having to walk in the entry.

(Tr. 33). As the safety standard requires, I have taken into consideration the ability of miners to transport an injured miner out of the No. 1 entry. The uneven footing that was hidden under the murky water, as well as the other obstructions, would make it reasonably likely that someone would trip and fall. Although miners may be able to mitigate the risk of injury through the exercise of caution when exiting the mine, the ability of miners to walk cautiously through hazardous areas in the event of an emergency is not part of the analysis under the third element of the *Mathies* test. *Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (July 1992). I also find that it is reasonably likely that any injury would be of a reasonably serious nature. The injuries would range from a twisted ankle to broken bones. I reject Inspector Fleshman's conclusion, set forth in the termination notice, that the conditions presented a drowning hazard. It was highly unlikely that anyone would drown in the No. 1 entry in the event of an emergency evacuation.

3. Unwarrantable Failure

I find that the Secretary did not establish that the violation was the result of Twentymile's unwarrantable failure to comply with the safety standard. The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as

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

Twentymile knew that the syncline presented a challenge because water tended to accumulate in the area. When it developed the entries in each section that crossed the syncline, it blasted a hole in the floor at a number of crosscuts and installed French drains. It removed the water from the drains using air pumps that continue to operate even when the power is off during a power move. Such power moves are required every three or four days when a longwall section is being developed. Twentymile installed a series of shark tanks with electric pumps in them to remove any water that was not being removed by the system of French drains. When excess water was discovered in the No. 1 entry on March 17, an additional electric pump was brought in and installed to remove the water.

The Secretary contends that the extra pump that was brought in was raised up too high with the result that it was “sucking air” rather than removing water. The pump was not installed in a sump, but was placed on the floor of the entry. I credit the testimony of Twentymile’s witnesses that this electric pump was removing water from the No. 1 entry. (Tr. 93-94, 109-110, 121-22).

I find that the evidence establishes that the shark tank at 42+00 was not operating properly. Shift Foreman Allen Meckley wrote in his notes on March 18 “Shark Tank 42 running over - pump kicking power.” (Tr. 105-06; Ex. R-2). He testified that he asked the fire boss to check the pump out and reset the power. (Tr. 106). The improperly operating pump at 42+00 allowed water to recirculate back to the area around 65+00. The shift foreman believed that the problem with the shark tank had been corrected.

I find that Twentymile’s conduct amounted to ordinary negligence rather than aggravated conduct. It was not ignoring the water problem created by the syncline and it was not indifferent to the problem. It had taken several measures to remove the water from the mine, as described above. If the shark tank pump at 42+00 had not continued to kick out, it is likely that most if not all of the water would not have been present on March 19. In looking at the factors set forth in *Mullins & Sons Coal*, I find that the evidence establishes that the condition only existed for about two days. (Tr. 97, 121, 127-28, 155). Twentymile had knowledge of the cited condition and had been taking steps to remove the water, as described above. On direct examination, Inspector Fleshman testified that there was water present from “just outby crosscut 65 to just outby

crosscut 72+50” for a distance of 700 feet. (Tr. 24; Ex. J-2). The evidence establishes, however, that water was mostly present around 65 and outby the auxiliary fans. (Tr. 54, 122-23). The No. 1 entry between these two locations was dry with water in some locations. Inspector Fleshman did not measure the depth of the water in these areas. As a consequence, I find that the violative condition was not particularly extensive. As described above, Twentymile had undertaken several initiatives to eliminate or reduce the water problem in the area of the syncline.

The Secretary contends that Twentymile had been put on notice that greater efforts were necessary for compliance. I disagree. The Secretary points to a citation that had been issued two years earlier when there was 16 inches of water in the No. 1 entry of the 16 Right development section. (Ex. G-3). Twentymile upgraded its pumping systems after that citation was issued. She also relies on the discussion between Inspector Fleshman and the mine’s safety director at the onset of the instant inspection during which he informed the company that escapeways were going to be given “heightened scrutiny” during MSHA inspections. (Tr. 17-18, 154-55). The inspector started his inspection two to three days before he issued the citation. This notice did not put Twentymile on notice that greater efforts were needed to comply with the standard. Inspector Fleshman simply told Twentymile that MSHA would be looking more closely at escapeways as a result of the Sago accident. Finally, the Secretary relies on muddy conditions that the inspector observed in the 19 Right gate road earlier in the inspection. (Tr. 18-19). He advised the company’s safety director at that time that mud can impede passage during an emergency evacuation. Again, the muddy conditions and the inspector’s statement did not put Twentymile on notice that greater efforts were necessary in the 20 Right section.

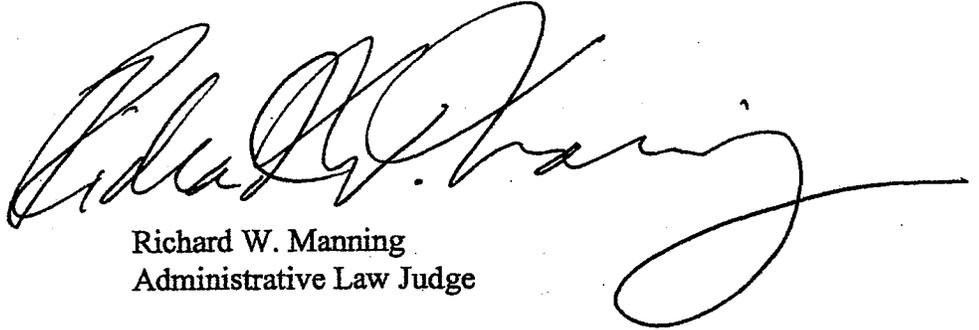
Although the violation was present for anyone to see, mine management genuinely believed that it had taken steps to eliminate the hazard. Although I determined that the violation was S&S, it did not pose a high degree of danger to miners. Violations of the standard often involve situations in which 16 inches or more of water is present or there is a blockage in the escapeway. In this instance, there was an S&S violation of the standard, but I do not find that the facts presented “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care” on the part of Twentymile management.

III. APPROPRIATE CIVIL PENALTY

Section 110(i) of the Mine Act sets out six criteria to be considered in determining an appropriate civil penalty for a violation. The parties stipulated that Twentymile is a large operator. MSHA issued about 271 citations and orders at the Foidel Creek Mine in the two years preceding March 19, 2006. The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect on Twentymile’s ability to continue in business. My findings on gravity and negligence are discussed above. The penalty was reduced because I determined that the violation was the result of Twentymile’s moderate negligence rather than its unwarrantable failure to comply with the safety standard. In addition, as discussed above, I find that the violation was not quite as serious as Inspector Fleshman believed it to be.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$3,000.00 for this violation. Accordingly, Citation No. 7636848 is **MODIFIED** to a section 104(a) significant and substantial citation with moderate negligence. Twentymile Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$3,000.00 within 30 days of the date of this decision.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

September 14, 2007

CARMEUSE LIME AND STONE, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 2006-158-RM
v.	:	Citation No. 6108736; 01/31/2006
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2006-159-RM
MINE SAFETY AND HEALTH	:	Citation No. 6108738; 02/01/2006
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. KENT 2006-186-RM
	:	Order No. 6108751; 02/15/2006
	:	
	:	Docket No. KENT 2006-206-RM
	:	Citation No. 6108752; 02/15/2006
	:	
	:	Docket No. KENT 2006-253-RM
	:	Citation No. 6108779; 04/17/2006
	:	
	:	Plant Black River Operation
	:	Mine ID 15-05484
	:	
	:	Docket No. KENT 2006-254-RM
	:	Citation No. 6109486; 04/12/2006
	:	
	:	Docket No. KENT 2006-255-RM
	:	Citation No. 6109487; 04/12/2006
	:	
	:	Docket No. KENT 2006-256-RM
	:	Citation No. 6109488; 04/12/2006
	:	
	:	Underground Black River Operation
	:	Mine ID 15-00062
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2006-318-M
Petitioner	:	A. C. No. 15-05484-87032
	:	
v.	:	
	:	

CARMEUSE LIME & STONE, INC.,	:	Docket No. KENT 2006-396-M
Respondent	:	A. C. No. 15-05484-89897
	:	
	:	Plant Black River Operation
	:	
	:	Docket No. KENT 2006-397-M
	:	A. C. No. 15-00062-89894
	:	
	:	Underground Black River Operation

DECISION

Appearances: Joseph B. Lockett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and Petitions for Assessment of Civil Penalty brought by Carmeuse Lime & Stone, Inc., against the Secretary of Labor, and by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Carmeuse Lime & Stone, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests the issuance of two orders alleging violations of the Act and six citations alleging violations of the Secretary’s mandatory health and safety standards. The petitions allege one violation of the Act and six violations of the Secretary’s mandatory health and safety standards and seek penalties of \$3,674.00. A trial was held in Covington, Kentucky. For the reasons set forth below, I vacate one order and three citations, modify one order and one citation, affirm two citations and assess penalties of \$511.00.

Settled Matters

At the beginning of the trial, the parties announced that they had settled one of the orders and four of the citations. (Tr. 9-10.) The Respondent agreed to pay the \$291.00 penalty proposed for Citation No. 6108752, in Docket Nos. KENT 2006-206-RM and KENT 2006-318-M, which was issued in connection with “imminent danger” Order No. 6108751, issued under section 107(a) of the Act, 30 U.S.C. § 817(a), and contested in Docket No. KENT 2006-186-RM. (Tr. 9.) Order No. 6108751 will be vacated.¹ Citation No. 6108736, in Docket Nos. KENT 2006-158-RM and KENT 2006-396-M, will be modified by deleting the “significant and substantial” designation and reducing the penalty from \$247.00 to \$60.00. (Tr. 10.) The

¹ Although it is not clear from the transcript, Counsel for the Secretary has confirmed in a September 12, 2007, letter that vacation of this 107(a) order was part of the settlement.

Respondent agreed to pay the \$60.00 penalty proposed for Citation No. 6108779, in Docket Nos. KENT 2006-253-RM and KENT 2006-396-M. (Tr. 10.) Finally, the Secretary agreed that Citation No. 6109488 in Docket Nos. KENT 2006-256-RM and KENT 2006-397-M will be vacated. (Tr. 10.) The terms of the agreement will be carried out in the order at the close of this decision.

Background

Carmeuse Lime & Stone operates the Black River underground limestone mine and plant on the Ohio River, south of Cincinnati, in Pendleton County, Kentucky. Limestone is extracted from the mine, using the room and pillar method, and processed into chemical lime at the plant. It is a large operation, covering about 100 acres. The underground mine has ceilings 25 feet tall and headings 50 feet wide. About 90 miners work in the underground mine and approximately 120 miners work at the plant.

MSHA Inspector Richard L. Jones was inspecting the plant on February 1, 2006, when he observed seven employees of A&T Industrial Services on the site. A&T had been contracted by Carmeuse to do clean-up work at various locations around the plant, using a vacuum truck to do the work. The A&T employees provided Jones with MSHA Forms 5000-23, "Certificate of Training," when he requested them. However, he did not recognize the name of the person who had signed the forms as having given the training or the location where the training had been given. The inspector called the person who had given the training and determined that the training had been given under Part 46 of the regulations, 30 C.F.R. § 46.1 *et seq.*, rather than Part 48, 30 C.F.R. § 48.1 *et seq.*, and that the instructor had not been certified by MSHA.² Consequently, he issued an order under section 104(g)(1) of the Act,³ 30 U.S.C. § 814(g)(1), to A&T. He also issued Citation No. 6108738, under section 104(a), 30 U.S.C. § 814(a), to

² Part 46 governs "Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines." Part 48, "Training and Retraining of Miners," governs all other miners whether working in underground mines, surface mines, or surface areas of underground mines. It is not disputed that A&T's employees should have been trained under Part 48.

³ Section 104(g) provides that:

(1) If, upon any inspection or investigation . . . the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training . . . , the Secretary . . . shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required

Carmeuse. On March 2, 2006, the citation was modified to a 104(g)(1) order.

The basic facts with regard to the two remaining citations are not in dispute and the parties have stipulated to most of them. At approximately 6:00 a.m. on Monday, April 10, 2006, a crew of 12 Carmeuse hourly employees, a supervisor, Shane Tuel, and an engineer proceeded underground by way of the slope car. They were close to the bottom of the slope when they smelled an odor. They noticed soot in the travelway of the slope. Without investigating further, they decided to leave the mine and reached the surface about 6:10 a.m.

Once on the surface, Tuel contacted Greg Black, the Mine Production Superintendent, at his home. Black in turn contacted Gary Greene, the Mine Maintenance Superintendent, at his home and they agreed to proceed to the mine. They arrived at approximately 7:30 a.m.

At about 8:00 a.m., Black, Danny Willis and Trevor Tallent, all members of the Black River mine rescue team, checked the quality of the air exiting the mine at the slope portal and proceeded underground. They were not wearing mine rescue breathing apparatus. They took air quality readings at the bottom of the slope. They then traveled by tractor to the 7N transformer where they again took air quality readings. The only difference in the three air quality readings was that the reading for CO had increased from 5 parts per million (ppm) at the portal and the foot of the slope to 12 ppm at the transformer. They returned to the surface at approximately 9:00 a.m.

The mine rescue team consisting of Greg Black, Nick Brewer, Jerry Butler, Danny Willis and Garland Case then organized to go underground. A command base was set up on the surface at 9:15 a.m. The team proceeded underground at 9:20 a.m. wearing mine rescue apparatus.

Alane Preston, the Safety and Loss Prevention Manager, called MSHA to advise them what was occurring at 9:33 a.m. At 10:00 a.m., Don Ratliff, the MSHA Field Office Supervisor, called the mine and issued a verbal 103(k) order requiring the withdrawal of the rescue team from underground.⁴ The team exited the mine after issuance of the order.

MSHA Inspector Thomas Galbreath was sent to the mine to investigate the situation, arriving at about 1:00 p.m. There, he met with Inspector Jones, who was already at the mine conducting an inspection, and Carmeuse officials. A mine exploration plan was drawn-up by Carmeuse and the mine rescue team again proceeded underground at 2:40 p.m. At about 3:30 p.m., the team reached the area of the P-19 conveyor where there had been a fire. The belt on the conveyor had burned and several small areas of material were still smoldering and were put out by fire extinguishers.

⁴ Section 103(k), 30 U.S.C. § 813(k), provides, in pertinent part, that: "In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine"

The last crew in the mine prior to April 10, 2006, at 6:00 a.m., was a maintenance crew which left the mine at 4:00 a.m. on Sunday, April 9. They were welding a belt structure and sparks from the welding apparently ignited the belt, although there was no evidence of fire when the maintenance crew left the area.

As a result of this incident, Inspector Galbreath issued Citation Nos. 6109486 and 6109487 to Carmeuse under section 104(a) of the Act. They, along with Citation No. 6108738, were contested at the trial. The citations will be discussed in the order that they were issued.

Findings of Fact and Conclusions of Law

Citation No. 6108738

This citation alleges a violation of section 48.25 of the Secretary's regulations, 30 C.F.R. § 48.25, in that:

Seven untrained contractor employees were allowed to work on this property because the operator did not conduct a complete search to assure the required training had been completed. The operator had no effective system in place to research the validity and completeness of the training that is required before allowing contractor employees to work. These contractor employees had been hired to perform cleanup work in the plant. The contractor employees produced 5000-23 training records, but the person that had conducted the training was not an MSHA certified trainer, and the training plan used was 30 C.F.R. Part 46 type.

(Govt. Ex. 1.) Section 48.25 requires that: "Each new miner shall receive no less than 24 hours of training as prescribed in this section. Except as prescribed in this paragraph, new miners shall receive this training before they are assigned to work duties."

As a threshold matter, the operator argues that the violation was properly issued under section 104(a) of the Act, and should not have been modified to allege a violation under section 104(g). The Commission has held that a 104(g) order must name the miners affected by the order so that it can later be determined whether the named miners had received the proper training to allow them to re-enter the mine and it must be issued "on the spot during or immediately following the inspection and provide for immediate withdrawal of the miners in question." *Twentymile Coal Co.*, 26 FMSHRC 666, 674 (Aug. 2004), *rev'd on other grounds* 411 F.3d 256 (D.C. Cir. 2005). Here the order meets neither of these requirements. Thus, it appears the operator is correct. Apparently recognizing this, the Petitioner stated in her brief that: "The Secretary would not oppose a modification of the violation to a 104(a) citation." (Sec. Br. at 9.) Consequently, I will modify the order back to a 104(a) citation.

It is undisputed that the seven A&T employees had not been trained as required under section 48.25. Nevertheless, the Respondent asserts that it should not be charged with this violation because it had “a more than adequate system in place to assure that its contractors had the MSHA-required training under 30 CFR. Part 48.” (Resp. Br. at 6.)

Gary Pelech, a Carmeuse maintenance planner, met with Todd Tallon, A&T President, on November 16, 2005, to discuss the work to be done and advised him that the workers had to be trained under Part 48. (Tr. 47-48.) In addition, Pelech gave Tallon a written document setting out the work to be done and that the workers be Part 48 trained. (Resp. Ex. 12.) On January 11, 2006, Pelech provided site-specific training to six of the A&T employees and required them to show him their MSHA 5000-23 forms showing their previous training. (Tr. 49-52.) The seventh employee was trained in the same manner on February 1, 2006. (Tr. 53.) When the seven employees signed in at the mine on February 1, they signified by a check mark on the sign-in sheet that they had been site-specific trained and MSHA Part 48 trained. (Resp. Ex. 13.)

It appears that Carmeuse had taken reasonable steps to insure that A&T’s employees were properly trained. However, the fact remains that they were not. The Act imposes strict liability on mine operators for violations regardless of fault, even if the violation was committed by an independent contractor, such as A&T. *Intern. Union, United Mine Workers v. FMSHRC*, 840 F.2d 77, 83-84 (D.C. Cir. 1988); *Extra Energy, Inc.*, 20 FMSHRC 1, 5-6 (Jan. 1997); *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359 (Sept. 1991). Moreover, it is within the Secretary’s discretion whether or not to cite the independent contractor, the operator, or both for the violation. *Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006.) Finally, operators have the overall compliance responsibility for insuring that independent contractors comply with the standards and regulations applicable to the work being performed by them in the operator’s mine. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986); *Mingo Logan Coal Co.*, 19 FMSHRC 246, 250 (Feb. 1997). Accordingly, I conclude that the Respondent violated the regulation as alleged.

Significant and Substantial

The inspector found this violation to be “significant and substantial.” A “significant and substantial” (S&S) violation is described in section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation “of any mandatory health or safety standard . . . of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)

I find that the “significant and substantial” designation is not applicable to this violation. As section 104(d)(1) plainly states, only violations of a “mandatory health or safety standard” can be S&S. Section 3(l) of the Act, 30 U.S.C. § 802(l), defines “mandatory health or safety

standard” as “the interim mandatory health or safety standards established by titles II or III of the Act, and the standards promulgated pursuant to title I of this Act.” Training and retraining of miners is not included in either title II or III of the Act, nor is it included in the Secretary’s mandatory health and safety standards promulgated pursuant to title I of the Act.

The mandatory health and safety standards are set out in Parts 56, 57, 58, 62, 70, 71, 72, 75, 77 and 90 of the regulations and are clearly identified as such.⁵ In contrast, section 48.21, 30 C.F.R. § 48.21, states: “The provisions of this subpart B set forth the mandatory requirements for submitting and obtaining approval of programs for training and retraining miners working at surface mines and surface areas of underground mines.”

The U.S. Court of Appeals for the District of Columbia Circuit has held that the Act “does not authorize the FMSHA to designate as ‘significant and substantial’ a violation of a regulation such as 50.11(b) that is not a mandatory health or safety standard.” *Cyprus Emerald Resources v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). Section 48.25 is a regulation such as section 50.11(b), 30 C.F.R. § 50.11(b), that is not a mandatory health or safety standard. Accordingly, I conclude that the violation was not “significant and substantial” and will modify the citation.

Citation No. 6109486

This citation alleges a violation of section 50.10, 30 C.F.R. § 50.10, because:

The mine operator did not immediately contact MSHA when evidence of a mine fire was discovered and the mine was evacuated. The supervisor and the day shift maintenance crew traveled down the slope at approximately 0600 on 4/10/2006. The supervisor immediately evacuated the crew from the mine, upon evidence of a fire, at approximately 50 foot from the bottom of the slope. MSHA was not notified until a phone call was made to Don Ratliff, Field Office Supervisor, in Lexington, Ky. at 0933. The mine had been evacuated at approximately 0615.

⁵ 30 C.F.R. § 56.1 (“This part 56 sets forth mandatory safety and health standards for each surface metal or nonmetal mine”); 30 C.F.R. § 57.1; 30 C.F.R. § 58.1 (“The health standards in this part apply to all metal and nonmetal mines.”); 30 C.F.R. § 62.100 (“This part sets forth mandatory health standards for each surface and underground metal, nonmetal, and coal mine”); 30 C.F.R. § 70.1; 30 C.F.R. § 71.1; 30 C.F.R. § 72.1 (“The health standards in this part apply to all coal mines.”); 30 C.F.R. § 75.1 (“This part 75 sets forth safety standards compliance with which is mandatory in each underground coal mine”); 30 C.F.R. § 77.1; 30 C.F.R. § 90.1 (“This Part 90 is promulgated pursuant to section 101 of the Act”). Where the introductory language of a Part is not set out, it is essentially the same as the language in the Part preceding it.

