

SEPTEMBER AND OCTOBER 2008

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SEPTEMBER AND OCTOBER 2008

Review was granted in the following case during the months of September and October:

Secretary of Labor, MSHA v. IO Coal Company, Docket No. WEVA 2007-293. (Judge Barbour, August 20, 2008)

Review was denied in the following case during the months of September and October:

Gabriel M. Robles v. LaFarge North America, Inc., Docket No. CENT 2008-115-DM. (Judge Melick, August 28, 2008)

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 7, 2008

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

v.

TWENTYMILE COAL COMPANY

:
:
:
:
:
:
:
:

Docket No. WEST 2008-375
A.C. No. 05-03836-127865

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On June 30, 2008, the Commission received from Twentymile Coal Company (“Twentymile”) a motion by counsel requesting that the Commission reopen proceedings involving 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 October 2, 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000127865 to Twentymile, proposing penalties for various citations, including Citation No. 7620939. On January 31, 2008, the Commission received from Twentymile a request to reopen so that it could contest the penalty associated with Citation No. 7620939. Twentymile explained that due to a processing error, the penalties that Twentymile was not contesting were not paid until November 2007.

On May 16, 2008, the Commission issued an order denying without prejudice Twentymile's request to reopen.¹ *Twentymile Coal Co.*, 30 FMSHRC 384 (May 2008). The Commission explained that, while Twentymile's request addressed the mistake that led to the late payment of the uncontested penalties, it did not explain the company's separate failure to return the assessment form to MSHA in order to contest the penalty associated with Citation No. 7620939.

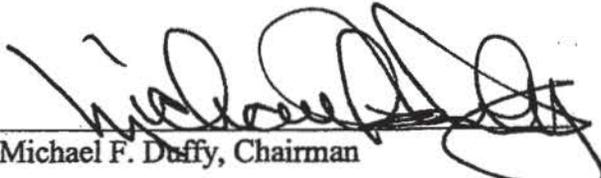
On June 30, the Commission received a second motion to reopen from Twentymile. Twentymile alleges that it failed to timely contest the proposed assessment related to Citation No. 7620939 because a Twentymile employee, who does not regularly process proposed assessments, directed that both the payment for uncontested citations and the checked assessment form indicating the contested penalty be sent to the same location.² The Secretary did not file a response to the second motion to reopen.

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 After a motion to reopen has been denied "without prejudice," a movant has the opportunity to file another request to reopen in order to remedy the procedural defects that led to the denial.

² Payment of a proposed penalty must be sent to MSHA at a St. Louis, Missouri, address, while the form contesting a proposed penalty must be sent to MSHA at an Arlington, Virginia, address.

Having reviewed Twentymile's June 30 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 Twentymile'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



Robert F. Cohen, Jr., Commissioner

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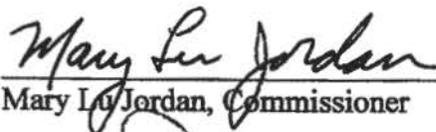
Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

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).

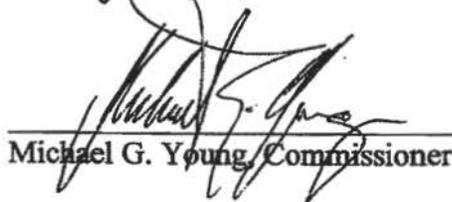
Having reviewed Bledsoe’s motion, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Bledsoe’s failure to timely contest the penalty proposal and whether relief from the final order should be granted. If it is 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.



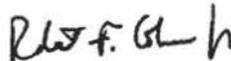
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Michael G. Young, Commissioner



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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 15, 2008

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
v. : Docket No. LAKE 2008-422-M
VOSS SAND WORKS, INC. : A.C. No. 11-03114-136303

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On May 19, 2008, the Commission received from Voss Sand Works, Inc. ("Voss Sand") a letter seeking to reopen a penalty assessment that may have 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 16, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000136303 to Voss Sand, proposing civil penalties for three citations. Voss Sand did not respond to the Proposed Assessment. On April 24, 2008, the Secretary issued a Notice of Delinquency to Voss Sand.

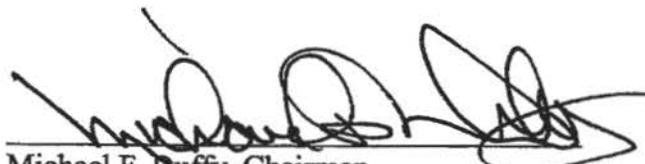
In response to the Notice of Delinquency, Voss Sand sent a letter to the Secretary on May 13, 2008. Voss Sand stated that it did not receive