(Govt. Ex. 10.) Section 50.10 requires, in pertinent part, that: “If an accident occurs, an operator shall immediately contact the MSHA District Office having jurisdiction over the mine. . . . The operator shall contact MSHA as described at once without delay and within 15 minutes.” For the purposes of this violation, section 50.2(h)(6), 30 C.F.R. § 50.2(h)(6), defines “accident” as: “An unplanned mine fire not extinguished within 30 minutes of discovery.”

At approximately 6:00 a.m. on Monday, April 10, 2006, Shane Tuel and his crew went underground in the slope car. (Jt. Ex. 1, Stip. 30.) They were close to the bottom of the slope when they smelled an odor and noticed soot in the travelway of the slope. (Jt. Ex. 1, Stip. 31.) As a result, they went back out of the mine.

Inspector Thomas Galbreath testified that he issued Citation No. 6109486 because:

[T]he evidence of a fire was discovered at approximately 6 a.m. by [the] maintenance crew going in, and at that time the maintenance supervisor evacuated the mine, and at that time there was evidence of fire, unplanned fire, and it became reportable. And it was not reported in the proper length of time. If he had got to the surface at 6:15 – an unplanned fire, you would have 30 minutes to extinguish it. If he had that time to extinguish it, it would have been 6:30 which, 15 minutes to report it, which would have been 6:45, and our Lexington field office was not called with the information until approximately 9:33.

(Tr. 110-11.)

The evidence in this case does not support a violation of section 50.10. The regulation requires that a fire be discovered, not be extinguished within 30 minutes and MSHA not be notified of the fire within 15 minutes of it not being extinguished. None of these occurred. A fire was not discovered at the time the inspector concluded that it had been. The operator was investigating the cause of the odor and soot, when MSHA ordered that the mine be evacuated. And when the fire was finally discovered, it was extinguished within 30 minutes.

The term “mine fire” is not defined in the regulations. “Fire” is defined as “the phenomenon of combustion as manifested in light, flame, and heat and in heating, destroying and altering effects.” *Webster’s Third New International Dictionary (Unabridged)* 854 (2002 ed.). It has been defined in another case involving this regulation as “a rapid, persistent chemical change that releases heat and light and is accompanied by flame, especially the exothermic oxidation of a combustible substance. *American Heritage Dictionary of the English Language*, 62 (4th ed. 2006).” *Phelps Dodge Tyrone, Inc.*, 29 FMSHRC ____, slip op. at 6, No. CENT 2006-212-RM (July 25, 2007) (ALJ). “Mine,” of course, is defined in section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1), and for the purposes of this decision is not in issue.

Significantly, neither definition of “fire” includes an “odor” or “soot.” Clearly, Tuel did not “discover” a “fire,” with light, flame and heat, before he decided to return to the surface with his crew. While his actions were certainly prudent, all that his information provided the operator was that there might be a problem in the mine that needed to be investigated. Among the possibilities that the company management considered before going back into the mine were that a piece of diesel equipment may have been left on in the mine, as had happened previously, or there was some sort of fire. (Tr. 187.)

The Commission has held with regard to this regulation that:

Although the regulation requires operators to report immediately certain “accidents” as defined in section 50.2(h), it must contemplate that operators first determine whether particular events constitute reportable “accidents” within that definition. Section 50.10 therefore necessarily accords operators a reasonable opportunity for investigation into an event prior to reporting to MSHA. Such internal investigation, however, must be carried out by operators in good faith without delay and in light of the regulation’s command of prompt, vigorous action. The immediateness of an operator’s notification under section 50.10 must be evaluated on a case-by-case basis, taking into account the nature of the accident and all relevant variables affecting reaction and reporting.

Consolidation Coal Co., 11 FMSHRC 1935, 1938 (Oct. 1989).

The citation in this case was issued during a period when an emergency temporary standard (ETS) had been issued by the Secretary. 71 Fed. Reg. 12252 (March 9, 2006). Among the changes made was the addition of a definition of “immediately” to section 50.10 as being “at once without delay and within 15 minutes.” *Id.* at 12269. In the preamble to the regulation, MSHA essentially adopted the Commission’s holding above, when it stated:

The ETS does not change the basic interpretation of § 50.10. By the terms of the provision, an operator is required to notify MSHA only after determining whether an “accident” as defined in existing paragraph 50.2(h) has occurred. This affords operators a reasonable opportunity to investigate an event prior to notifying MSHA. That is, mine operators may make reasonable investigative efforts to expeditiously reach a determination.

Id. at 12260.

In conformance with these guidelines, Black, Willis and Tallent went into the mine to

investigate the situation. Prior to entering the mine they checked the air coming from the slope portal; nothing indicated that a fire was occurring. (Jt. Ex. 1, Stip. 35.) When they reached the shop to see if any of the diesel equipment was running, the air quality readings were normal. (Jt. Ex. 1, Stip. 36, Tr. 196.) Not finding any equipment running, they continued on. When they reached the 7 North transformer they got a CO reading of 12 ppm. (Jt. Ex. Stip. 36.) They were not sure what this meant, so they headed to the fresh air side of the mine. (Tr. 198.) At that point, Black decided that since a mine rescue team exercise had already been planned for that day, it would be good training to complete the search of the mine as a mine rescue team training exercise and they returned to the surface. (Tr. 199.)

The five man mine rescue team entered the mine at 9:20 a.m., wearing mine rescue apparatus. (Jt Ex. 1, Stip. 39.) Meanwhile, "to be cautious," Alane Preston called the MSHA District Office at 9:33 a.m. and spoke to Don Ratliff, telling him that they "were being conservative about it," that they "had not found a fire or anything," but "had some kind of soot in the air" and "were investigating" it. (Jt. Ex. 1, Stip. 41, Tr. 250-51.) Shortly thereafter, Ratliff called back and issued a "K" order, ordering the mine to be evacuated.

Under the guidance of MSHA Inspectors Galbreath and Jones, the mine was explored in the afternoon in accordance with a plan required by MSHA. At about 3:30 p.m., the team reached the P-19 conveyor where it was apparent that the 120 foot conveyor belt had burned. There were three areas of smoldering material which were immediately extinguished with fire extinguishers. It was believed that the belt was ignited by slag from cutting and welding operations in the area that ended about 3:00 a.m. on Sunday morning. (Tr. 212.)

Clearly, there was no evidence of a mine fire when Tuel left the mine. Black and his men were properly investigating the cause of the soot and odor when they left the mine to bring in the mine rescue team. The mine rescue team was properly investigating the situation when they were ordered to leave the mine. Nor does it appear that the company was not expeditiously trying to discover what the cause of the soot and odor were. Further, the air readings that they were taking did not indicate that anything serious was occurring. Lastly, when the cause of the soot and odor was finally discovered, what little fire there was, was putout in significantly fewer than 30 minutes. Accordingly, I conclude that the Respondent did not violate section 50.10 and the citation will be vacated.

Citation No. 6109487

This citation alleges a violation of section 57.4362, 30 C.F.R. § 57.4362, in that:

Following evacuation of the mine at approximately 0615 on 04/10/2006, because of a fire emergency, three mine rescue members entered the mine at approximately 0800 to explore the mine. These miners were not wearing any form of mine rescue apparatus and were in advance of the fresh air base. This mine has

three means of exhaust and only one exhaust (mine portal) was tested for atmospheric conditions. They were underground until approximately 0900. Mine rescue members were exposed to the possibility of toxic gases by not knowing the conditions underground. This hazard could cause a fatal accident. This mine has a fully equipped mine rescue team that is trained in all aspects of mine exploration.

(Govt. Ex. 11.) Section 57.4362 provides that: "Following evacuation of a mine in a fire emergency, only persons wearing and trained in the use of mine rescue apparatus shall participate in rescue and firefighting operations in advance of the fresh air base."

The Secretary has failed to establish this violation. While there may have been an evacuation of the mine, it did not occur in a "fire emergency," no persons were participating "in rescue and firefighting operations," and no one was "in advance of the fresh air base."

"Fire emergency" is not defined in the regulations. However, it stands to reason that for there to be a fire emergency, there must be a fire. As has already been seen in the discussion of the previous citation, when Black and the others entered the mine at 8:00 a.m., there was no fire. Indeed, fire was only one of several possibilities that they considered, when they entered the mine to investigate the cause of the soot and odor.

Further, in the preamble to this regulation, MSHA stated that: "[O]nce a fire emergency *has been declared* and a fresh-air base *has been established*, mine rescue apparatus must be worn as a protection against smoke, fumes, and toxic products of fire." 50 Fed. Reg. 4,022, 4,028 (1985) (emphasis added). As the Commission has observed, the preamble and the regulation envision a formal procedure of declaring a fire emergency and establishing a fresh air base. *Gouverneur Talc Co.*, 20 FMSHRC 129, 135 (Feb. 1998). Here, no fire emergency had been declared.

Next, it is plain from the facts of this case that the three men were not participating in rescue and firefighting operations when they went into the mine to investigate the situation.

Finally, no fresh air base had been established, so no miner could have been in advance of it. The Secretary grounds its claim that a fresh air base had been established on the conclusion of Inspector Galbreath that the fresh air base was located "at the hoist house." (Tr. 121.) Galbreath offered no other evidence as to how he concluded that a fresh air base was ever established, let alone that one was set-up prior to the three men entering the mine at 8:00 a.m. On the other hand, Sammy Linville, a Carmeuse kiln operator and rescue team member, testified, as a witness for the Secretary, that "when the three guys came out and we was in a room, we said that the hoist house would be considered the fresh air base," which indicates that if one were established, it was not until after the three men came out of the mine. (Tr. 160.) Black testified that a fresh air base was not "established any time on April 10." (Tr. 217.) That Black was correct is

supported by the fact that the parties stipulated that a “command base” was set up on the surface at 9:15 a.m. (Jt. Ex. 1, Stip. 40.)

Certainly, a fresh air base, as commonly understood, was not established. A “fresh air base” is defined as: “An underground station, located in the intake airway, that is used by rescue teams during underground fires and rescue operations. The base should be as close to the fire as safety will permit, adequately ventilated, and in constant touch with the surface by telephone.” Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms*, 223 (2d ed. 1997). As Commissioner Jordan pointed out in her concurring opinion in *Gouverneur Talc*, “[a]ccording to this definition, therefore, the regulation contemplates the formal establishment of a properly ventilated underground area to demarcate the boundary beyond which apparatus must be used.” 20 FMSHRC at 137 (footnote omitted). Obviously, nothing like that was established here.

In conclusion, at least three of the four elements of this regulation were not proven by the Secretary. Accordingly, I conclude that the company did not violate section 57.4362 and will vacate the citation.

Civil Penalty Assessment

The Secretary has proposed a penalty of \$1,769.00 for Citation No. 6108738. However, it is the judge’s independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996).

In connection with the penalty criteria, the parties have stipulated that Black River Plant employed approximately 120 people who worked 247,291 hours in 2005. (Jt. Ex. 1, Stips. 3 and 4.) From this, I find that the operator is a medium to large size business. The parties also stipulated that the penalties will not affect Carmeuse’s ability to remain in business, and I so find. (Jt. Ex. 1, Stip. 14.) From the Assessed History Violation Report and the allied papers, I find that the operator has a slightly lower than average history of previous violations. (Govt. Ex. 14.) I further find from the citation that the company demonstrated good faith in abating the violation.

With regard to gravity, I agree with the inspector that the failure to insure that contract employees are properly trained could have serious consequences. However, in this case it did not because the employees had received site specific training, had received Part 46 training and were not working in or around Carmeuse employees, but were cleaning up lime dust around the plant area. Therefore, I find that the violation was not very serious.

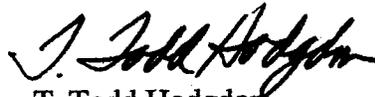
Finally, I do not agree with the inspector that the operator was moderately negligent in connection with this violation. The company had made reasonable, although not exhaustive, efforts to insure that the A&T employees were properly trained. Consequently, I find the operator’s level of negligence for this violation was low and will modify the citation accordingly.

Taking all of these factors into consideration, I conclude that a penalty of \$100.00 is appropriate for Citation No. 6108738. I further find that the penalties agreed to for the settled citations are appropriate under the penalty criteria.

Order

In view of the above, Citation No. 6108736, in Docket Nos. KENT 2006-158-RM and KENT 2006-396-M, is **MODIFIED**, as agreed by the parties, by deleting the "significant and substantial" designation and is **AFFIRMED AS MODIFIED**; Order No. 6108738, in Docket Nos. KENT 2006-159-RM and KENT 2006-396-M, is **MODIFIED** from a 104(g) order to a 104(a) citation and by deleting the "significant and substantial" designation and is **AFFIRMED AS MODIFIED**; Order No. 6108751, in Docket No. KENT 2006-186-RM, is **VACATED**, as agreed by the parties; Citation No. 6108752, in Docket Nos. KENT 2006-206-RM and KENT 2006-318-M, is **AFFIRMED**, as agreed by the parties; Citation No. 6108779, in Docket Nos. KENT 2006-253-RM and KENT 2006-396-M, is **AFFIRMED**, as agreed by the parties; Citation No. 6109486, in Docket Nos. KENT 2006-254-RM and KENT 2006-397-M, is **VACATED**; Citation No. 6109487, in Docket Nos. KENT 2006-255-RM and KENT 2006-397-M, is **VACATED**; and Citation No. 6109488, in Docket Nos. KENT 2006-256-RM and KENT 2006-397-M, is **VACATED**, as agreed by the parties.

Carmeuse Lime and Stone, Inc., is **ORDERED TO PAY** a civil penalty of **\$511.00** within 30 days of the date of this order.



T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 26, 2007

R S & W COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2007-361-R
v.	:	Order No. 7010193; 09/13/2007
	:	
SECRETARY OF LABOR,	:	Docket No. PENN 2007-362-R
MINE SAFETY AND HEALTH	:	Order No. 7010194; 09/13/2007
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. PENN 2007-363-R
	:	Citation No. 7010195; 09/13/2007
	:	
	:	R S & W Drift
	:	Mine ID 36-01818

DECISION

Appearances: Adam F. Welsh, Esq., U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Respondent
Adele L. Abrams, Esq., Diana R. Schroeder, Esq., Beltsville, Maryland, on behalf of the Contestant

Before: Judge Barbour

In these contest proceedings brought pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)) (the "Mine Act" or "Act"), RS&W Coal Company ("RS&W" or "the company") challenges the validity of two orders of withdrawal and one citation issued on September 13, 2007, at its RS&W Drift Mine.¹ Because its mine was

¹The company contests Section 104(b) Order No. 7010193, which charges the company with a failure to timely abate a violation of 30 C.F.R. § 75.370(a)(1) (Docket No. PENN 2007-361-R); Section 104(b) Order No. 7010194, which charges the company with a failure to timely abate a violation of Section 75.364(b)(4) as cited in section 104(a) Citation No. 7009620 (Docket No. PENN 2007-363-R); and section 104(a) Citation No. 7010195, which charges the company with a failure to comply with Section 103(a) of the Act, 30 U.S.C. § 813(a) (Docket No. PENN 2007-363-R). As noted in the decision, the company effectively withdrew its contest of Order No. 7010193 when MSHA vacated the order. The citation underlying the order (Citation No. 7008854) remains extant, and Docket No. PENN 2007-361-R is therefore stayed pending either the abatement of the citation or the issuance of an order of withdrawal for the company's failure to timely abate the violation of Section 75.370(a)(1) alleged in the citation. Tr. ___; Screen 44-46 of 1,000 (e-mail

closed by the orders, the company sought and was granted an expedited hearing, which was convened on Tuesday, September 18, 2007, in Washington, D.C. At the close of the hearing, and with the concurrence of counsels, I entered a decision on the record. Except for editorial changes, the decision is reproduced verbatim herein.²

In these contest proceedings brought pursuant to Section 105(d) of the . . . Act . . . RS&W Coal Company is contesting two orders issued pursuant to Section 104(b) of the [A]ct and one citation issued pursuant to Section 104(a). Prior to going on the record, the conte[st] regarding the validity of one of the orders, Order No. 7010193, was resolved for the time being when the time for compliance with the standard allegedly violated in the citation underlying the order was extended, and the order was effectively terminated. . . . [T]he parties and I agree . . . [a] proper way to proceed . . . is to keep Docket No. PENN 2007-361-R open as a viable case pending resolution of the underlying citation. Should another order be issued, it will be filed under this document number and proceedings will then . . . follow according to the Commission's rules.

[T]he remaining cases, Docket[s] No. PENN 2007-362-R and PENN 2007-363-R, have been heard today in the Commission's offices in . . . [Washington, D.C.]. Because Order No. 7010194 had the effect of closing the underground portion of RS&W's mine, the hearing was conducted on an expedited basis. I am issuing this bench decision following the receipt of all of the evidence and after hearing counsels' closing arguments. The decision will not be final and appealable to the Commission until it has been reduced to writing, and that cannot take place until the transcript is received. Upon issuance of the written decision, it will be sent by fax to counsel.

* * *

version of the transcript).

²Because I doubted the hearing process was the best way to reach a result that adequately accounted for the technological and fiscal considerations involved in resolving the parties' remaining outstanding issues, before entering the bench decision, I expressed my hope the parties would redouble their efforts to resolve the remaining issues short of another expedited hearing. Tr. __; Screen 967-970 of 1,000 (e-mail version of transcript). As the reader will note, the hope is reiterated in the bench decision.

Order No. 7010194 [Docket No. PENN 2007-362-R] charges RS&W with a violation of 30 C.F.R. [§] 75.364(b)(4), a mandatory safety standard requiring in pertinent part at least every seven days [that] a certified person examine for hazardous conditions at each seal along a return or bleeder air course.³ RS&W is cited for failing to make the required examination at the mine's east side worked out area seals. The underlying citation, Citation No. 7009620, gave RS&W a week to abate the alleged violation. The contested order was issued eight days later when . . . [the inspector] determined . . . the condition had not been corrected.

There are [three] primary issues. Was RS&W in violation of Section 75.364(b)(4)[?] [I]f so, was it given a reasonable time to abate? And was it reasonable not to further extend the time for abatement?

I find RS&W violated Section 75.364(b)(4). First, I conclude from the testimony of Inspector Dudash that there were at least two seals that, if inspection is required, should have been inspected. It is true when Inspector Dudash issued the citation and Inspector Mehalchick issued the order, that neither inspector personally observed the seals. Nonetheless, I accept the testimony of Inspector Dudash that he saw the seals in May [2007], and there is no indication the nature of the seals changed between May and September. In fact, the only change would have been their progressive deterioration, something that is inevitable over time and something that, if anything, would warrant their inspection.

In reaching . . . [a] conclusion . . . the two seals existed, I note further Inspector Dudash's unrefuted testimony . . . he carefully checked with his supervisor to make sure, in view of . . .

³Section 75.364(b)(4) states:

At least every 7 days, an examination for hazardous conditions at the following locations shall be made . . . :

* * *

(4) At each seal along return and bleeder air courses and at each seal along intake air courses not examined under § 75.360(b)(5).

[an] [existing] petition for modification [(discussed below)], which seals, if any, . . . [were] “covered” by the standard, and that the two seals were among those indicated to him [to be covered].

Having found the seals existed, I also find . . . they were not inspected every seven days as required by the . . . [cited standard]. There really isn't any dispute about this point.

RS&W would have me find a [granted] petition for modification entered into the record as Contestant's Exhibit 1 removed . . . [the company's] obligation to inspect the seals. This I cannot do.

First, and most obviously, the petition modifies the application of Section 75.332(b)(1) and Section 75.332(b)(2) [not Section 77.364(b)(4)].

Moreover, in my opinion, the company never satisfactorily explained how the modification of standards that deal with the ventilation of working sections and working places relieve it from the duty to weekly examine seals in return and bleeder air courses. And I further find, as [the company's witness] Mr. Randy Rothermel testified, that the area in question was a bleeder.

In reaching these findings, I am mindful of the company's assertion . . . compliance will force it to send an examiner into a dangerous area [,but for me t]o focus . . . on the hazards posed . . . [to] the examiner, . . . [would require] me to ignore other [legal and readily available] options . . . namely, and as the inspectors repeatedly testified, to danger off the area or to rehabilitate it.

I understand there may be detrimental economic consequences to these alternative[s], but the economic feasibility of abatement has, in my view, only been argued, not proven, and I am not in a position to decide the issue on the record if I believed it relevant to abatement, which [in any event] I do not.

As for the greater hazard defense the company has raised, that is to say, [if the standard applies] . . . compliance poses a diminution of safety for the examiner, . . . that [i]s an issue for a petition for modification of a cited standard, not as argued here[,] a defense to the violation.

Having found the violation existed, I further find the time granted to abate it was reasonable. It [i]s clear [to me] from the testimony had RS&W begun abatement efforts, perhaps even begun . . . discussion of such efforts [with MSHA], the time for compliance would have been extended. It is the operator's responsibility to comply, which means the operator must take the initiative in compliance efforts. Here I find RS&W did not take that initiative. [Rather, the company did nothing.]

In upholding the citation and order, I further find the violation was not serious. The danger, as explained by the inspectors, was that explosive or noxious gases might build up behind the seals and leak into the mine atmosphere. Given the lack of significant methane [ever accumulating] at the mine and given the lack of evidence of other dangerous gases accumulating, I find such a hazard was unlikely to occur.

Moreover, even if there had been a more immediate hazard, one would assume MSHA would have cited it long before [it issued the underlying citation on] September 5th, which leads me to a discussion of RS&W's negligence.

I conclude that it was low. As counsel for the operator pointed out and as the testimony establishes, the mine was inspected at least several times prior to September 5th . . . [Y]et [,] a violation of Section 75.364(b)(4) was not cited at those times.

I further find, as the company's witnesses testified, that management officials genuinely, albeit mistakenly, believe compliance was not required.

Moving on to the alleged violation of Section 103(a) of the [A]ct [Docket No. PENN 2007-363-R], I find the violation existed as charged.⁴ I accept the testimony of Inspector Mehalchick, who . . . was there, that when Mr. [Randy] Rothermel was asked [by MSHA] to let MSHA officials look at the [mine's] books, he denied the request. This violated the cited section of the [A]ct because the MSHA officials were at the mine as part of

⁴Section 103(a), 30 U.S.C. § 813(s), states in pertinent part:

Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal . . . mines each year[.]

an ongoing inspection and, therefore, [they] had the right to see the books.

I have no doubt Mr Rothermel was [,as he testified,] angry. I have no doubt he felt [ill] [as he also testified] [and that] . . . he was on medication that made him sleepy, but his excuse that he did not authorize MSHA to look at the books because he thought the mine . . . was closed [by the previously issued Section 104(b) Order] . . . rings hollow to me. The order which he was given specifically restricted closure to the underground areas of the mine and [did] not affect the mine office where everyone involved had gathered.

The parties agree . . . the violation was unlikely to cause an injury or illness, and I concur. The parties disagree as to RS&W's negligence, and here on balance, I find the evidence favors a lower level of negligence than [that] found by the inspector.

The fact Mr. Rothermel was ill may well have temporarily clouded his judgment and triggered the response that he made [denying MSHA permission to see the books].

Therefore, [in these cases] and in view of . . . the extenuating circumstances, while I will uphold the contested enforcement actions, I will modify the inspectors' negligence findings.

Accordingly, Citation No. 7009620, Order No. 7010194 and Citation No. 7010195 are affirmed, except to the extent that Citation No. 7009620 and Citation No. 7010195 are modified to reflect RS&W's low negligence.

Finally, Docket No. [PENN 2007-] 361-R remains a viable case, subject to resolution of the pending citation.

This means MSHA is closing the underground portion of [RS&W's] mine for a non-S&S, non-serious violation caused by low negligence. Is it legal? Yes. Is it the best use of MSHA's authority? I leave that [question] for others to ponder, but what seems certain is that it would benefit all involved to try to work together in a cooperative rather than a confrontational spirit. The present situation obviously helps neither party[;] nor for that

matter does it assist [those of] the public [who rely on the mine's anthracite coal].

* * *

Tr. __; Screen 970-998 of 1,000 (e-mail version of transcript).

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

Distribution: (by Certified Mail and by Facsimile)

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/ej

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 27, 2007

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 2007-25-M
Petitioner : A.C. No. 41-01118-99184
v. :
: :
LATTIMORE MATERIALS COMPANY, LP, : Ambrose Sand Plant
Respondent :

DECISION

Appearances: Amy S. Hairston, Esq., and Michael D. Schoen, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of the Petitioner;
Charles C. High, Jr., Esq., Kemp Smith, LLP, El Paso, Texas, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000), the "Act," charging Lattimore Materials Company, LP (Lattimore) with violations of mandatory standards and proposing civil penalties of \$37,450.00, for the violations. The general issue before me is whether Lattimore violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional specific issues are also addressed as noted.

As amended, Citation No. 6262905, issued pursuant to Section 104(d)(1) of the Act, charges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.16009 and, alternatively, the standard at 30 C.F.R. § 56.9201.^{1 2} The citation alleges as follows:

¹ Section 104 (d)(1) of the Act provides as follows:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health

Three miners were seriously injured when a suspended shaker deck slipped and pinned two of the miners against a pipe and knocked the third miner down into the belly of the sand screen. Three other miners narrowly avoided serious injury by the swinging screen deck. The Plant Manager was directing the crew and was one of the miners pinned against the pipe. The crew was working directly in front of the suspended shaker deck. The plant manager engaged in aggravated conduct by allowing the crew, while under his direction, to work in the path of the suspended deck. This is an unwarrantable failure to comply with a mandatory standard.

The standard at 30 C.F.R. § 56.16009 provides that “[p]ersons shall stay clear of suspended loads.” For the reasons that follow, I find that the Secretary has sustained her burden of proving a violation of the cited standard.

It is undisputed that three employees of Lattimore, Bradley Rader, Ricky Pittman, and Robert Fondren, were seriously injured around 8:20 a.m. on January 12, 2006, while helping to install a replacement deck on a shaker at the Ambrose processing plant. A crane operated by co-worker Jerry Hicks was used to maneuver the deck frame at a 20 degree angle into the shaker. The 4,200 pound replacement deck was approximately eight feet wide, 20 feet long and four feet high. When the deck had been partially inserted into the shaker screen housing, it became stuck. At that point, the four hoisting straps were slackened by the crane operator and the two front straps removed. Just before the straps were released from the crane, Rader, Pittman and Fondren, were pulling on the replacement deck with two hoists and a “come-along”. The deck then suddenly slid into place striking Rader, Pittman and Fondren. Rader and Pittman were standing between the deck frame and the bottom chute in front of a cross-member pipe and both employees were struck in the pelvic area.

Crane operator Jerry Hicks witnessed the incident from the crane cab. Hicks testified that he had, on at least six prior occasions, used a crane to insert a replacement deck into a shaker and he discussed the procedures to be followed that day with his supervisor, Ricky Avery. Four hoisting straps were rigged so that the deck was at a 20 degree angle - - the angle at which the insertion was

or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those person referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

² In light of my findings herein that the Secretary has sustained her burden of proving a violation of the standard at 30 C.F.R. § 56.16009, there is no need to address the alternative charges. The issue is moot.

to take place. Two of the four hoisting straps were attached about six feet from the front of the deck and the other two were attached at the rear (Dol. Exh. No. 31). Hicks testified that, as he raised the deck to about 30 feet, employees grabbed the sides of the deck to feed it into the slot. The front hoisting straps were removed after the shaker deck was inserted up to the point where those straps had been attached to the deck. Hicks testified that he lowered the position of the crane to provide enough slack to enable removal of the front straps. At the same time, the rear straps were also slackened. Hicks testified that the rear straps had "quite a bit of slack" and that he was not given any signal to resume tension on the straps. He was following the hand signals of his supervisor, Randy Brazier, who was standing on a platform on the shaker. Hicks testified that he then saw the deck suddenly start sliding into the shaker without warning. The crane was not then holding the deck. There was no tension on the straps. When the deck slid in, it had been inserted about half way "more or less". Hicks noted that once the straps were slackened, he had no control over the deck. It was about five minutes later when he learned of the injuries and he assisted in hoisting the injured miners down by stretcher. He observed that all of the injured were talking but he did not know how serious they were injured.

Ambrose plant manager, Bradley Rader, also testified. Ricky Avery, Lattimore's area supervisor was his supervisor. Rader was in charge of the deck installation. He had never been trained by Lattimore on deck installations nor about safe installation procedures. He had only twice before installed such decks. On this occasion, as the deck was being installed, he was in the shaker "possum belly" with Pittman and Fondren (Dol. Exh. No. 6). Rader testified that they were using two five-ton hoists and a one-and-a-half-ton "come-along" to pull the deck inside. They were pulling the deck in only about one-quarter to one-half inch at a time and it had been pulled about half way in when it became stuck. Rader testified that he added the "come along" and was trying to rehook the hoist when the deck suddenly came sliding in pinning him. The deck was moved to free him and he was transported to a stretcher by the crane to the ground. He felt bruised, and intermittently hot and cold. He was taken to Parkland Hospital by helicopter where his spleen and one kidney were removed.

On cross examination Rader testified that he had never before seen a deck slide in as it did on this occasion. It had to be pulled in with hoists and "come-alongs" an inch at a time. Later at the hospital, Mark Clark, the Vice President of Aggregates Operations, visited him. Rader said that he did not know anything about his condition. His surgery was not completed until after 6:00 p.m. that day.

Another eyewitness, Robert Fondren, the Ambrose plant operator, testified that he was working for Brad Rader in the "possum-belly" of the shaker. He recalled that it took about one hour to move the replacement deck about half way in. It then took off, pinning him. Fondren credibly testified that he wanted to use the one-and-one-half ton "come-along" as a brake to hold the deck but he could not get it hooked up. "Brad stopped me from hooking it up". Fondren opined that the "come-along" should have been used as a brake to prevent the deck from sliding into the miners.

Eyewitness Ricky Pittman was also in the "possum-belly" helping to install the deck.

Pittman recalled that he was working a "come-along" pulling the deck into the housing as Rader was working another "come-along". The deck was half way into the shaker when it stopped. Suddenly the deck slipped and he saw that Rader was trapped. Pittman testified that "Rader didn't look good". Pittman testified that the emergency medical technicians (EMT's) never told him what was wrong with him. He arrived at the hospital around mid morning but did not go to the emergency room until 5:00 p.m. that day.

Within the framework of the above essentially undisputed eyewitness testimony, it is clear that the replacement deck remained at least partially suspended from the crane as it was inserted into the shaker and up to the point at which the front two harnesses, located approximately six feet from the front of the deck, were slackened and removed and when the two rear harnesses were also slackened. There is no dispute that the three man crew under the direction of plant manager Bradley Rader were working directly in the path of the replacement deck as it was suspended from the harnesses attached to the crane until that point in time. This clearly constitutes a violation of the standard at 30 C.F.R. § 56.16009. It is also clear, however, that at this point in time the deck continued to be suspended by the shaker frame itself. Indeed, the eyewitness testimony of crane operator Jerry Hicks that the deck then "was hung in the shaker frame" is undisputed (Tr. II p. 76). Shortly thereafter, demonstrating that it was capable of free movement, the deck slid into the shaker frame injuring Mssrs. Rader, Pittman and Fondren. Under these circumstances there was also a violation of the cited standard.

In reaching these conclusions I have not disregarded Lattimore's argument that the meaning of the cited standard should be controlled by the heading of the subpart of the Secretary's regulation in which it appears, i.e. "Materials Storage and Handling". Lattimore contends that the shaker deck was not a "material" and that the cited standard is therefore inapplicable hereto. When considering analogous arguments regarding the rules of statutory construction however, the dominant legal authority is that, when interpreting statutes, where the text of the section is clear, the section's heading does not limit or alter its text. See *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947); *Francisco v. Stolt Achievement Mt.*, 293 F.3d 270, 275 (5th Cir. 2002); and *Samirah v. O'Connell*, 335 F. 3d 545, 548-549 (7th Cir. 2003). I find therefore that Lattimore's argument herein is not only without legal support but contrary to analogous legal authority.

I further find that the violation was "significant and substantial". A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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 injury in

question will be of a reasonably serious nature.

See also *Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

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), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984); See also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

In this case there was a clear danger to safety created by the violation i.e. the danger of being crushed by a deck weighing 4,200 pounds. Injuries, which of course actually occurred, were also reasonably likely. At the time of the incident there was nothing except friction to hold the deck from sliding into the shaker frame at a 20 degree angle and crushing miners working in its path. Indeed Mr. Fondren testified that he wanted to use a "come-along" to serve as a "brake" for the deck but was prevented from doing so by his Plant Manager Rader. It was also highly likely for injuries to be serious because of the weight of the deck. Indeed, as a result of the violation, Mr. Rader lost his spleen and a kidney and continues to suffer from brain trauma, Mr. Pittman suffered a broken pelvis and was unable to return to work for almost a year and Mr. Fondren suffered a fractured arm.

The violation was also clearly the result of Lattimore's "unwarrantable failure" to comply with the cited standard. Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-03; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991); see also *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure and recognized that a heightened standard of care is required of such individuals. See *Youghioghney & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (December 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (November 1995) (heightened standard of care required of section foreman and mine superintendent).

Several factors stand out in this regard. I find that indeed the violative condition was obvious and posed a high degree of danger. The evidence establishes that a deck weighing 4,200 pounds, was pointed at a downward angle of about 20 degrees, was restrained only by friction and that three employees working in a confined area were in its direct path. At least one of these employees, Robert Fondren, also clearly recognized the obvious danger of the situation when he requested to use a "come-along" to serve as a "brake" and indeed had used a "come-along" in this manner during a

previous installation of a deck into the same shaker. The operator's agent, Plant Manager Bradley Rader vetoed Fondren's request with the tragic consequences that followed. Thus, the hazard was not only obvious but was also pointed out to the operator's agent who vetoed remedial action. The serious injuries suffered by Rader, Pittman, and Fondren further confirm the high degree of danger presented by the violative condition. These factors also establish that the operator was highly negligent in committing the violation.

Citation Nos. 6262903 and 6262904

Citation No. 6262903 alleges a violation of the mandatory standard at 30 C.F.R. § 50.10 and charges as follows:

The mine operator failed to notify MSHA of a serious accident when three miners were injured on 1/12/06 while attempting to install a shaker screen deck. After losing control of the suspended deck two of them were pinned inside the belly of the sand screen. The deck knocked down the third miner as it swung into the belly. The accident occurred on 1/12/06 around 8:00 a.m. MSHA was notified of the accident on 1/13/06 around 10:00 a.m. by a "courtesy call" from Scott Horner, Manager of ES&H.

The cited standard, 30 C.F.R. § 50.10, provides as follows:

If an accident occurs, an operator shall immediately contact the MSHA District Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District Office, it shall immediately contact the MSHA Headquarters Office in Arlington, Virginia by telephone, at (800) 746-1553.

Citation No. 6262904 alleges a violation of the standard at 30 C.F.R. § 50.12 and charges as follows:

The mine operator altered the site of an accident prior to notifying MSHA that a serious accident had occurred and after the recovery of injured miners. The mine operator took pictures of the accident scene and talked to miners at the site. The mine operator failed to preserve the accident scene and resumed work on the sand screen on 1/13/06 prior to notifying MSHA of the accident.

The cited standard, 30 C.F.R. § 50.12, provides as follows:

Unless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

As noted, the cited regulatory provisions are triggered only by the occurrence of an “accident” within the meaning of the Secretary’s regulations. The term “accident” is defined in 30 C.F.R. § 50.2(h)(2) to include “[a]n injury to an individual at a mine which has a reasonable potential to cause death....” The issue to be decided then, is whether any of the injuries to the three miners in this case had a “reasonable potential to cause death”.

I find that, indeed, even before the injured miners were transported by ambulance and helicopter to area hospitals, there was evidence available to agents of Lattimore that the injuries had a reasonable potential to cause death. It was clear, or should have been clear, to Lattimore’s agents who were present at, and immediately after, the accident that three miners had suffered crushing injuries from the shifting movement of a 4,200 pound replacement deck for the shaker screen. At least one of the victims, Plant Manager Brad Rader, told paramedic Deborah Sarrao, in the presence of other Lattimore employees, that he was in severe pain. Both Rader and Pittman were placed on backboards to protect them from spinal cord injuries. Rader was, according to Ms. Sarrao, also showing signs of shock. His skin was pale, he was sweating profusely and was disoriented. Rader and Pittman were also sent by helicopter to the Parkland Hospital, the nearest “level one trauma center” - the highest level trauma center.³

Michael Bose, then a Lattimore vice president, was at the plant at the time of the accident but was not at the immediate scene. He heard commotion and was able to talk to the victims as they laid on stretchers. Rader told Bose that he was in pain and Bose observed that Rader was disoriented. Pittman also told Bose that he was in severe pain. Bose acknowledged that he knew that disorientation was a sign of shock. He was also aware that helicopters picked up the victims and took them to Parkland Hospital. Bose, who acknowledged having had first aid training for about the previous 15 years and that he kept his training current, therefore had almost immediate knowledge that the three victims had suffered crushing injuries, that at least one was in severe pain, that they had been placed on backboards, (a practice he should have known is used to protect against spinal injuries), that one miner was showing signs of disorientation which were known to Bose as evidence of shock (a condition he knew or should have known may in itself cause death), and that the two injured miners were being sent by helicopter to what he should have known was a “level one” trauma center. Having had first aid training, Bose should also have known that crushing injuries often cause unseen internal injuries. Indeed, he should have been aware, as was Scott Horner, Lattimore’s manager of environmental safety and health and Mark Clark, vice president of aggregate operations, that a year and a half earlier at another Lattimore facility, a miner had also suffered crushing injuries and died as a result (See Exh. Dol. 14).

Under the circumstances, I conclude that indeed Lattimore’s agents should have known almost immediately after the incident that the injuries sustained by at least two of the injured miners had a reasonable potential to cause death and that, accordingly, the incident qualified as a “accident”

³ While there is no evidence that paramedic Sarrao conveyed her medical opinion to any agent of Lattimore, her observations of the victims corroborate what was observable to those agents.

within the meaning of 30 C.F.R. § 50.2(h)(2). Since MSHA was not contacted for more than 24 hours after the accident i.e. not until January 13th, at approximately 10:00 a.m., I do not find that such notification was “immediate” within the meaning of 30 C.F.R. § 50.10. Accordingly, the violation charged in Citation No. 6262903 is affirmed. The Secretary has found that gravity was low and I have no reason to disagree with that assessment. The Secretary has also found, however, that negligence was the result of the operator’s “reckless disregard”. I find the operator chargeable, however, with only moderate negligence in light of the ambiguities in the definition of “accident” in the cited standard, the fact that there was no evidence of any intentional cover-up or concealment after the accident, that there was no evidence that the delay impeded the investigation, that notice was actually provided to MSHA within 26 hours and that the violation was admittedly of low gravity and, in effect, presented no danger. See *Secretary v. Cougar Coal Company, et. al.*, 25 FMSHRC 513, 521-522 (September 2003), wherein the Commission stated that “it would benefit the mining community if the Secretary would clarify when it is urgent to notify MSHA, and when it is not”.

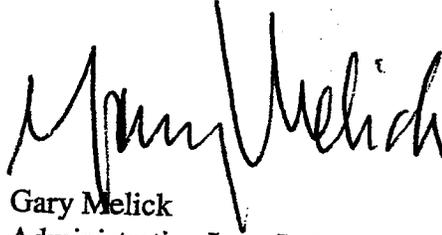
Trenton Scott Homer, Lattimore’s manager of environmental safety and health, testified that he authorized work to be resumed at the accident site around 4:30 or 5:00 pm. on the date of the accident. Homer acknowledged that thereafter the work crew moved the crane, removed rigging that was used for the deck installation and reinstalled guardrails that had been removed during the installation process. Walter DeLoach an inspector for the Department of Labor’s Mine Safety and Health Administration (MSHA) arrived at the mine around 1:30 p.m. on January 13, 2006. DeLoach testified that the rigging used to lift the deck was rolled up in the bed of the crane and miners were observed adding parts to the shaker screen. The shaker deck had also been mounted. Under the circumstances, I find that the accident site was indeed also altered following the “accident”. The Secretary has again alleged low gravity and I have no reason to dispute that finding. The Secretary has also found the operator chargeable with “reckless disregard”. I find no evidence of any attempt to cover-up or conceal the accident, there is no evidence that the altered scene was relevant to or impeded MSHA’s accident investigation and the violation was admittedly of low gravity and, in effect, presented no danger. For these and for the additional reasons stated above, I find the operator chargeable with but moderate negligence.

Civil Penalties

Under section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operator’s ability to continue in business. The record shows that Lattimore is a relatively small mine and has a modest history of violations (four violations for 19 inspection days). The gravity and negligence findings have previously been discussed. There is no dispute that the violations were abated in a timely and good faith manner and there is no evidence that the penalties would affect the operator’s ability to continue in business. Under the circumstances, I find that penalties of \$75.00, \$75.00, and \$36,800.00 for Citations No. 6262903, 6262904 and 6262905 respectively, are appropriate.

ORDER

Citations No. 6262903, 6262904 and 6262905 are affirmed and Lattimore Materials Company, LP, is directed to pay civil penalties of \$36,950.00 for the violations charged therein within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge
(202) 434-9977

Distribution: (Certified Mail)

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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 16, 2007

SECRETARY OF LABOR,	:	EMERGENCY RESPONSE PLAN
MINE SAFETY AND HEALTH	:	DISPUTE PROCEEDING
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. WEST 2007-892-E
	:	Citation No. 7284469; 9/18/2007
v.	:	
	:	Mine ID 05-03836
TWENTYMILE COAL COMPANY,	:	Foidel Creek Mine
Respondent	:	

DECISION

Appearances: Stephen Turow, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, and John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

This case is before me on a Referral of Emergency Response Plan Dispute, by the Secretary of Labor (“Secretary”), pursuant to section 316(b)(2)(G) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 876(b)(2)(G) (“ Mine Act”). At issue is a citation issued on September 18, 2007, charging Twentymile Coal Company with a violation of the Act by failing to adopt an emergency response plan that provided for a refuge area about halfway between the mine portal and the 6 Main North (“6 MN”) intake air shaft.¹ An evidentiary hearing was held in the Commission’s courtroom in Denver, Colorado, on October 2, 2007. The parties filed post-hearing briefs.

I. BACKGROUND WITH FINDINGS OF FACT

Congress enacted the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”) in response to recent fatal accidents at underground coal mines. The MINER Act amended section 316 of the Mine Act to require, *inter alia*, that each underground coal mine

¹ I use the term “refuge area” in this decision to refer to an area where emergency supplies of breathable air must be provided under an emergency response plan. The map at Joint Exhibit 7 (“JE-7”), shows the configuration of the mine portal, the 6 MN, and the main entries between these two points.

operator develop and adopt an Emergency Response Plan (“ERP”) and submit it to the Department of Labor’s Mine Safety and Health Administration (“MSHA”) for approval and periodic review. The MINER Act became effective on June 15, 2006.

Twentymile developed an ERP and, after discussions with MSHA, submitted several revisions of the plan to MSHA. The final revised plan was submitted on August 7, 2007. Section 316(b)(2)(E)(iii) of the Mine Act, as amended by the MINER Act, includes the following language: “The plan shall provide for emergency supplies of breathable air for individuals trapped underground sufficient to maintain such individuals for a sustained period of time.” It is the portion of Twentymile’s ERP dealing with this requirement in the outby area of the mine that is in dispute in this proceeding.

Rather than engaging in rulemaking, the Secretary elected to provide guidance to the underground coal mining community with respect the development of ERPs through a series of three Program Policy Letters (“PPLs”) and a Program Information Bulletin (“PIB”). MSHA’s first PPL, PPL 06-V-8, merely stated that an operator’s ERP must address the requirement to establish an emergency supply of breathable air and it indicated that MSHA is evaluating alternatives to meet this requirement and is soliciting further information on the requirement. (Stip. 13; Ex. R-50).² On August 4, 2006, MSHA issued PPL 06-V-9 which indicated that the agency needed more time to gather information on the issues of post-accident breathable air. (Stip. 14; Ex. R-52).

On October 24, 2006, MSHA published Program Policy Letter PPL 06-V-10 which states in part:

For an ERP to be approved, it must specifically address the type, amount, and location of post-accident breathable air necessary to maintain individuals trapped underground for a sustained period of time. Oxygen, compressed air, or other alternatives may be used to meet this requirement.

On August 30, 2006, MSHA published a Request for Information (RFI) in the Federal Register seeking further information from the mining community on “topics related to post-accident breathable air that would be sufficient to maintain miners trapped underground for a sustained period of time.” Once MSHA is able to review the information received, the Agency will provide additional guidance. In the meantime, however, mine operators shall gather information from available resources and provide for emergency supplies of breathable air.

² The parties submitted 44 Stipulations, which are referred to as “Stip.”

(Stip. 16; Exs. R-53, R-54).

Twentymile submitted its initial ERP on August 11, 2006. (Stip. 10; Ex. R-1). In October and November 2006, MSHA responded to Twentymile's initial ERP and a meeting was held at MSHA's Coal Mine Safety and Health District 9 headquarters ("District 9") to discuss the plan. (Stips. 17 & 18; Ex. R-2). Twentymile submitted a revised plan on February 1, 2007. (Stip. 19; Ex. R-3).

On February 8, 2007, MSHA issued Program Information Bulletin P07-03 which provided operators, for the first time, with specific, detailed guidance concerning MSHA's understanding of various ways in which operators could provide breathable air for individuals who may be trapped underground. (Stip. 20; Ex. R-55). MSHA subsequently developed three additional guidance documents and made them attachments to the PIB. (Stip. 20; Exs. R-57, R-58, R-59). The PIB required all operators to submit revised ERPs for MSHA's review by March 12, 2007.³ (Stip. 21).

On March 2, 2007, MSHA responded to Twentymile's ERP submission of February 1, 2007. (Stip. 23; Ex. R-4). MSHA addressed the issue of post-accident breathable air, in part, as follows:

(I) Emergency supplies of breathable air for individuals trapped underground.

In accordance with Program Policy Letter No. P06-V-10 and PIB P07-03, the type, amount and location of oxygen must be specified for the ERP to be approved. Relevant variables used in your mine specific analysis should be identified. If an approach other than boreholes or protected airlines that include sufficient volume of air for both breathing and purging is used, the approach for scrubbing carbon dioxide is necessary. Please include the parameters (e.g., number of persons, length of time, amount of oxygen per person per unit time, type of generation, delivery/conservation system, etc.) that were used to determine the quantity of breathable air. Air, food and water are to be provided for periods represented in one of the options presented in PIB P07-03 for the expected number of miners on the section; and, for sections using hot-seating during shift changes, the provisions should be doubled.

³ The PIB was challenged as improper rulemaking in the United States District Court for the District of Columbia, No. 07-1068. The challenge was resolved on August 22, 2007, pursuant to a settlement in which the National Mining Association withdrew its claim and MSHA re-affirmed that the PIB was a non-binding guidance document. (Stip. 22; Ex. R-56).

Id. On March 12, 2007, Twentymile submitted a revised ERP that contained a statement detailing the manner in which it intended to provide breathable air for trapped miners. (Stip. 25; Ex. R-5). On March 22, 2007, District 9 Manager Allyn Davis, responded to this revised plan and stated that it does not meet MINER Act requirements regarding the provision of breathable air for trapped miners. (Stip. 26; Ex. R-6). The letter sought additional clarification on this issue.

On March 28, 2007, Twentymile submitted a revised ERP. (Stip. 28; Ex. R-7). With respect to providing breathable air in outby areas, the plan provided under the heading “Additional possibilities outby the section”:

The recently completed intake ventilation shaft can be easily isolated from the main air courses with equipment doors and is accessible. This location is currently outfitted with emergency food supplies and water. The greater area can be quickly isolated with another installed open equipment door. Page phone communication to the surface is available. Additional utility pipes are installed at this location that can be utilized in an emergency.

Id. In its response of April 13, 2007, District Manager Davis asked “how the breathable air requirements will be met for outby personnel.” (Stip. 29; Ex. R-8). On April 23, 2007, Twentymile submitted a revised ERP that, with respect to Mr. Davis’s inquiry, stated:

Personnel working in outby areas can readily access the recently completed intake ventilation shaft should escape from the mine be impossible.

This shaft will be outfitted with an emergency escape hoist later this year.

Personnel working outby the working sections, either inby or outby the shaft, will have access to the shaft or access to one of the two intake escapeways to the portal.

Other means of escape are available to outby personnel, depending on their location, including the 18 Right intake bleeder shaft.

(Stip. 31; Ex. R-9).

In late May, a representative from Twentymile discussed the issue of outby personnel with Hillary Smith of MSHA’s District 9. Twentymile pressed Ms. Smith to explain why its ERP has not been approved when MSHA District 2 has approved ERPs at several mines that have provisions that are quite similar to Twentymile’s proposed ERP with respect to breathable

air in outby areas. Ms. Smith raised differences that she perceived between the situation at the Foidel Creek Mine and the mines in District 2. (Stip. 32). She advised Twentymile that, given the responses that MSHA provided in the Questions and Answers attached to PIB 07-03, she did not think that District Manager Davis would accept an ERP from Twentymile that failed to provide breathable air in the main entries at Foidel Creek for travel distances exceeding 15,000 feet. (Stip. 32; Ex. R-57). The representative for Twentymile told Ms. Smith that he did not believe that MSHA's position was correct. (Stip. 32).

On June 14, 2007, Twentymile submitted another revised ERP which provided in relevant part:

Personnel working in outby areas can readily access the recently completed intake ventilation shaft should escape from the mine be impossible. Currently, the eighteen foot intake shaft is regulated through a pair of equipment doors leading from the shaft bottom, providing additional intake air to continuous miner sections through one of the intake splits/primary escapeways from the portal. If necessary, the shaft bottom can be isolated by closing the equipment door regulators. The return entries around this shaft area are separated from the intake entries with Kennedy panel/Tekseal near zero leakage stoppings. In case of emergency barricading in this location, the intake pressure should minimize leakage of mine gasses into the area. If necessary, the drain pipe can be outfitted to provide additional air to the bottom of the shaft.

The greater area at the shaft bottom (approximately 100,000 cubic feet of space) can be closed off by closing and sealing a single equipment door. This area contains four cased drill holes from the surface. A mine page phone at the bottom is connected to a page phone on the surface and could be used for communications if this area is isolated off. One hole in this location is used for supplying aggregate material to the mine. Another is used for and connected to the mine compressed air system. These boreholes could be utilized to provide additional emergency supplies, including breathable air if necessary.

The intake shaft will be outfitted with an emergency escape hoist later this year. The equipment procurement and permitting are in progress and installation should be completed by late August 2007. Once in place, personnel could be removed from the mine at a rate of six persons every ten minutes. If necessary to provide additional breathable air to miners at the bottom, SCSRs delivered to the top

from the warehouse could be delivered to the bottom in the hoist cage.

Personnel working outby the working sections, either inby or outby the shaft, will have access to the shaft or access to one of the two intake escapeways to the portal. Personnel working in these areas will at no time be more than 10,000 feet from either the portal or the 6 Main North intake shaft. The main entries are outfitted with two separate intake escapeways, each travelable with diesel pickup mantrips, each containing caches sufficiently spaced for individuals walking and for the number of personnel working inby that point.

Other means of escape are available to outby personnel, depending on their location, including the 18 Right intake bleeder shaft. The cage is capable of handling four individuals at a time [and] a round trip from the surface to the bottom and back is less than 30 minutes. Two crews of twelve persons could be recovered to the top in less than three hours. If necessary to provide additional breathable air to miners at the bottom, SCSRs delivered to the top from the warehouse could be delivered to the bottom in the hoist cage.

(Stip. 33; Ex. R-10).

On June 22, 2007, MSHA responded by letter to Twentymile's revised plan. The letter states, in part:

The post-accident breathable air portion of the ERP that you have submitted does not meet the MINER Act requirements regarding the provision of breathable air for trapped miners. Given the conditions at the Foidel Creek Mine, the current version of the ERP cannot assure quantities of breathable air sufficient to maintain individuals trapped in the mine, unless it contains provisions that:

Post-accident breathable air needs to be addressed in the main entries an approximate distance of 10,000 to 15,000 feet from the portal. The distance from the portal to the intake shaft is too great a distance not to maintain some sort of post accident breathable air, and two isolated intake escapeways

to the same portal locations do not provide the same amount of protection as breathable air.

(Stip. 34; Ex. R-11).

On June 28, 2007, Dick Conkle, the Safety Director with Twentymile, informed Bill Reitze of MSHA that the revised ERP plan that Twentymile would be “submitting would not include refuge chambers in the mains entries and indicated that miners could not be trapped in this area because of multiple ways out of the mine.” (Stip. 36). Twentymile submitted this revised plan that, as relevant here, was substantially similar to the plan submitted on June 14, 2007. (Stip. 37; JE-1).

On July 31, 2007, Mr. Davis advised Twentymile that its ERP was approved, except for the part dealing with breathable air for outby miners. (Stip. 38). With respect to that portion of the plan, Mr. Davis stated:

Specifically, we cannot approve an ERP in full for the Foidel Creek Mine unless post-accident breathable air is provided at some point in the main entries at a distance of between 10,000 to 15,000 feet from the portal. Breathable air is necessary within this area to maintain miners who are traveling or performing maintenance/examination activities in the main entries and who could be trapped within the approximately 20,000-foot, and often significantly sloped, expanse between the portal and the intake air shaft, if an event (e.g., fire or explosion) compromises the intake escapeways and the intake air shaft. In such an instance, breathable-air would be necessary in the area that we have identified to permit miners to survive for a sustained period of time prior to rescue.

(Stip. 38; JE-2).

On August 7, 2007, Twentymile submitted the revised ERP that is the subject of the dispute in this case. The cover letter to the plan states:

We consider the Twentymile Mine configuration unique in that multiple directions are available for personnel working underground to use if an event required evacuation from the mine. We feel the requirement of a rescue chamber for the area in question, from the portal to the intake shaft, is not applicable because of the multiple directions available as described above and in the body of the Emergency Response Plan. Wording changes have been made to the Post-Accident Breathable Air, Outby the

section, page 3, fourth paragraph concerning personnel working outby the working sections. Added are the two sentences; “Therefore, these individuals would not be trapped by an event occurring in the mine. If changes are made to the mining plan that alters this configuration in a fashion that could result in entrapment, this plan will be modified to address those changes and provide the necessary facilities.”

(Stip. 40; JE-3). With respect to breathable air for outby areas, the plan submitted on August 7 was the same as the plan submitted on June 14 except for the changes highlighted in the above letter, some minor wording changes, and provisions that Twentymile will supply foam packs for ensuring a good seal around equipment doors in the area of the 6 MN shaft as well as food, water, first-aid kits, blankets, and emergency light sources in that area. (JE-4).

On September 10, 2007, District Manager Davis responded to Twentymile’s submission by stating, in part, that if Twentymile continues to refuse to establish a refuge area between the portal and the 6 MN intake air shaft, the Secretary will “conclude that the parties are at an impasse and will initiate proceedings pursuant to section 316(b)(2)(G) of the Mine Act to resolve the dispute.” (Stip. 41; JE-5). Twentymile responded to Mr. Davis’s letter by reiterating that the Foidel Creek Mine has a configuration that is “unique in that multiple directions are available for personnel working underground to use if an event required evacuation from the mine” with the result that “the requirement of a refuge chamber for the area in question, from the portal to the intake shaft, is not applicable. . . .” (Stip. 42; JE-6). The letter further states that “[i]f changes are made to the mining plan that alters this configuration in a fashion that could result in entrapment, this plan will be modified to address those changes and provide the necessary facilities.” *Id.*

On September 18, 2007, Hillary Smith of MSHA issued Citation No. 7284469 under section 104(a) of the Mine Act, alleging the following violation:

The Foidel Creek Mine violated § 316(b)(2) of the [Mine Act] by failing to develop, adopt, and submit to MSHA an emergency response plan . . . that effectively provides for the maintenance of individuals trapped underground for a sustained period of time. Specifically, the August 7, 2007, emergency response plan (ERP) does not provide materials and equipment necessary to supply breathable air for miners who may be trapped in the main entries of the mine in the approximately 20,000 foot distance between the portal and the intake air shaft near the 6 MN section.

The citation summarizes the negotiations that occurred and states that MSHA “notified the operator of its obligation to make the specific modification to the ERP in order to come into compliance with § 316(b)(2) of the Mine Act.” The citation then states that this “modification

would require the installation of an established refuge area/rescue chamber at a midpoint between the portal and the intake air shaft, which has the capability to maintain the maximum number of persons who may be trapped in this area for a period of at least 72 hours.”

The Secretary filed her referral of an ERP dispute with the Commission on September 20, 2007, in accordance with 29 C.F.R. § 2700.24(a). Twentymile timely responded to the referral and requested a hearing.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

Twentymile describes the issue in this case as whether the citation should be vacated as improperly issued because Twentymile’s ERP should have been approved without a requirement of a supply of post-accident breathable air, other than SCSRs, in the main entries between the mine portals and the 6 MN intake air shaft. The Secretary agrees with this description of the issue with the caveat that the citation must be affirmed if MSHA’s decision to reject the disputed provision of the ERP was not arbitrary or capricious.

A. Summary of the Parties’ Arguments

1. Secretary of Labor

The Secretary contends that the district manager did not act in an arbitrary or capricious manner when he refused to fully approve Twentymile’s ERP without including a provision for post-accident breathable air for miners who may be trapped underground in the mine’s main entries. The Secretary takes the position that, in the event of a fire in the belt entry or a fire associated with diesel equipment, or in the event of another incident produced by a confluence of unforeseeable events, miners may be prevented from escaping through the mine portal and may be driven deeper into the mine. Although the Secretary recognizes that miners may be able to travel the three and a half miles to the 6 MN air shaft and escape, some miners may not be able to reach that air shaft due to factors such as exhaustion, injury or disorientation from smoke and gasses.

She argues that the MINER Act does not limit the scope of protection by mandating the establishment of refuge areas only in areas where miners are “likely” to be trapped. Rather, the Act recognizes the possibility that miners may be trapped at any underground coal mine and requires each operator to provide breathable air sufficient to maintain miners who may be trapped underground. The evidence presented at the hearing establishes that there is a reasonable possibility that miners may be trapped in the main entries at the Foidel Creek Mine and may need a refuge area capable of providing breathable air to maintain them until they can be rescued. The district manager considered two specific scenarios when he determined that a refuge area was required: the possibility of a belt fire or an equipment fire. Because the evidence presented at

the hearing established that such events were reasonably possible, the district manager's determination was neither arbitrary nor capricious and the citation should be affirmed. While the Secretary recognizes that Twentymile has a number of measures in place that are designed to prevent or contain a fire in the mains, such measures are not fool-proof.

2. Twentymile

Twentymile contends that the Secretary's case rests on the "reasonable possibility" that a belt fire, equipment fire, or explosion would block miners working in the mains from escaping to the mine portal. With respect to emergency supplies of breathable air for miners trapped underground, the Senate Report states that "with regard to entrapment, the act requires that emergency plans analyze the *likely* risks to determine if breathable air beyond increased stores of SCSRs is necessary . . ." (Ex. R-60. p. 6) (emphasis added). As a consequence, Twentymile contends that the provision in the MINER Act requiring the provision of supplies of breathable air is not triggered by a mere "reasonable possibility" that miners could be trapped. An ERP must consider possible risks and provide for supplies of breathable air for risks that are "likely." This approach is consistent with the "reasonably prudent person" test used by the Commission to avoid due process problems. (T. Br. 16).

Twentymile also contends that the Secretary failed to establish that there was a "reasonable possibility" that anyone would become trapped in the mains at the Foidel Creek mine and would thereby need to seek refuge. Twentymile argues that the record in this case makes clear that the risk of miners becoming entrapped in the mains at the mine is extremely unlikely. Indeed, the Secretary admitted in her opening statement that it was unlikely that anyone would be trapped in that part of the mine. As a consequence, MSHA's district manager was required to approve Twentymile's ERP as a matter of law.

Although Twentymile does not believe that the use of an "abuse of discretion" or "arbitrary and capricious" standard is appropriate, application of such standard to the facts in this case must result in a finding that the decision of the district manager was arbitrary and capricious. Congress clearly required the Secretary to review each plan taking into consideration the "specific physical characteristics of the mine." (§ 316(b)(2)(C)(iii)). The district manager failed to recognize that there are multiple ways out of the mine that would preclude entrapment in the mains. In addition, he failed to recognize that, unlike most mines, Twentymile provides two isolated intake escapeways with air from different sources. He also failed to recognize that a miner could move easily from one intake escapeway to another without entering belt entries. He failed to recognize that miners working in the mains have vehicles and that they could drive to a mine exit. He also failed to take into consideration the enhancements with respect to fire protection that Twentymile had in place.

The district manager's rejection of the disputed provision of the ERP was made on an *ad hoc* basis rather than in accordance with "ascertainable standards." Such decision-making is itself arbitrary and capricious. The district manager failed to examine the relevant data and

articulate a satisfactory explanation for his action that sets forth a rational connection between the facts and the choice made. (T. Br. 19-20) (citations omitted). The district manager's decision was also internally inconsistent. The approved portion of the plan does not require a supply of breathable air for the longwall section because there were two isolated escapeways available. (Tr. 60; JE-4). The same logic applies to the mains because there are two isolated intake air escapeways in the mains in the direction of the mine portal. (Tr. 61; Ex. S-2). In addition, there were other escapeways in the direction of the portal, including the belt entry. Miners could also escape by traveling inby to the 6 MN intake air shaft where there is a hoist for use to escape during an emergency. Finally, Twentymile outfitted the 6 MN intake air shaft area with a refuge area that can be barricaded. Miners could barricade themselves and have breathable air supplied through boreholes from the surface.

It is clear from William Reitze's testimony that the district manager was concerned that the intake escapeways would become blocked near the mine portal in the event of a fire or explosion. Even if such a blockage occurred, which is highly unlikely, miners in the mains could drive or walk to the 6 MN intake air shaft and exit the mine. This route is primarily downhill. These facts undercut the district manager's rejection of the plan and the Secretary's argument that a refuge area is necessary in the vicinity of the 3 MN. Twentymile also notes that there are over 1,500 SCSRs stored in caches in the mains that are spaced no more than one half hour travel time apart. (JE-4; JE-7).

B. Summary of the Evidence

William Reitze, an MSHA supervisory mining engineer in District 9, reviewed emergency response plans for the district manager. (Tr. 25). Hillary Smith, who works for Mr. Reitze, was the point person in the review process. (Tr. 58-59). Reitze testified that "we felt that the distance between the portals and the 6 Main North . . . intake shaft escape facility was too far to allow either exhausted individuals or injured individuals to escape should there be an incident that occurs just inby the portals in the First Main North, Second Main North area." (Tr. 26). As a consequence, the district manager wanted a refuge area "somewhere roughly halfway between the main portals and the Six Main North intake escapeway," which would place it in the 3 MN area. *Id.* The district manager was seeking a facility that was "prebuilt" rather than having materials present that miners could use to barricade themselves. (Tr. 27, 59).

Reitze testified that an accident just inside the portal area may create a situation where a refuge area may be needed. Specifically, he testified that if miners cannot escape through the mine portal, they would have to travel, by one means or another, to the 6 MN escape shaft. (Tr. 28, 49). If there were an equipment fire and miners worked to try to put the fire out, they might become extremely exhausted and just might not be able to travel the over three mile distance to the 6 MN shaft. *Id.* He admitted that it would be a better practice to fight a fire near the portal from an outby direction and did not know whether the miners were so trained. (Tr. 66).

Reitze testified that an equipment fire could generate a significant amount of smoke and contaminate the air. Hydraulic fluid or diesel fuel could help propagate a fire. (Tr. 52-54). He admitted, however, that all underground vehicles were equipped with automatic fire suppression systems and fire extinguishers. (Tr. 71-72). Frictional heating from a belt moving against the metal frame could ignite float coal dust, coal dust, belt string, or loose coal. (Tr. 44-48, 68-69). Such a fire, if it became hot enough, could compromise stoppings separating the belt entry from one of the intake escapeways. *Id.* Reitze admitted that Twentymile has carbon monoxide (“CO”) sensors along the belt entry. (Tr. 67). MSHA’s requirement for a refuge area in the 3 MN is predicated on the assumption that both intake escapeways are contaminated with smoke. (Tr. 48). Although unlikely, Reitze testified that it is possible to have an explosion in the mains near the portal. He testified that for an explosion to occur “you would have to have float coal dust in the right proportions in suspension in the air stream and then subject that to some sort of ignition source or fire. . . .” (Tr. 55, 69-71). He said a hot fire can cause a roof fall which in turn can put float coal dust into suspension. *Id.* An explosion could damage stoppings or other ventilation structures that separate the air courses. (Tr. 56).

Reitze acknowledged that these events were not likely to occur. He stated:

This mine is a fairly progressive mine in many ways, so the likelihood would be very unlikely that [such events] could occur. But there is a reasonable possibility that they could occur.

(Tr. 30, 48, 57). He stated that this “reasonable possibility” was based on the fact that:

you cannot say that any type of incident will never happen. The history of the mining industry over the years over many hundreds of years has shown that you cannot rule out anything.

Id. He also testified that MSHA’s conclusion was based on specific factors in the mains at the Foidel Creek Mine. (Tr. 57-58). If the emergency event were to occur near the portals and miners could not exit the mine at the portals, they would have to travel about three and a half miles. Most of the travel distance would be downhill, but the grade in some places would be 15 to 17 percent. (JE-7). These steep grades could hinder travel for injured miners, especially if they were wearing a SCSR and the entries were filled with smoke. (Tr. 50).

The entries in the mains are about 18 feet wide and 8 feet high. (Tr. 32, 160). As stated above, the mains are on a downhill grade as one travels from the portals to the 6 MN intake air shaft, except that the entries go up again at an 8 percent grade close to the 6 MN air shaft. (Tr. 162). The grades are shown on the map submitted as part of the ERP, and range between 0 and 17 percent. (Tr. 34, 162; JE-7). These grades were taken into consideration when establishing the distance between SCSR caches for the ERP in the mains. There are five to eight parallel entries in the mains, including two intake air escapeways and a belt entry. The air for the No. 2 intake entry and the No. 5 intake entry originate from two distinct points outside. (Tr. 61). The

belt entry, which is between these two intake entries, was constructed with overcasts and undercasts to allow miners to travel from the No. 2 entry to the No. 5 entry without traveling through the belt entry. (Tr. 65, 165-66). Diesel pickup trucks and other equipment are used to transport miners through the mains. Twentymile has about 140 pieces of mobile diesel equipment for use underground. (Tr. 40; Ex. S-31).

Derrick Tjernlund, a senior fire protection engineer at MSHA's approval and certification center in Triadelphia, West Virginia, was the fire investigator for MSHA with respect to the January 2006 belt fire at the Aracoma Alma Mine. (Tr. 121; Ex. S-32). He testified in this proceeding, as an expert witness, about how belt fires and equipment fires can start and propagate in an underground coal mine and about explosions in underground coal mines. (Tr. 123-52). He was present during Mr. Reitze's testimony, but he has never been to the Foidel Creek Mine. He testified that, based on his own expertise and the testimony of Reitze, he believes that it is "probably not that likely" that a fire or explosion in the mains between the portal and the 6 MN intake air shaft would trap miners or prohibit them from escaping from the mine. (Tr. 142-43). He went on to testify that "if you do get a belt fire, the potential for a serious fire is definitely there." *Id.* He does not question the wisdom of requiring a refuge area in the 3 MN because the scenarios described by Reitze are "credible event[s]." *Id.*⁴

Robert Johnson, the technical safety coordinator for Twentymile, testified that he was involved in the submission of the ERPs by Twentymile. (Tr. 156-57; Ex. R-18). He testified that miners would not get trapped in the mains at the mine because of "the multiple ways that [miners] can [use] to get out of the mine" and the "multiple directions they could go." (Tr. 158, 165). If there were a problem "outby, they could go inby and escape from one of the escape facilities; or if the incident [were] inby, they could go to the portal." *Id.* On the inby side, the mine has the 6 MN air shaft "which is now equipped with an automatic hoist – you get in and push the button and evacuate the mine." *Id.* This shaft has a diameter of 18 feet. (Tr. 163). There are also two other intake shafts further inby that can also be used for escape. One contains an automatic elevator and the other an escape capsule. (Tr. 158-59). Johnson concluded that, in order to have miners trapped in the cited area, there would have to be multiple "incidents inby and outby the individuals' location." (Tr. 169).

During a typical shift, there are about five miners shoveling along the belts, two miners rock dusting, two or three miners performing belt maintenance, and two fire bosses performing the preshift. These miners generally have pickup trucks at their disposal. (Tr. 161). He testified that in most instances, miners working in the outby areas of the mine would exit the mine in an emergency using a pickup truck or other vehicle. (Tr. 162). Johnson admitted that it would be difficult to drive through the intake entries if they were filled with smoke. (Tr. 168).

⁴ MSHA Inspector Donald Gibson also testified for the Secretary. He testified concerning citations that have been issued at the Foidel Creek Mine alleging that there were accumulations of loose coal, coal dust and float coal dust along the belt entry and openings in ventilation controls. (Tr. 93- 116; Exs. S-10, S-11, S-12, S-14, S-16, S-21, S-34, and S-35).

The area around the 6 MN air shaft is also outfitted with emergency supplies of food, water and sealant. (Tr. 62, 165). In addition, there are other bore holes that can be used to supply fresh air to miners who have barricaded themselves in that area. (Tr. 163-65; Ex. R-20).

R. Lincoln Derick, an owner of Derick Mining & Safety, was the safety manager and technical safety coordinator with Twentymile for about 15 years. (Tr. 173; Ex. R-17). He has extensive experience and expertise in mine safety, mine fires, and mine rescue. (Tr. 173-77; Ex. R-17). He testified about the extra measures that have been taken at the Foidel Creek Mine to enhance the safety and health of miners. These additional measures include protections that are not required under MSHA's standards and are generally not found in other underground coal mines. The mine has two intake escapeways to the portal, for example, that provide outside air from different sources. (Tr. 178). The mine also has several other ways to escape the mine, other than through the portal, that are on intake air, including the 6 MN shaft, the 18 Right intake shaft, and the 9 Right intake shaft. (Tr. 178-79). The mine is equipped with an atmospheric monitoring system that measures the mine atmosphere at numerous locations for methane and CO levels. (Tr. 179-80). Derick testified that Twentymile has more CO sensors along the belt entry than most mines. In addition, the mine has installed tachometers and other devices along the belt that will shut down the belt in the event it is slipping against a drive. (Tr. 180-83). The belts are equipped with other safety features, which are not typically found in underground coal mines, that will shut down the belts if everything is not operating correctly. *Id.* Finally, the sprinklers along the belt are high-pressure, high-flow sprinklers that will flood the area to put out a fire. (Tr. 184-86). The sprinkler lines are under pressure at all times and will activate automatically in the event of a fire. *Id.* In addition, the mine has a fully equipped fire brigade that would fight any fire in the mine from the outby side. (Tr. 186-87).

Mr. Derick testified that because of the safety features in use at the mine, set forth above, the scenarios described by Messrs. Reitze and Tjernlund for a belt fire, equipment fire, or an explosion are highly unlikely. (Tr. 188-189). Although one can imagine "simultaneous events that are . . . improbable," the likelihood of people being trapped is very low because there is "fresh air" available to escaping miners in either direction. (Tr. 196). He opined that having a refuge area in the 3 MN is putting a "dangerous carrot" out there. *Id.* He believes that people should get themselves to the 6 MN intake shaft and that any injury that would slow them down getting to this air shaft would also slow them down getting to the refuge area. (Tr. 199).

C. Analysis of the Issues

I agree with the Secretary that the issue here is whether her decision to require the construction of a refuge area along the mains near the midpoint between the portal and the 6 MN intake air shaft was arbitrary and capricious. Twentymile argues that section 316(b)(2) is unconstitutionally vague, that the Secretary's use of PPLs and the PIB to evaluate ERPs is contrary to law because they were not subject to notice and comment rulemaking, and the Secretary's refusal to approve the ERP was contrary to law. These general legal issues were also

raised by the Respondents in *Emerald Resources/Cumberland Coal Resources*, 29 FMSHRC 542, 550 (June 2007). Commission Procedural Rule 24(e)(2)(iii) specifies that the “scope of [a hearing on an ERP dispute] is limited to the disputed plan provision. . . .” This rule implemented the requirement in the MINER Act for expeditious resolution of disputes concerning the contents of plans so that the “benefits of the Act could be realized by miners.” *Id.* I agree with Judge Zielinski’s analysis of the general legal issues set forth in his decision in *Emerald Resources/Cumberland Coal Resources*. *Id.* at 550-52. See also *C.W. Mining Co.*, 18 FMSHRC 1740, 1746 (Oct. 1996); *Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983). As discussed below, I also reject Twentymile’s argument that the arbitrary and capricious standard is not applicable because the Secretary clearly violated the MINER Act when she required Twentymile to install a refuge area where it is unlikely that miners will be trapped.

The Secretary bears the burden of proving that her refusal to accept Twentymile’s plan provision concerning breathable air in the mains in favor of her requirement for a refuge area was not arbitrary and capricious. I credit the testimony of Reitze and Tjernlund and I find that the Secretary met her burden of proof.

It is about four miles between the portal to the 6 MN air shaft. Twentymile focuses on the fact that it was not likely that miners would ever become trapped in the outby areas of the mine. Twentymile is correct when it argues that it is unlikely that a refuge area in the outby area of the Foidel Creek Mine will ever need to be used. It must be kept in mind, however, that it is unlikely that refuge areas in any underground coal mine will ever need to be used. Although the events at the Sago Mine in January 2006 generated a great deal of publicity, there have actually been very few instances since the Mine Act became law in which miners needed to barricade themselves underground because they were unable to exit the mine in an emergency. Escape from the mine is always the most desirable outcome and the MINER Act addresses that issue. Thus, although the legislative history indicates that a plan must evaluate the “likely risks,” the MINER Act cannot be interpreted to require the Secretary to prove that the use of a particular refuge area is likely, that the catastrophic events that could lead to its use are likely, or that escape from the mine is unlikely in order to legally include the refuge area in an ERP. The vast majority of refuge areas that are being established under the MINER Act will never be used because either the catastrophic events that could necessitate their use will never occur or because the affected miners will be able to escape the mine. Although it may be less likely that anyone would be trapped in the outby areas of this mine than in active workings in an underground coal mine, it was not unreasonable for the district manager to be concerned and require the inclusion of an outby refuge area.⁵

⁵ The Secretary argues that the requirement for refuge areas in underground coal mines is similar to the provision for oxygen masks on commercial airplanes. Although it is highly unlikely that anyone, including frequent flyers, will ever have to use an oxygen mask, every commercial airline must equip its planes with oxygen masks for all passengers and must instruct passengers on their use.

It is important to understand that Twentymile is an exemplary underground coal mine operator. Twentymile's management is obviously very interested in the safety of its employees and the company has committed a considerable amount of its resources to provide a safe working environment. Many of the safety initiatives instituted at the Foidel Creek Mine, as described by Robert Johnson and Lincoln Derick, provide a higher level of safety than is required by the Mine Act and the Secretary's safety standards. I credit their testimony. Indeed, Reitze referred to Twentymile as a "progressive" operator. It cannot be denied that the presence of these safety initiatives makes it less likely that the refuge area will need to be used in an emergency. Nevertheless, I find that the Secretary established that there is a "reasonable possibility" that a major accident or multiple accidents could trap miners, especially injured miners, between the portal and the 6 MN air shaft. In such an instance, miners may need to use the refuge area that the Secretary is seeking to include in the plan.

Twentymile argues that the district manager failed to consider the mine specific conditions when he rejected its proposal for miners working in outby area. This argument is not compelling because it is clear that the district manager did consider the specific conditions. He evaluated the need for a refuge area taking into consideration the distances involved and the possibility of a belt fire, an equipment fire, or another unexpected event near the portal. These types of events have occurred in mines, as evidenced by the belt fire at the Aracoma Alma Mine, for example. I do not have the authority to substitute my judgment on this issue for that of the district manager. I find that the district manager considered the specific conditions present in the outby areas of the mine when he reached his decision to reject the proposed language in the plan dealing with breathable air in outby areas. The fact that District Manager Davis reached a different conclusion than Twentymile on this issue does not establish that he failed to consider the facts.

Twentymile also relies on the fact that the district manager approved a similar provision for the active longwall section. A refuge area for the longwall section was not required to be included in the plan because there are two distinct escape routes out of that area. The evidence establishes that the district manager did not require a refuge area for the longwall because that section receives intake air from two independent sources. (Tr. 87). The intake air in the longwall comes from opposite directions while the air in the mains travels down parallel intake entries.⁶ (Tr. 61, 87-88). The Secretary believes that a single event could contaminate both intake airways in the mains but that a single event could not contaminate both air courses in the longwall section. The intake air courses in the mains are parallel to one another and are separated by the belt entry and ventilation controls. These ventilation controls could be damaged in the event of a major accident. Thus, it was reasonable for the district manager to accept Twentymile's proposal for breathable air on the longwall section and reject its proposal for the mains. The ERP does require a refuge area for the conventional mining sections.

⁶ The fresh air from the 6 MN shaft is used to ventilate active mining areas, not the mains. The air in the intake entries in the mains enters the mine at the portals.

Twentymile sought to introduce evidence at the hearing to show that other MSHA district managers approved ERPs for other mine operators that contained provisions that were similar to Twentymile's proposed ERP with respect to breathable air in outby areas. The Secretary filed a motion *in limine* to exclude such evidence. Twentymile opposed the motion and the parties provided further argument on this issue at the hearing. (Tr. 72-82). I granted the Secretary's motion at the hearing. *Id.* I determined that the scope of this proceeding is limited to whether the Secretary's rejection of the disputed plan provision was arbitrary and capricious. I held that the evidence Twentymile sought to introduce would be of little probative value. (Tr. 80-81). It is unlikely that two underground coal mines would present exactly the same factual situation. Even if two mines were similar, the only issue in the present case would be whether District Manager Davis acted reasonably. Twentymile's evidence on this issue really concerns its larger argument that the Secretary's process of using PPLs and the PIB to evaluate ERPs was unlawfully *ad hoc* and produced inconsistent results. I permitted Twentymile to make an offer of proof on this issue. (Tr. 82; Exs. R-70 through R-75).

It is worth noting that the subject of refuge areas in outby sections of a mine was addressed by the Secretary in the "Breathable Air Questions and Answers" that was attached to PIB P07-03. The attachment provides:

As with air provided to miners at the working section, breathable air should be provided to outby miners working in established work positions within an inflatable chamber, barricade or other alternative that isolates miners from contaminated environments. Air may be provided through compressed air or oxygen canisters, chemical oxygen generator, a bore hole, or compressed air lines. To increase the chances that outby miners could reach breathable air supplies after an accident, District Managers generally will be looking for breathable air locations to be located not more than one hour travel distance from each other. This will help assure that miners would not need to travel more than 30 minutes in either direction to reach a refuge area.

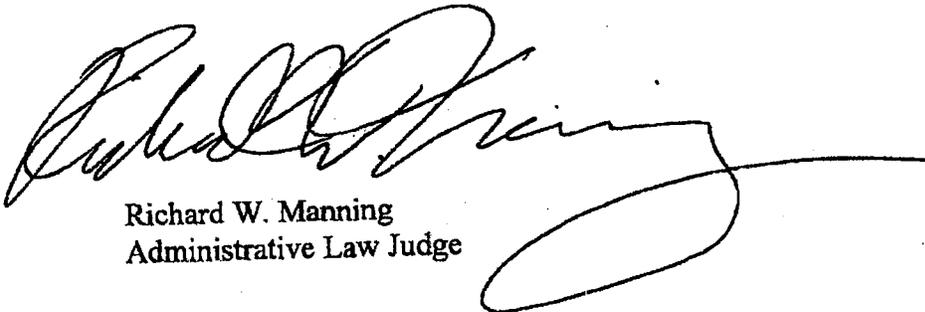
(Ex. R-57). The district manager's insistence on the establishment of a refuge area in the mains between the portal and 6 MN is consistent with this guideline. If miners were working inby the portal and an accident prevented them from exiting the mine at the portals, they could be required to travel as much as three and a half miles to the 6 MN intake air escapeway. I find that the Secretary established that, in such an instance, there is a reasonable possibility that miners will need to seek refuge before they can reach the intake air shaft. The district manager took into consideration all of the safety features described above as well as the presence of caches of SCSRs located along the intake entries and the availability of vehicles in the entries.

To summarize, I find that the Secretary carried her burden of proving that her refusal to accept Twentymile's proposal on breathable air in the outby area of the Foidel Creek Mine was

not arbitrary and capricious. The record demonstrates that the Secretary engaged in substantial negotiations with Twentymile over the course of many months. The record also establishes that the district manager's position on this issue was made in good faith and is reasonable.

III. ORDER

Citation No. 7284469 is **AFFIRMED**. Twentymile must include a provision for post-accident breathable air in the main entries somewhere near the 3 MN as required by the Secretary. Further negotiations between the parties will be necessary to map out the details.



Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

October 24, 2007

DRUMMOND COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. SE 2006-59-R
v.	:	Order No. 7681973; 12/01/2005
	:	
SECRETARY OF LABOR,	:	Docket No. SE 2006-60-R
MINE SAFETY AND HEALTH	:	Order No. 7681974; 12/01/2005
ADMINISTRATION (MSHA)	:	
Respondent	:	Mine ID: 01-02901
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2006-280
Petitioner	:	A. C. No. 01-02901-83883
v.	:	
	:	
	:	
DRUMMOND COMPANY, INC.,	:	
Respondent	:	Shoal Creek Mine

DECISION

Appearances: Marybeth Zamer Bernui, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Noelle Holladay True, Esq., and Marco M. Rajkovich, Jr., Esq., Rajkovich, Williams, Kilpatrick & True, PLLC, Lexington, Kentucky, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and a Petition for Assessment of Civil Penalty brought by Drummond Company, Inc., against the Secretary of Labor and by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Drummond Company, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815. The company contests the issuance to it of two citations alleging violations of the Secretary's mandatory health and safety standards. The petition alleges the same two violations of the Secretary's mandatory standards and seeks a penalty of \$120.00. A hearing was held in Birmingham, Alabama. For the reasons set forth below, I vacate the citations.

Background

Drummond Company operates the Shoal Creek Mine, a large, underground coal mine near Birmingham, in Jefferson County, Alabama. In November and December 2005, the mine had one active longwall section, one longwall section that was being moved, one longwall set-up section and four continuous miner sections, all served by five ventilating main mine fans and two functioning bleeder systems. The mine operated three shifts per day and had nearly 700 underground employees.

Between 2:30 a.m. and 3:00 a.m. on November 30, 2005, James Glynn, the Assistant Mine Foreman on the owl shift, was notified by the communications officer that a fan alarm had been activated and the water gauge on the No. 6 fan had gone down an inch, indicating a reduction in air pressure. Glynn, who was already underground, set out to find the problem. He discovered that the No. 9 North Main stopping had been blown out, creating a 12 foot by 16 foot hole in the stopping.

Glynn, along with the Mine Foreman and the communications officer, who was located on the surface, then contacted each of the working sections and asked that they take air readings to determine the effect of the hole in the stopping on ventilation. The only change of significance was reported by the foreman of the G-5 longwall section, who informed that the airflow measured about 65,000 cubic feet per minute (cfm). Normal airflow at that location was about 85,000 cfm and had been measured at 86,179 cfm during the preshift inspection conducted prior to the start of the shift. The mine's ventilation plan called for a minimum of 45,000 cfm at that section.

Glynn ordered materials to repair the stopping and work began between 5:00 a.m. and 6:00 a.m. Although none was being mined at the time, Glynn directed that no coal be produced until the stopping had been fixed and the sections were notified that it was all right.¹ In addition all sections were instructed to continue to take air readings every 30 minutes and to report any changes. At no time during the repairs was a reading under 65,000 cfm obtained.

Repair of the stopping had not been completed by the beginning of the day shift. At around 8:00 a.m., Johnny Calhoun, supervisor of the ventilation department at the local MSHA field office, received a call from a miner stating that there had been a stopping failure on the previous shift and asking if miners could be sent underground while the stopping was being repaired. Calhoun replied that "when the stopping came out, it was an unintentional change that occurred; that, however, once they started building that stopping back, that they had to comply with 324, 75.324, meaning that it became an intentional change to the ventilation system once they started doing repair on that stopping." (Tr. 23.)

¹ The owl shift is primarily a maintenance shift where power sources are moved, belt lines extended and repairs are performed to make sure that the day shifts are ready to operate.

Don Hendrickson, the Mine Manager, arrived at the mine around 5:30 a.m. He learned during the morning shift change that there was a complaint about miners being in the mine while the stopping was repaired. He attended a meeting in the mine office with the union safety committee, someone from the company's safety department, the mine foreman and MSHA Inspector John Church, who happened to be at the mine for an inspection, to discuss the situation. Church left during the meeting and apparently called Calhoun. When he returned, he said that the company had to comply with section 75.324, if it applied. Hendrickson and the other supervisors concluded that it did not apply.

The miner called Calhoun back to say that the company did not agree that section 75.324 applied and that someone from the company would be calling him. Shortly thereafter, Ed Sartain, a member of Drummond's Safety Department, called Calhoun to ask about the situation. Calhoun, who knew no more than that a stopping had been blown out and was being repaired, told Sartain that if Drummond felt that section 74.324 applied to the situation, they should comply with its requirements.

The miner called Calhoun back a third time to advise that miners had been sent into the mine. He also said that the repair of the stopping was almost completed. Calhoun told him that he would send someone to the mine to investigate the complaint the next day. The repair to the stopping was completed between 9:30 a.m. and 10:00 a.m. The preshift air reading taken on the G-5 section after the repair measured 82,940 cfm.

MSHA Inspector David Allen went to the mine on December 1, 2005, to investigate the complaint. As a result of his investigation, he issued Citation Nos. 7681973 and 7681974, which are the subject of this proceeding.

Findings of Fact and Conclusions of Law

Citation No. 7681973 alleges a violation of section 75.324(b)(1), 30 C.F.R. § 75.324(b)(1), because: "The operator did not remove power from the affected area [G-5 Longwall Section (MMU 007-0)] during an intentional change in the ventilation system conducted during the owl and day shifts on 11/30/05." (Govt. Ex. 5.) Citation No. 7681974 charges a violation of section 75.324(b)(2), 30 C.F.R. § 75.324(b)(2), in that: "An intentional change was made in the ventilation system on the owl and day shifts on 11/30/05 and the operator allowed persons who were not involved in this change to remain in the mine while the change was being made." (Govt. Ex. 4.) Both citations were originally charged as 104(d)(2) orders, 30 U.S.C. § 814(d)(2), but were modified on December 19, 2005, to 104(a) citations, 30 U.S.C. § 814(a).

The Secretary asserts that the language of the regulation is clear. She argues that when Drummond intentionally repaired the stopping, which changed the air on the G-5 longwall section by more than 9,000 cfm (from 65,000 cfm to 82,940 cfm), the operator made an intentional ventilation change. Therefore, she concludes that the company violated the regulation

by not removing electric power and shutting off mechanized equipment in the affected areas and removing all miners but the repairers from the mine. On the other hand, while agreeing that the language of the regulation is clear, the operator contends that it does not apply because there was not a intentional change to its ventilation system. In fact, while the meaning of the regulation, as explained by MSHA when the rule was adopted, is indeed clear, it is apparent that the Secretary has misinterpreted it in this situation.

Section 75.324, 30 C.F.R. § 75.324, is entitled "Intentional changes in the ventilation system" and provides, in pertinent part, that:

(a) A person designated by the operator shall supervise any intentional change in ventilation that –

(1) Alters the main air current or any split of the main air current in a manner that could materially affect the safety or health of persons in the mine, or

(2) Affects section ventilation by 9,000 cubic feet per minute of air or more in bituminous or lignite mines

(b) Intentional changes shall be made only under the following conditions:

(1) Electric power shall be removed from areas affected by the ventilation change and mechanized equipment in those areas shall be shut off before the ventilation change begins.

(2) Only persons making the change to ventilation shall be in the mine.

Until 1992, changes in ventilation were governed by section 75.322 of the regulations.² Section 75.322 was a restatement of section 303(u) of the Act, 30 U.S.C. § 863(u), which requires that:

Changes in ventilation which materially affect the main air current or any split thereof and which may affect the safety of persons in the coal mine shall be made only when the mine is idle. Only those persons engaged in making such changes shall be permitted in the mine during the change. Power shall be removed from the areas affected by the change before work starts to make the change and shall not be restored until the effect of the change has been ascertained and the affected areas determined to be safe by a certified person.

² The rules governing ventilation were revised and recodified in 1992. Safety Standards for Underground Coal Mine Ventilation, 57 Fed. Reg. 20868 (May 15, 1992).

This same standard had been in effect since at least section 303(u) of the Federal Coal Mine Health and Safety Act of 1969.

On first reading, it appears that the inspector's interpretation of the rule may be correct. Drummond intended to repair the stopping, thus intentionally (making a ventilation change) increasing air flow at the G-5 section from 65,000 cfm to about 85,000 cfm. This is clearly more than 9,000 cfm. However, this is not in accord with MSHA's explanation of the rule when it was adopted. In announcing the new rule in 1992, MSHA stated:

This section revises existing § 75.322. It requires certain precautions when a change is made to increase or decrease ventilation on a working section or when a ventilation change alters the main air current of the mine or any split of the main air current in a manner that could materially affect the health and safety of miners under ground.

57 Fed. Reg. at 20879. MSHA went on to state that: "Section 75.324 sets an action level of 9,000 cfm for ventilation changes on working sections . . ." *Id.* at 20880. Finally, MSHA stated:

MSHA recognizes that in some large mines a ventilation change of 9,000 cfm . . . in the main air current of the mine or an individual split of the main air current may not necessarily be significant. . . . Accordingly, *these limits in the final rule do not apply to main air currents or to splits of the main air currents.* Instead, the final rule specifies that the prescribed precautions must be taken when the ventilation change is one that "alters the main air current in a manner that could materially affect the safety or health of persons in the mine."

Id. (emphasis added).

It is apparent from this that since 1992 there have been two kinds of ventilation changes that bring section 75.324 into play. The first is a change in the main air current or any split of the main air current and involves the regulation if the change "could materially affect the safety or health of persons in the mine." The second is a change in air on a working section and involves the regulation if the change "affects section ventilation by 9,000" cfm or more. In effect, the new rule included the old rule and added a new one for changes to increase or decrease ventilation on working sections.³

³ It is obvious that the regulation, as it is currently written, is subject to misinterpretation since it can easily be read, as it was in this case, to be in effect whenever there is a change to the main air current or any split of the main air current that materially affects the safety or health of

In this case, the repair to the stopping was on the No. 9 North Main roadway, clearly a main air current or split of a main air current. However, the Secretary has based these allegations solely on the basis that the alleged ventilation change affected ventilation on the G-5 section by more than 9,000 cfm, not that it materially affected the safety or health of miners.⁴ (Tr. 126, Sec. Br. at 10.) There was no change made to ventilation air on the G-5 section; the change was made to the main air current or split of main air current on the No. 9 North Main. Accordingly, I conclude that the Respondent's repair of the stopping was not a violation of the regulation and will vacate the citations.

Order

In view of the above, Citation Nos. 7681973 and 7681974 are **VACATED** and it is **ORDERED** that these cases are **DISMISSED**.


T. Todd Hodgdon
Administrative Law Judge

miners or affects section ventilation by 9,000 cfm. However, if such an interpretation were correct, than the statement that the 9,000 cfm limit does not apply to main air currents or splits of main air currents would be meaningless.

⁴ MSHA revised the ventilation rules again in 1996. Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9764 (March 11, 1996). Section 75.324 was not revised. However, in a discussion of the rule, MSHA stated that the phrase "materially affect the safety or health of persons in the mine" is "important in that it identifies those ventilation changes that require approval of the MSHA district manager under § 75.370(c)." *Id.* at 9779. The discussion went on to provide the following examples of intentional changes that would materially affect the safety or health of miners:

[A]dding a new shaft; bringing a new fan on line; changing the direction of air in an air course; changing the direction of air in a bleeder system; shutting down one fan in a multiple fan system; starting a new operating system with ventilating quantities redistributed from other sections of the mine; changing entries from intakes to returns and vice versa; and any change that affects the information required by § 75.371, Mine ventilation plan; contents.

Id. While these examples are clearly not meant to be exclusive, it does not appear that the repair of a stopping, assuming *arguendo* that a stopping repair is a *ventilation change*, is the type of change covered by section 75.324.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 29, 2007

MACH MINING, LLC,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 2006-82-R
	:	Citation No. 7582682; 03/02/2006
v.	:	
	:	Docket No. LAKE 2006-83-R
SECRETARY OF LABOR,	:	Citation No. 7582683; 03/06/2006
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2006-84-R
Respondent	:	Citation No. 7583684; 03/06/2006
	:	
	:	Docket No. LAKE 2006-85-R
	:	Citation No. 7582685; 03/06/2006
	:	
	:	Mach #1 Mine
	:	Mine ID 11-03141
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2006-146
Petitioner	:	A.C. No. 11-03141-92222
	:	
v.	:	Docket No. LAKE 2006-149
	:	A.C. No. 11-03141-94581
MACH MINING, LLC,	:	
Respondent	:	Mach #1 Mine

DECISION

Appearances: Christine M. Kassak-Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, IL, for the Secretary of Labor
David J. Hardy, Esq., Spilman, Thomas & Battle, PLLC, Charleston, WV, for Mach Mining

Before: Judge Barbour

These are consolidated contest and civil penalty proceedings brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (“Mine Act or Act”) (30 U.S.C. §§ 815, 820). In the contest proceedings, Mach Mining, LLC challenges the validity of four citations issued pursuant to sections 104(a) and 104(d)(1) of the Act (30 U.S.C. §§ 814, 814(d)(1)). In the civil penalty proceedings, the Secretary of Labor, on behalf of her Mine Safety and Health Administration (MSHA), petitions for the assessment of civil penalties for the violations of mandatory safety standards alleged in the contested citations and for the assessment of a civil penalty for an additional alleged violation.

The contested citations issued as the result of two roof fall accidents at Mach’s No. 1 Mine, a bituminous coal mine in Williamson County, Illinois. The falls occurred in the mine’s slope on February 24 and February 25, 2006.¹ The Secretary investigated, and on March 6, 2006 issued the citations. In the citations, the Secretary asserts the company violated mandatory safety standard 30 C.F.R. 77.1900-1, which requires an operator to “adopt and comply” with its shaft and slope sinking plan once the plan has been approved by the MSHA district manager.² The Secretary further charges the alleged violations constituted significant and substantial contributions to mine safety hazards (“S&S”), that one of the violations was caused by Mach Mining’s unwarrantable failure to comply with the company’s plan and that the other alleged violations were caused by the company’s moderate negligence.

Mach Mining denies it violated section 77.1900-1. It also denies the S&S and negligence allegations. The company further argues the penalties proposed by the Secretary for the alleged

violations are inappropriate. The matter was heard in Carbondale, Illinois.³

¹ A “slope” is in part defined as, “An entrance to a mine driven down through an inclined coal seam.” U.S. Department of the Interior, *A Dictionary of Mining, Mineral, and Related Terms* 1988 at 1029 (“DMMRT”).

² 30 C.F.R. § 77.1900(a) states in pertinent part, “[e]ach operator of a coal mine shall prepare and submit for approval by the Coal Mine Health and Safety District Manager . . . a plan providing for the safety of workmen in each slop or shaft that is commenced or extended after June 30, 1971.” Section 77.1900-1 states, “[u]pon approval by the Coal Mine Health and Safety District Manager of a slope or shaft sinking plan, the operator shall adopt and comply with such plan.” Initially, the subject enforcement actions charged violations of 30 C.F.R. §77.1900(a). Prior to the hearing, counsel for the Secretary’s motion to amend the citations to charge violations of 30 CFR §77.1900-1 was granted. *See Order Granting Motion to Amend Citations* (June 5, 2007).

³ The Secretary and the company settled one of the contest proceedings and one of the civil penalty proceedings. Counsel for the Secretary explained the settlement on the record, and I dismissed the settled proceedings (Docket No. LAKE 06-82-R and Docket No. LAKE 06-146).

STIPULATIONS

The parties stipulated as follows:

1. The . . . Commission has jurisdiction over [the] proceedings.
2. Mach Mining's operations affect interstate commerce.
3. At all times relevant . . . Mach Mining [o]perated the Mach [No.] 1 Mine.
4. The Mach [No.] 1 Mine extracts bituminous coal.
5. The Mach [No.] 1 Mine began its slope development in October[,] 2005.
6. The subject citations were properly served by a duly authorized representative of the Department of Labor upon an agent for Mach Mining on or about the date and at the place indicated therein.
7. On February 24, 2006, Mach [No.] 1 Mine had a roof fall in its slope development area.
8. On February 25, 2006, there was a more extensive roof fall in the same area.

Joint Exh. 1.

THE LEADUP TO THE CITATIONS **AND** **THE SLOPE SINKING PLAN**

Michael D. Rennie is an underground mine inspector in MSHA's Benton, Illinois field

Tr. 10-11.

office and the primary accident investigator in MSHA's Vincennes District, the district encompassing the Benton field office. Tr. 18-19. Rennie has worked for MSHA since 1991. According to Rennie, during the winter of 2006, the company was in the process of developing the No. 1 Mine. One of the first things it had to do was drive the slope, which when completed would lead to the mine's active workings and be used daily by miners to access and exit the mine.

On February 24, Rennie was in Benton when he received a telephone call informing him of a roof fall in the slope. Rennie was familiar with the mine as he had been there twice before, most recently on February 21. Tr. 24. Rennie was assigned to investigate the accident. Tr. 25.

Before going to the mine, Rennie contacted Mach's president, Pete Hendrick, and orally issued an order pursuant to section 103(k) of the Act (30 U.S.C. § 813(k)) to ensure miners' safety and to preserve the accident scene.⁴ The order, which was later reduced to writing, required the fall area to be barricaded so no person could travel into it. Gov't Exh. 1; Tr. 25.

Rennie reviewed the mine's approved slope sinking plan ("the Plan").⁵ Tr. 25. The Plan had been submitted to the MSHA district manager, in September 2005. Following exchanges of letters between MSHA roof control specialist Mark Odum and Mach officials, MSHA approved the Plan on February 8, 2006. *See* Gov't Exh. 2.⁶ Odum was responsible for reviewing and recommending for approval slope plans in the Vincennes District. Tr. 110-111.

Robert "Mickey" Gauldin, the mine manager, in great part drafted the Plan. Gauldin used copies of other mines' slope plans as models. Tr. 260. Under the Plan, the roof was required to be supported with 96 inch roof bolts. Tr. 34; Gov't Exh. 2 at 8. Rennie described the bolts as the roof's "primary" means of support. Tr. 34, *see also* Tr. 174-176. Secondary support was required

⁴ Section 103(k) provides an inspector with authority "[i]n the even of any accident . . . to issue such orders as he [or she] deems appropriate to insure the safety of any person in the . . . mine." 30 U.S.C. §813(k).

⁵ As Rennie explained, a slope sinking plan in general, "spells out how . . . [an operator] is going to sink the slope . . . and what steps . . . [the operator is] going to take to protect the health and safety of . . . [its] workers as they [develop the slope]." Tr. 28. Such a plan is mine specific.

⁶ Gov't Exh. 2 consists of the body of the Plan (pages 6-18), cover and submission letters (pages 4-5), a letter of conditional approval on behalf of the District Manager to the company (page 3), a letter from the company to the District Manager requesting final approval of the conditionally approved plan (page 2), and a letter on behalf of the District Manager to the company approving the Plan (page 1).

to be provided by steel arches (also referred to as steel “sets”) and lagging.⁷ Gov’t Exh. 2 at 8., Tr. 35. The sets had to be installed on four to five foot spacing and, if wooden lagging was used, the lagging had to be a minimum of three inches thick. *Id.*; *see also* Tr. 36. In general, the distance between the floor and the underside of the top of a set was approximately 11 ½ feet. Tr. 40. The slope was 27 feet wide and the distance between the inside of the legs of a set was “just under 25 feet.”⁸ Tr. 40.

The Plan also required lagging to consist of “a minimum of 20 gauge corrugated decking or a hardwood block (minimum 3 inches thick).” Gov’t Exh. 2 at 8. The Plan further stated the “[b]locking of the arches will be performed following the manufacturers recommendations.” *Id.*; 37. In Rennie’s view, the “manufacturer’s recommendations” were shown in an attachment to the plan entitled “Attachment #3– Steel Arches.” Tr. 101; Gov’t. Exh.2 at 13. In addition to a structural drawing depicting a raised arch, Attachment 3 listed specifications for arch parts. Rennie agreed nothing in the Plan specifically referenced manufacturer’s recommendations for blocking and there was no attachment or diagram showing how or where lagging was to be installed. Tr. 101, 133. Further, Rennie acknowledged that although lagging could be used on both the tops of arches (“top lagging”) and along their sides (“side lagging”), the Plan just referred to “lagging” in general.⁹ Tr. 134.

Although no blocking was represented in the attachment, a tension rod was shown. The rod stretched between the top of the legs of the arch. Rennie testified the rod served the same purpose as blocking in that it stabilized the arch. *See* Tr. 38; Gov’t Exh. 2 at 13. Because the tension rod was shown in the drawing Rennie believed a rod was required to be installed at the top of each arch in the slope. Tr. 135.

Hendrick, on the other hand, believed manufacturers recommended the use of either blocking or tension rods, and if an arch was blocked, a tension rod was not needed. Tr. 195-196, 199. Hendrick noted a drawing Mach received from American Commercial (a manufacturer) after the falls showed blocks, but did not show a tension rod. Tr. 197, 199-200; Op. Exh. 6 at 2.

⁷ “Lagging” is defined as material whose purpose is to “[wedge] and [secure] the roof and sides behind the main timber or steel supports in a mine and provide early resistance to pressure” (*DMMRT* at 302) and as “[p]lanks, slabs, or small timbers” whose purpose is “not to carry the main weight, but to form a ceiling or a wall, preventing fragments of rock from falling through.” *Id.*

⁸ In parts of the roof where shale was encountered, wire mesh was affixed to the roof bolts to provide protection “from small rock and things.” Tr. 34, *see also* Tr. 175-176. The mesh was an additional precaution, one not required by the Plan. Tr. 149.

⁹ After the roof falls, MSHA insisted the Plan be changed “to clarify the lagging requirements” and to specifically require top lagging and side lagging. Tr. 134-135; *see also* Tr. 101-102.

In Hendrick's opinion, blocking was preferable because it made an arch stronger. Tr. 201. ("[B]locking's better than the tension rod." Tr. 241.) Hendrick agreed at the time of the roof falls, none of the arches in the slope had tension rods and side blocking was missing. Tr. 242.

Hendrick also maintained blocking and lagging were not required until all of the arches were installed to the end of the slope. Tr. 190, 232-233. This was because once the slope reached the bottom concrete would be poured to cover the ribs of the slope. Tr. 181. The concrete was especially needed at the corner of each arch. Hendrick called it the "magic corner." *Id.* It was the area of the arch that "ha[d] to have the most support." *Id.* However, the concrete could not be poured until the floor was "concreted" because the weight of the arches would cause their legs to sink into the soft "unpaved" floor.¹⁰ *Id.* According to Hendrick, "[e]veryone [including MSHA] understood" blocking and lagging would not be completed until the slope was finished. However, Hendrick contended the roof falls changed the way MSHA viewed the Plan. Tr. 235.

Hendrick testified Odum came to the mine on January 23, 2006, and walked the slope. At that time, the slope had advanced about 1800 feet. Tr. 185, *see also* Tr. 269-270. Hendrick testified he told Odum the floor would be surfaced with concrete after the slope was driven and then concrete would be applied to the sides and to the corners of the arches. Tr. 185. The side lagging would serve as a form for the concrete. Hendrick believed Odum understood what Mach intended to do and did not have a problem with it. Tr. 186.

Hendrick also testified when Rennie was at the mine on February 21, Hendrick told Rennie the company planned to concrete the slope floor after the slope reached its lowest point. Tr. 144. Rennie did not object. The company had tried to pour concrete as mining progressed, and the process had not worked well. In fact, Gauldin described it as a "nightmare." Tr. 264. Gauldin believed the concrete "absolutely" was needed to properly anchor and support the steel arches. Tr. 265. As important to Mach, once the concrete was in place, the slope could be used for the next twenty years. Tr. 180.

When Rennie was at the mine on February 21, he issued one citation, for a loose screw on a piece of equipment (Tr. 114) and told Hendrick "everything looked good." Tr. 115. The lack of any questions about compliance with the Plan on February 21 was not unusual. Gauldin testified when MSHA officials were at the mine in January, none of the agency's officials voiced any objections to the way in which the slope was being constructed. Approximately 450 steel arches were then in place, none with tension rods. Further, side lagging was missing. Moreover, although Gauldin recalled a "big portion" of the arches exhibited top lagging, not all did. Tr. 271-272.

In addition to the Plan's statements about "steel sets and lagging," the Plan contained

¹⁰ The floor was so soft it was difficult for equipment to traverse. Concrete also would correct this problem. Tr. 177-178, *see also* Tr. 179-180; Op's Exhs. 3, 4.

another provision destined to be the center of a dispute. The Plan stated: "The language of 30 C.F.R. §§75.209-211 addressing temporary roof support installation procedures shall be adopted for purposes of this plan."¹¹ Gov't Exh. 2 at 8. According to Gauldin, the same language regarding sections 75.209-75.211 had been in the slope plans of other operators, and it was purposefully included in those plans to allow companies to erect temporary roof supports.¹² Tr. 278- 279. In Gauldin's opinion, because of the language, Mach's miners could proceed up to five feet beyond permanent roof supports when erecting temporary roof supports. After the roof falls, MSHA disagreed.

THE FEBRUARY 24 INSPECTION

On February 24, Rennie went to the mine (Tr. 26) where he met with Hendrick and Gauldin. The slope had advanced approximately 2,200 feet. The roof fall occurred at approximately 2000 feet. Tr. 27, Tr. 152. Rennie proceeded underground with Hendrick. The party traveled to the fall area. Rennie determined there was no methane present, and he took photographs of the roof fall and surrounding mine areas.

The roof leading to the edge of the fall area was supported by roof bolts and steel arches. The steel legs of each arch were snug against the slope ribs. Between the rock of the roof and the top of the steel arches was wire mesh netting and below the netting was lagging in the form of wooden beams. The lagging rested on top of the steel arches. *See* Gov't Exh. 4. There was no side lagging. *See* Tr. 54-58.

Rennie could see the fall was large in size. Hendrick stated it extended for about 25 to 30 feet down the slope entry. Tr. 202. The fall had covered a scoop. *Id.*; Tr. 148. Rennie took a photograph while standing "just outby the last good arch on the left side of the [slope] entry." Tr. 60. The photograph showed four destroyed arches inby the good arch and the fall extending toward the left side of the slope entry. Tr. 61, 64; Gov't Exh. 5. In Rennie's opinion, most of the fall originated above the roof bolt anchors. Tr. 65-66. The photograph also showed two roof

¹¹ Section 75.209 concerns "Automated Temporary Roof Support . . . systems." Section 75.210 concerns, "Manual installation of temporary support." Section 75.211 involves "Roof testing and scaling."

¹² Section 75.210(b) states:

When manually installing temporary supports, the first temporary support shall be set no more than 5 feet from a permanent roof support and the rib. All temporary support shall be set so that the person installing the support remains between the temporary support and two other supports which shall be no more than 5 feet from the support being installed.

bolts, one of which was still “in tact” with its bearing plate against the roof. Tr. 62; Gov’t Exh. 5. The other roof bolt had part of its shaft exposed. Rennie assumed the roof had fallen around it. *Id.* Rennie testified he did not see any other roof bolts further inby on the left. Tr. 63. Rennie believed most had “[come] down with the roof.” Tr. 65.

Having viewed the fall, Rennie returned to the surface where he discussed with Hendrick how the fall would be cleaned up and the roof supported. Tr. 69. Rennie testified Hendrick told him the company was going to use a scoop to remove the debris. In addition, miners would set arch spans on top of the arch legs that were not moved or damaged by the fall. Rennie maintained Hendrick assured him miners would never be under unsupported roof while the work took place. Tr. 42.

Rennie asked Hendrick to put the cleanup plan in writing, which Hendrick did. *Id.*; *see also* Tr. 202. Rennie said the plan should be submitted to the MSHA district office for approval, and Hendrick had it “faxed” to Vincennes. Tr. 45, 70; Gov’t Exh. 3 at 2. Anticipating approval, Rennie modified the section 103(k) order to allow the proposed cleanup to proceed.¹³ Tr. 45-46; Gov’t Exh. 3 at 1. MSHA maintained the cleanup plan, once approved became part of the original Plan.¹⁴ Tr. 47-48. The cleanup plan stated, “No one to proceed out from unsupported roof.” Gov’t Exh. 3 at 2. In Rennie’s view, this was substantively the same prohibition as that in the Plan stating, “no persons at any time will be allowed to travel under unsupported top.” Tr. 48; Gov’t Exh. 2 at 8. When Rennie left the mine, he understood, given the prohibitions on

¹³ The modification states:

The investigation has begun. The miners have been instructed by mine management about procedures to be followed for the roof fall clean up. A supplemental plan has been submitted to the District Manager outlining the procedures to be followed while the roof fall is cleaned up, and how the roof will be supported. No mining is to take place until the additional support is installed.

Gov’t Exh. 3 at 1.

¹⁴ Counsel stated, “The Secretary’s position has always been that the [cleanup] plan as modified becomes the [P]lan.” Tr. 75. Although Mach sent the cleanup plan by fax to the MSHA district office and although the assistant district manager who reviewed it told Rennie he would approve it and to modify the section 104(k) order to allow the cleanup to proceed, nothing in writing was sent to Mach stating the cleanup plan was approved and/or was considered to be part of the Plan. Tr. 163-164.

proceeding out from under supported roof, during the clean up miners would work from under the arch supports that were left standing after the fall. Tr. 52.

THE CLEAN UP
AND
THE SECOND ROOF FALL

According to Hendrick, cleanup of the fall started on the night of February 24 and continued on February 25. Tr. 202. Mach set one or two additional arches under supported roof. Tr. 240. After the arches were set, miners began working from under them removing rock from the first roof fall and hand-loading it on the conveyor belt. Shortly thereafter, a rock fell from the roof. The rock landed on the fallen material, slid down the debris, and passed between two miners. Tr. 205, 242. Management's plan was to retrieve the scoop first and then remove the fallen rock (Tr. 283), however, Hendrick feared other rocks might fall. The roof was loose and layered (Tr. 206-207), and Hendrick decided a crib was necessary to further support it until the miners "got the cleanup plan implemented."¹⁵ Tr. 124; *see also* Tr. 276.

In Hendrick's opinion, using a crib was the safest way to provide the needed additional support. Tr. 208. Jacks or posts would not work because their maximum length was eight feet, and the height of the roof was more. *Id.* In addition, and as Gauldin explained, a crib was stronger than a jack or post. Moreover, a crib would "[tell] you what's going on" by visually or audibly indicating when it was taking weight. Tr. 282. Hendrick believed the Plan allowed him to "build a crib . . . five feet in by the last permanent roof support." Tr. 205.

Hendrick testified he, Gauldin, and a few other miners proceeded to construct the crib and that during the process, none of them traveled or worked more than five feet in by the last permanent roof support, which in this case was the last arch before the fall area. Tr. 221-222; *see also* Tr. 82-83. He was sure because he "eyeballed" the distance. Tr. 228. Gauldin, speaking for himself, testified he too stayed within the five feet limit. Tr. 276-277.

First, the miners removed debris and leveled the area where they planned to erect the crib. Then, according to Hendrick, he, Gauldin, and one other miner moved out from under supported roof. They stacked the crib timbers and wedged the crib in place. Tr. 208. As Hendrick recalled, the job took between five and seven minutes. Tr. 209. Everything went smoothly. Tr. 211.

Rennie took issue with the way Hendrick and the others constructed the crib. Rennie believed the crib should have been built by going no more than "[a]n arm's length" under unsupported roof. He stated, "you set support as you go and gradually progress out." Tr. 50. However, Rennie knew of no written statement of this "arm's-length" rule. Tr. 154. He agreed although the language of the Plan prohibited persons from proceeding beyond supported roof, the

¹⁵ The crib was to be "temporary" because it partly blocked the entry and because rock on which it was built eventually had to be removed. Tr. 131.

Plan also stated, "The language of 30 C.F.R. § 75.209-211 addressing temporary roof support installation procedures shall be adopted for purposes of this plan." Gov't Exh. 2 at 8. He further agreed the language including sections 75.209, 75.210 and 75.211 in the Plan was not changed after the fall. Tr. 153.

According to Hendrick, the crib was finished around 10:00 a.m on February 25. About an hour and a half later, the foreman told Hendrick the crib timbers began creaking. The noise was the result of the wood being subjected to increasing pressure. Tr. 213. Miners were working in the area. *Id.* The foreman ordered the entire crew to move into a nearby crosscut. After they did, the roof fell. Tr. 123. Because the miners were in the cross cut, no one was injured. *Id.*, *see also* Tr. 284.

The second fall was more massive than the first. Hendrick described it as originating 12 or more feet above the first fall. Tr. 212; *see also* Tr. 71. In fact, the fall originated so high in the roof Gauldin stated the only way to support the roof above the fall was to fill the cavity with concrete, which is what Mach did. Tr. 267-268. Of the second fall Gauldin said, "I've never, never seen anything like it." Tr. 268.

RENNIE'S FEBRUARY 27 MINE VISIT

Rennie returned to the mine on February 27, along with Mark Odum. Once there, Rennie was told about the second roof fall. Tr. 69, 71. Rennie then met with Hendrick and Odum. Tr. 70. While the second fall was larger than the first, it encompassed much of the same area. Tr. 71. Rennie testified he learned miners had been working in the area just before the fall. Tr. 72. In addition to building the crib, miners had cleaned up ten feet of the debris from the first fall and they had erected two new steel arches on existing legs to support the roof above the cleaned area. *Id.*

Rennie believed the arches were erected by miners getting "up onto the rock, and . . . bolt[ing] . . . [the arches] to the legs."¹⁶ Tr. 70, *see also* Tr. 72. This is not how Rennie thought the company planned the cleanup. Rennie recalled Hendrick telling him the company was going to use a scoop with a gin pole (a pole that supports hoisting tackle) to raise the arch spans. Using the pole would have allowed all miners to remain under supported roof. *Id.* However, in Rennie's opinion, manhandling the arch spans into position for bolting meant miners had to proceed beyond supported roof and have "an exposed cavity directly over . . . [their] head[s]." Tr. 73. This violated the cleanup plan because, in Rennie's view, the plan "plainly states that no one at any time would be out from under unsupported roof." *Id.*

Hendrick, on the other hand, maintained the roof above the arches was permanently supported with roof bolts. He testified the gin pole was not used because when the arches were

¹⁶ Rennie used the term "manhandle" to describe how the arches were placed in position. *See e.g.*, Tr. 72.

raised, the miners were under roof support. Tr. 247.

After talking to Hendrick, Rennie proceeded to the area of the fall. On viewing the second fall, Rennie noticed pieces of wooden cribbing 12 feet outby the last supported roof. Tr. 78-80; Gov't Exh. 8; Tr. 119. The material was on top of the fall. *Id.* Rennie asked Hendrick how the material got to where he saw it. Hendrick said it was due to forces generated by the fall. Tr. 120. Although Rennie agreed this could have happened (Tr. 80), he nonetheless maintained the crib had been built "out from under unsupported top." Tr. 127.

RENNIE'S MARCH MINE VISITS
AND
THE CITATIONS

Rennie left the mine, but returned on March 1 and again on March 2. On March 1, Rennie was accompanied by MSHA District Manager, James Oakes. The two men met with Hendrick and reviewed how steel arches were installed in the slope. Tr. 85. On March 2, Rennie, along with Odum, brought members of MSHA's technical support team to the mine to observe how the arches were erected in the roof fall area. Tr. 85-86.

Following his March visits, Rennie consulted with members of the technical support team and with his supervisor. On March 6, he issued Citation No. 7582683 to Mach. Gov't Exh.10. The citation alleges Mach violated section 77.1900-1 by failing to comply with its slope sinking plan. The citation states "[e]vidence . . . indicated . . . work had been performed beyond permanent roof support." Gov. Exh. 10; *See also* Tr. 91. Rennie testified the alleged violation was based on the fact Hendrick told Rennie that Hendrick and Gauldin went up on top of the roof fall, under unsupported roof, to erect the crib and that miners set arches by "manhandling" them "out onto the rock" from under unsupported roof. Tr. 91. In Rennie's opinion, proceeding under unsupported roof violated the part of the Plan that states, "No persons at any time will be allowed to travel under unsupported top." Gov't Exh. 2 at 8; Tr. 91-92. In addition, proceeding under unsupported roof violated the clean up plan, which specifically prohibits the practice.¹⁷ Tr. 92; Gov't Exh. 3 at 2.

¹⁷ Rennie acknowledged mandatory safety standard 30 C.F.R. §75.210(b), which states in part, "When manually installing temporary supports, the first temporary support shall be set no more than five feet from a permanent roof support and the rib," allows miners to proceed up to five feet inby permanent roof support when setting temporary roof support. Tr. 129. He also acknowledged the standard was incorporated into the Plan. Tr. 129. However, he did not consider a crib to be a temporary support, even though he agreed the subject crib was of a temporary nature because the rock under and around it was going to be removed. Tr. 131. Hendrick's view of the question as to whether the crib was temporary roof support was more simple. He stated, "If it's not permanent, it has to be temporary." Tr. 210; *see also* Tr. 286.

In Rennie's opinion, the violation created a "very high chance" that an accident would occur and a miner would be killed. Tr. 93, 95. He pointed out that when the crib was erected, the roof already had fallen once. Tr. 94. In addition, Rennie found the alleged violation to be S&S, because Hendrick told him miners had, in fact, proceeded under unsupported top, albeit not more than five feet under. Tr. 94. Further, because Hendrick knew miners had gone beyond supported top Rennie found the violation was the result of Mach's unwarrantable failure to comply with the Plan. Tr. 94.

In addition to Citation No. 7582683, Rennie issued two other citations at issue. In Citation No. 7582684, Rennie charged lagging was not installed in the slope according to the Plan and in violation of section 77.1900-1. Gov't Exh.11, *see also* Gov't Exh. 4. Rennie believed the Plan required the installation of lagging above the arches, and some of this lagging was missing. Tr. 96, 97; *see* Gov't Exh. 4. He also testified the Plan required the lagging to be three inches thick, and he saw lagging that was two inches thick. *Id.*; Gov't Exh. 2 at 8. The place where the lagging was too thin was above the tripper.¹⁸ Tr. 146. Further, Rennie identified a "whole side" that was not lagged (Tr. 97-98; Gov't Exh. 4), as well as "other isolated areas throughout the slope" where lagging was missing. Tr. 98.

Rennie feared a miner would be hit by rock falling from areas where lagging was inadequate or missing (Tr. 99), but Hendrick viewed this as unlikely. Hendrick estimated, at the time of the roof fall, 90 percent or more of the required lagging was installed. Tr. 222, 225-226. Rennie found the condition was caused by Mach's negligence.

Finally, in Citation No. 7582685, Rennie charged several of the arches were not blocked properly from the top of the slope to about 2000 feet into the slope and none of the arches had tension rods.¹⁹ Gov't Exh. 2 at 13. In Rennie's opinion, the lack of adequate blocking and of tension rods was highly likely to cause permanently disabling injuries to miners. Two falls had occurred, and the lack of proper blocking "[took] away a lot of the [archs'] strength." Tr. 102. He further maintained the conditions were caused by Mach's negligence. Tr. 105-106

THE ALLEGED VIOLATIONS

LAKE 2006-82-R

LAKE 2006-146

¹⁸ After the roof falls, MSHA insisted the Plan be changed "to clarify the lagging requirements" and to specifically require top lagging and side lagging. Tr. 134-135; *see also* Tr. 101-102.

¹⁹ Rennie explained to strengthen the arches' crosspieces, blocks should have been wedged at the top of each leg of the arches between the ribs and the ends of the curved crosspieces. Tr. 103.

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>
7582682	3/2/06	77.1900-1	\$135

As previously noted, counsel for the Secretary moved to vacate the citation, dismiss the contest proceeding, and dismiss the civil penalty proceeding as it related to the citation. The motion was granted. *See n.2 infra.*

LAKE 2006-83-R
LAKE 2006-149

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>
7582683	3/6/06	77.1900-1	\$3800

THE CITATION

Citation No. 7582683 states:

The operator[']s approved slope sinking plan was not being complied with. Evidence observed during the investigation of a roof fall accident in the slope which is under development indicated that work had been performed beyond permanent roof support. Cribbing materials had been placed under unsupported roof on top of fallen rock approximately 12 feet beyond the last permanent roof support. The approved slope sinking plan states that "No person[s] at any time will be allowed to travel under unsupported top[.]"

Gov. Exh. 10.

THE VIOLATION

The framework for analyzing a violation of section 77.1900-1 is identical to that for other "plan" standards (*e.g.*, 30 C.F.R. § 75.220(a)(1) (mandatory roof control plan) ; 30 C.F.R. § 75.370 (mandatory ventilation plan)). When asserting a violation of a submitted and approved plan, the Secretary:

must first establish that the provision allegedly violated is part of the approved and adopted plan. *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). She must then prove that the cited condition or practice violated the provision. *Id.* When a plan provision is ambiguous, the Secretary may establish the meaning intended by the

parties by presenting credible evidence as to the history and purpose of the provision, or evidence of consistent enforcement. *Id.*

Harlan Cumberland Coal Co., 20 FMSHRC 1275, 1280 (Dec. 1998).

Standards such as section 77.1900-1 recognize due process entitles an operator to fair notice of the Secretary's interpretation of a plan's provision. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (Aug. 1995). "The ultimate goal of the [plan] approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord '[A]fter a plan has been implemented . . . it should not be presumed lightly that terms in the plan do not have an agreed upon meaning.'" *Jim Walter*, 9 FMSHRC at 907 (quoting *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

The Secretary charges Mach Mining violated the provision of its Plan that states: "No persons at any time will be allowed to travel under unsupported top." As noted above, the provision appears in the section of the Plan titled "Safeguards for Prevention of Caving During Excavation." Gov't Exh. 2 at 8. Therefore, the Secretary has born the first part of her burden by establishing the provision allegedly violated is part of the approved and adopted plan. However, as *Harlan, infra*, instructs, the Secretary must do more. The Secretary also must prove that the cited condition or practice violated the provision (20 FMSHRC at 1280), and it is here her allegations of a violation come a cropper.

First, the Secretary maintains miners were beyond permanent roof support because "Evidence observed during the investigation . . . indicated that work had been performed beyond permanent roof support." Gov't. Exh. 10. The "evidence" is described in the citation as "[c]ribbing materials . . . placed under unsupported roof on top of fallen rock approximately 12 feet beyond the last permanent roof support." *Id.* In fact, the testimony establishes a crib was built beyond permanent roof support, but not 12 feet beyond, as the citation implies and as Rennie suspected. *See e.g.* Tr. 80. The Secretary provided no evidence to establish Rennie's suspicion as a fact, and at the hearing Rennie agreed the material could have been pushed or propelled to where he saw it by forces generated by the roof fall. Tr. 80.

What the record makes evident, and what Mach readily concedes, is that prior to the second roof fall, its miners constructed a crib in the fall area to provide temporary support so miners could start cleaning up the fallen roof material. Rennie stated Hendrick told him miners did not go more than 5 feet beyond supported room when they build the crib, and Hendrick repeatedly testified this was the case. Tr. 205, 209, 221-222, 240-241. In additional Gauldin, who helped build the crib, testified at all times he was within five feet of permanent roof support. He was sure because he "eyeballed" the distance. Tr. 228, 276-277.

Rennie was not present when the crib was built, and the Secretary did not present any convincing evidence the crib was constructed in a fashion other than that described by Hendrick and Gauldin, both of whom were present. Therefore, I find miners went beyond supported roof

to build the crib in question, but in so doing they did not go more than five feet beyond permanent roof support.

I further find the crib was temporary in nature as its purpose was to provide temporary roof support. Gauldin explained the crib was built to allow miners to remove debris and to retrieve the covered scoop. Once the scoop was removed, the crib would have been taken down. Tr. 283. Indeed, the crib had to be removed because the material on which it rested ultimately was going to be removed and because the crib blocked part of the entry. Thus, the crib's function was to provide roof support for a limited time. The crib was in every sense of the word, "temporary." Certainly, there are other kinds of temporary support; posts and jacks, for example, but the fact other types of less than permanent support exist does not deprive the subject crib of its temporary status.

It seems clear to me that building the crib did not violate the Plan, which by incorporating section 75.210(b) allowed miners to proceed five feet, but no more, beyond permanent roof support when installing temporary roof supports. In other words, with regard to building the crib, I find the Plan allowed Mach's miners to do exactly what they did, and for these reasons, I conclude Mach did not violate the Plan with regard to building the crib after the first roof fall.

Another aspect of the alleged violation, although one not specified in the citation, is Rennie's belief that miners proceeded under unsupported roof to erect arches prior to cleaning up the first fall. Tr. 73. Hendrick countered Rennie's testimony by maintaining the roof under which the miners worked to erect the arches was supported. Tr. 247.

There are two reasons why this particular allegation does not warrant a finding of violation. First, the allegation is not set forth in the citation and the citation was never amended to include it. Second, I recognize the citation states, "evidence observed during the investigation . . . indicate[s] that work had been performed beyond permanent roof support," but even if I found the phrase inclusive of the unspecified allegation miners worked beyond permanent support to erect several arches, the Secretary has not met her burden of proof. Rennie maintained the roof was not supported. Hendrick maintained it was. Neither witness was patently incredible. Hendrick was there. Rennie was not. The evidence is at best in equipoise, which means the Secretary did not prove the alleged violation by a preponderance of the evidence. *Keystone Coal Mining Corporation*, 17 FMSHRC 1819, 1838 (November 1995).

LAKE 2006-84-R
LAKE 2006-146

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>
7582684	3/6/06	77.1900-1	\$107

THE CITATION

Citation No. 7582684 states:

The operator . . . has not complied with the approved slope sinking plan. Lagging is missing or has not been installed in the top and sides of the arches at several locations from the top of the slope to about the 2000 foot mark down the slope.

Also, hardwood blocks measuring 3/4 to 2 inches thick were used as lagging in the tops and sides of the arches in several areas in the slope from the top of the slope to about the 2000 foot mark down the slope. The approved slope sinking plan requires on Page 3 that "Arches will be installed on 4-5 foot spacing and lagging with a minimum of 20 gauge corrugated decking or a hardwood block (minimum 3 inches thick)."

Gov't Exh 11-1.

THE VIOLATION

There are two aspects to the alleged violation. First, the Secretary alleges lagging did not exist where it was required on the top and along the sides of the arches at "several locations from the top of the slope to about the 2000 foot mark down the slope." Gov't Exh. 11-1. Second, she alleges wooden blocks used as lagging on the top and sides of the arches were not of the required thickness in several areas from the start of the slope in by approximately 2,000 feet. *Id.*

After describing the primary and permanent roof support used in constructing the slope, the Plan described secondary and additional roof support. The Plan states: "Secondary support will be provided using arches or steel sets and lagging from the beginning of the cutting zone to the coal bed. . . . Arches will be installed on 4-5 foot spacing and lagged with a minimum of 20 gauge corrugated decking or a hardwood block (minimum 3 inches thick)." Gov't Exh. 2 at 8. The Plan thus requires the use of both arches and lagging. Materials required to be used for lagging must be either corrugated decking or hardwood block, and the decking must be 20 gauge while the block must be a "minimum [of] three inches thick." Gov't Exh. 2 at 8.

The word "lagging" has two connotations. It can mean material used primarily for a support function. It also can mean material used primarily for a protective function. *See DMMRT* at 302. Does the word as used in the Plan mean material that "wedges and secures the roof and sides behind the main timber or steel supports and provides early resistance to pressure;" or, does it mean material used "not to carry the main weight but to form a ceiling or a

wall, preventing fragments or rock from falling through”? *Id.* The Plan is poorly drafted and imprecise, but I conclude the word is used primarily in its protective function and that lagging under the Plan is to be used to protect against rock falling from the roof or sloughing from the ribs.

There is no doubt Mach failed to achieve full compliance in this regard. While Mach erected the steel arches required by the plan, the testimony establishes the company did not provide “lagging from the beginning of the cutting zone to the coal bed.” Gov’t Exh. 2 at 8. Hendrick testified some side lagging had been installed prior to the first roof fall (Tr. 194), but, as Gauldin testified, there was not much of it. Tr. 272. I find under the Plan, protective side lagging should have been installed as the mining advanced, and Mach’s failure to do so violated the Plan as alleged in the citation.²⁰

Citation No. 7582684 further alleges the lagging used on the top and the sides of the arches in several areas was of an inadequate dimension. As the citation notes, the Plan required if hardwood block were used lagging should be a “minimum of 3 inches thick.” Gov’t Exh. 2 at 8. The record supports finding top lagging was less than completely installed from the slope entry to the point where the roof fell. Rennie testified to this effect (Tr. 96, 97), and Gauldin agreed the tops of the arches were not all lagged. Tr. 272. In addition to missing top lagging, some of the lagging installed was not of the thickness required. Rennie identified, and Mach did not dispute, an area where Mach used two inch thick wooden top lagging. Tr. 97-98, Gov’t Exh. 4. Hendrick responded that the company intended to eventually replace the two inch lagging with larger lagging. Tr. 146-147. However, this had not yet been done and, as I indicated, I read the Plan to have required on-going compliance on Mach’s part. Therefore, I find the Secretary established Mach violated the Plan regarding the required thickness of the top lagging in the area depicted in Gov’t Exh. 4, as well as the missing top lagging in areas of the slope as testified to by Rennie.²¹

²⁰ Although Hendrick testified “everyone understood” side lagging was not required as mining advanced (Tr. 235; *see also* Tr. 181) the Plan stated, “Secondary support *will* be provided.” (Gov’t Exh. 2 at 8 (*emphasis supplied*)), and it is more reasonable to read the Plan as requiring implementation to take place as the slope developed, not after the slope was completed. This is because one of the Plan’s primary goals was to protect miners during development, and side and top lagging played roles in meeting that goal by protecting miners from rib sloughage and roof fall. Thus, I conclude systematic and on going installation of side and top lagging was required. It is true following the roof falls the Plan was amended to contain more specific requirements about lagging, but the post-falls amendment of the Plan does not vitiate the original requirement. Tr. 138.

²¹ It is true Hendrick estimated top lagging was installed over 90 percent of the slope from the fall area outby, but even if this was so, all of the required top lagging was not installed, and the Plan was violated. Tr. 225-226.

S&S and GRAVITY

A S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “if, based upon the particular facts surrounding a violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). To establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (January 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v. Sec’y of Labor*, 81 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985). Further, an S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (August 1985); *U.S. Steel*, 7 FMSHRC at 1130.

Finally, the S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996).

Here, the Secretary established a violation of the Plan. She also established a safety hazard contributed to by the violation. The side and top lagging provided protection from rib sloughage and falling roof material. The fact the ribs were likely to slough into the slope was attested to, among other things, by the fact Mach believed it was necessary to surface them with concrete to prevent their deterioration and keep them in tact. Tr. 193. The fact roof material was prone to fall in some areas of the slope was attested by the two falls that occurred and by the additional protective feature – i.e., the steel mesh – Mach chose to install. Tr. 34, 149, 175-176. Side and top lagging would have offered degrees of protection from rib bursts, sloughage, or roof falls. The fact the ribs and roof were subject to sloughage and falls and the fact miners used the slope on a daily basis meant the lack of required lagging and the use of inadequate lagging was reasonably likely to result in injuries to miners as mining continued. Moreover, because such injuries were the result of sloughing and/or falling rock, they were likely to be serious. For these reasons, I conclude the violation was S&S. Moreover, the nature of the likely injuries also meant the violation was serious.

NEGLIGENCE

Inspector Rennie found the violation was due to Mach's "moderate" negligence. Gov't Exh. 11-1; Tr. 99. I conclude he was correct. The company drafted the Plan and was solely responsible for compliance. While Hendrick believed "everyone," including MSHA, understood lagging could await application of concrete to the floor and sides (Tr. 235), a reasonably prudent operator would have read the Plan – as I have found – to require on-going compliance during the slope's development. A major purpose of the Plan, if not *the* major purpose, was to protect miners while they were engaged in the slope's development, and contemporaneous compliance furthered the purpose.

I am of the belief, however, the Secretary was complicit in the violation. At the time Rennie cited the violation, the lack of lagging as required by the Plan was not a recent phenomenon. The conditions were not cited until Rennie's roof fall-related inspection, even though they existed when Rennie and other MSHA personnel, including MSHA's district manager, were in the slope prior to the first fall. During those visits, no one from MSHA commented on the existing deficiencies in side and overhead lagging, let alone cited a violation of section 77.1900-1. Tr. 185, 271; *see also* Tr. 115.

Given the fact both Mach and MSHA did not focus upon the Plan's lagging requirements prior to the first roof fall, and given the fact the record reveals no imminent hazards that would have alerted the company to the immediate need for such lagging, I conclude the company's exhibited an ordinary lack of reasonable care.

LAKE 2006-146

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>
7582685	3/6/06	77.1900-1	\$135

THE CITATION

Citation No. 7582685 states in part:

The operator . . . has not complied with the approved slope sinking plan. Arches installed in the slope have not been blocked properly. No blocking was installed on the sides of the arches in several locations and top blocking was missing in several locations from the top of the slope to about the 2000 foot mark down the slope, nor were the tension rods installed across any of the arches in the slope.

The approved slope sinking plan requires on Page 3 that "Arches will be installed on 4-5 foot spacing and lagging

with a minimum of 20 gauge corrugated decking or a hardwood block (minimum 3 inches thick).” Blocking of the arches will be performed following the manufacturer[']s recommendation. American Commercial Inc.[’s] ([m]anufacturer) recommendations are that the arches be blocked or a tension rod installed across the arches.

Gov’t Exh 12 at1-2.

THE VIOLATION

There are two aspects to the alleged violation. First, the Secretary alleges arches were not side blocked and top blocked at “several locations from the top of the slope to about the 2000 foot mark down the slope.” Gov’t Exh. 12–1. Second, she alleges none of the arches had tension rods. *Id.*

After specifying the primary roof support to be used in constructing the slope, the Plan describes secondary support that is authorized, including the arches. In setting forth how the arches are to be installed, the Plan states in part, “Blocking of the arches will be performed following the manufacturer’s recommendations. Included (Attachment #3 – Steel Arches) is the manufacture’s steel set drawings and calculations.” Gov’t Exh. 2 at 8. As I read this statement, it does not require blocking, rather it means if there is blocking it must be carried out according to the manufacturer’s recommendations. Further, the logical implication of the phrase “Included (Attachment #3– Steel Arches) is the manufacture’s steel set drawings and calculations” (Gov’t Exh.2 at 8) is that Attachment 3 contains the applicable “manufacturer’s recommendations.” Gov’t Exh. 2 at 13; Tr. 101.

Attachment 3 includes no reference to “blocking.” In fact, as the following exchange between the Secretary’s counsel and Inspector Rennie shows, there was nothing in the Plan setting forth the manufacturer’s recommendations for blocking. Rather, such recommendations were included in an amendment to the Plan that was prepared, submitted, and approved after the subject citation was issued.

Q. [Secretary’s counsel]: Is there anything in this plan that shows manufacturer’s recommendations for blocking?

A. [Inspector Rennie]: Not in this plan, no.

Q. [Secretary’s counsel]: Okay. In a later plan?

A. In a later plan, there was, yes.

Q. But not in effect at the time?

A. Not in this plan, no.

Tr. 101-102.

Therefore, I conclude the Secretary has not established, and in fact cannot establish under the specific wording of the Plan, that “[a]rches installed in the slope have not been blocked properly.” Gov’t Exh. 12-1.

I further find she cannot establish a failure to install tension rods on the arches violated the Plan. The purpose of using wood blocks to hold an arch in place and to help bear the weight of the roof may be similar to the purpose of a tension rod in that they both can stabilize an arch and support the weight above and around it. However, they are two very different means of achieving the purpose, and there is nothing in the Plan that states tension rods shall be installed following the manufacturer’s recommendation. Rather it is “[b]locking,” if used, that must “be performed following the manufacturer’s recommendations” (Gov’t Exh. 2 at 13), and as Rennie testified, there is nothing in the Plan regarding blocking recommendations. Tr. 101-102. It is not enough to include in the Plan a schematic drawing of an arch showing a tension rod and insist this means the rod must be included on all arches when there is no reference to tension rods in the written portion of the Plan.²²

For these reasons I conclude the Secretary has not established the conditions set forth in Citation No. 7582685 violated section 77.1900-1.

²² Indeed, the Plan as approved was written in such an imprecise and convoluted manner misunderstandings as to its meaning were almost certain to occur. The agency owes it to those whom it is charged to protect to make sure any plan she approves states what she and the company actually intend. Approval of a verbal mish mash fosters the safety of no one.

REMAINING CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

As counsel for the Secretary explained, because the mine was being developed at the time the citations were issued, there is “basically no history of previous violations.” Tr. 9. Accordingly, the history of previous violations criteria will have no bearing on the penalties assessed.

SIZE

In proposing penalties for the alleged violations, the Secretary, perhaps due in part to the fact production had yet to commence, indicated Mach was small in size. See Petitions for Assessment of Civil Penalty, Exhibits A. I find this to have been the case.

GOOD FAITH ABATEMENT

No allegation was made by the Secretary that Mach failed to exhibit good faith in abating the violation of section 77.1900-1 set forth in Citation No. 7582684. Therefore, I conclude Mach’s abatement efforts were timely and effective.

ABILITY TO CONTINUE IN BUSINESS

No evidence was offered that any penalty assessed will affect Mach’s ability to continue in business, and I find it will not.

CIVIL PENALTY ASSESSMENT

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. §</u>	<u>Proposed Assessment</u>
7582684	3/6/06	77.1900-1	\$107

I have found the violation was serious. I also have found the company’s negligence was moderate. Given these findings and the other civil penalty criteria, I conclude a civil penalty of \$250 is appropriate.

ORDER

The Secretary has failed to prove the violations of section 77.1900-1 alleged in Citations No. 7582683 and 7582685, and the citations **ARE VACATED**. The Secretary has proven the violation of section 77.1900-1 alleged in Citation No. 7582684, and Mach **SHALL PAY** a civil penalty of \$250 for the violation within 40 days of the date of this decision. Upon payment of the penalty, these proceedings **ARE DISMISSED**.


David F. Barbour
Administrative Law Judge

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/sf

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 29, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2007-550
Petitioner	:	A.C. No. 48-01248-117512
	:	
v.	:	
	:	KFX Plant LLC
EVERGREEN ENERGY, INC.,	:	
Respondent	:	

DECISION ASSESSING A CIVIL PENALTY
BASED ON THE PARTIES' JOINT MOTION FOR SUMMARY DECISION

Before: Judge Manning

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Act"). The parties filed a "Joint Motion for Administrative Law Judge to Assess Appropriate Penalty and Parties' Stipulation of Facts." I construe this motion as a joint motion for summary decision under Rule 67 of the Commission's Procedural Rules. 29 C.F.R. § 2700.67.

I. STIPULATIONS OF THE PARTIES

The case involves Order No. 7610463 issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") on January 25, 2007, under section 104(d)(1) of the Act. The order alleges that Evergreen Energy ("Evergreen") failed to record the results of the on-shift examinations as required by section 77.1713(c). The order states, in pertinent part:

On 12/30/2006 day shift and 12/31/2006 day shift, no examination for the KFX plant was recorded. Rick Friesen, shift supervisor, was responsible for conducting the examination for the days affected. This constitutes more than ordinary negligence in that he was aware of the requirements of the standard for documenting hazards to minimize the dangers.

The parties entered into the following stipulations, as corrected for minor errors:

1. Attached is the correct violation history for the 24-month period preceding the date of the inspection.

2. Respondent stipulates to the facts and findings that are set forth in the order at issue in this case (No. 7610463), including but not limited to the findings regarding the nature of the violation and gravity.

3. If this citation had been regularly assessed according to the regular assessment formula that was in effect on the date the citation was issued (January 25, 2007), the proposed penalty would have been \$306.00.

4. Respondent is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq. (the "Act").

5. The Administrative Law Judge has jurisdiction in this matter.

6. The operator demonstrated good faith in abating the violation.

7. Respondent operates a coal mine. The mine produced 87,263 tons of coal during calendar year 2006. The controlling entity produced a total of 606,962 tons of coal during calendar year 2006. (See 30 C.F.R. 100.3(b) (2006)).

8. Respondent's payment of the penalty proposed by MSHA (\$3,500.00) would not impair Respondent's ability to continue in business.

In the motion, the Secretary set forth her position, as follows:

It is the Secretary of Labor's position that violations of section 77.1713(c) should be treated seriously because the purpose of the recording requirement is to ensure that any hazards found during inspections are timely abated. See 30 C.F.R. 77.1713(d). It is the Secretary of Labor's position that under all the circumstances, the proposed penalty is appropriate.

Evergreen provides the following argument:

Attached hereto is Respondent's letter explaining why Respondent believes that the proposed penalty is too high. As

noted in the letter, the violation is not significant and substantial. It is Respondent's position that the violation was the result of a paperwork error, in that the inspection was not recorded. It is Respondent's position that the violation should not have been specially assessed and that the proposed penalty is excessive.

Respondent's letter attached to the motion makes the same arguments and stresses that the penalty should be reduced because the inspector did not mark the order as significant and substantial. The letter also states that although "the inspection was conducted and not recorded, this failure to record the inspection does not necessarily endanger miners in their work place."

II. ASSESSMENT OF A CIVIL PENALTY

As a general rule, Commission judges are accorded broad discretion in assessing civil penalties under the Act. Such penalties must reflect proper consideration of the six penalty criteria set forth in section 110(i) and the deterrent purposes of the Act. *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-95 (March 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). If a judge significantly changes the penalty from that proposed by MSHA, he must provide "sufficient explanation" for the penalty assessed. *Sellersburg*, at 293; *Cantera Green*, 22 FMSHRC 616, 620-21 (May 2000).

The record shows that Evergreen operates a small to medium-sized mine. The controlling entity is small. The record shows that Evergreen has paid penalties for 13 violations in the previous two years. Eleven of these citations were designated as non-significant and substantial. It received a section 104(d)(1) citation on December 22, 2006, for an alleged violation of section 48.25(a), but a penalty has not yet been assessed for the citation. Evergreen has a relatively low history of previous violations taking into consideration the size of the mine. The negligence of the operator was high and the violation was a result of Evergreen's unwarrantable failure to comply with the safety standard. The inspector determined that it was unlikely that the violation would lead to an injury and that the violation was not of a significant and substantial nature. He also determined that if an accident were to occur as a result of this violation, it could result in a fatality. A penalty up to the amount of MSHA's proposed penalty will not affect Evergreen's ability to continue in business. The violation was rapidly abated in good faith.

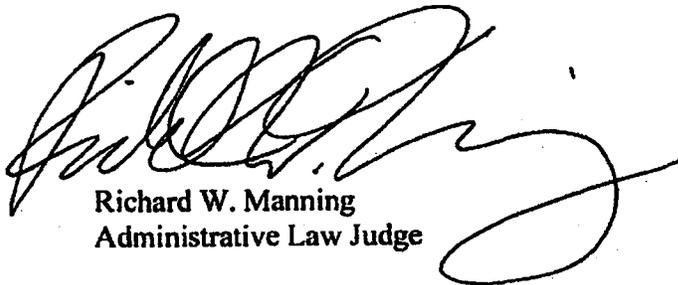
I agree with the Secretary that failing to record pre-shift and on-shift examinations has the potential to allow a hazardous condition to continue unabated. On the other hand, if a condition that is hazardous is detected during an on-shift examination, the mine operator has the duty to correct it. As stated in section 77.1713(a), a certified person must conduct the examinations and requires that "any hazardous conditions noted during such examinations shall be reported to the operator and *shall be corrected by the operator.*" (emphasis added). There is no allegation in this case that Evergreen failed to correct any hazardous conditions found by Mr. Friesen, the shift supervisor, during his examinations on the dates in question. Thus, the violation was not especially serious. The record shows, however, that Evergreen previously violated section

77.1713(c) on December 13, 2005. This helps to substantiate the Secretary's high negligence determination.

The Secretary proposed the penalty under her special assessment regulations at 30 C.F.R. § 100.5. As a consequence, it is difficult to determine exactly how she arrived at the \$3,500.00 proposed penalty. As stated above, the MSHA inspector determined that it was unlikely that the violation would lead to an injury and he marked the violation as non-significant and substantial. In the "Narrative Findings for a Special Assessment," however, the Secretary states that the "gravity of the violation was considered serious." Although the parties stipulated to the "facts and findings" set forth in the citation, including the inspector's "findings regarding the nature of the violation and gravity," they did not stipulate to the narrative special assessment findings. In assessing a civil penalty, I rely on the inspector's determinations, as marked on the citation, rather than on the conclusions set forth in the Secretary's narrative special assessment findings. Based on the above and the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I find that a penalty of \$2,000.00 is appropriate.

III. ORDER

For the reasons set forth above, Order No. 7610463 is **AFFIRMED** and Evergreen Energy, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$2,000.00 within 30 days of the date of this decision. Payment should be sent to MSHA's new address: U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 30, 2007

UNITED MINE WORKERS OF AMERICA, LOCAL 1248, Complainant
v.
MAPLE CREEK MINING, INC., Respondent

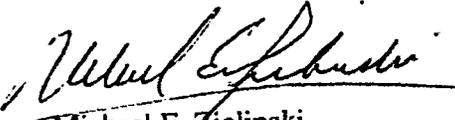
: COMPENSATION PROCEEDING
:
: Docket No. PENN 2002-23-C
:
:
: Maple Creek Mine
: Mine ID 36-00970

ORDER OF DISMISSAL

This case is before me on remand pursuant to the July 13, 2007, Decision of the Commission. *UMWA, Local 1248 v. Maple Creek Mining, Inc.*, 29 FMSHRC 583 (July 2007). The Commission vacated orders denying Respondent's motion for summary decision and motion for reconsideration, conclusively establishing that the claim for up to one week's compensation under the third sentence of section 111 of the Act must be rejected. The case was remanded because the Commission was unable to ascertain whether there is any other valid claim for compensation under the other provisions of section 111.

Complainant was directed to file a status report identifying any issues remaining to be resolved under its Complaint for Compensation, as amended. Complainant reported that it had identified some miners who had not received compensation pursuant to the first two sentences of the subject section, and that the names of the miners and the amounts owing had been forwarded to Respondent. Subsequently, the parties filed a Joint Motion to Dismiss the action, representing that all outstanding claims for compensation had been satisfied.

Based upon the foregoing, the motion to dismiss is granted, and this case is hereby **DISMISSED**.


Michael E. Zielinski
Administrative Law Judge

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29 FMSHRC 898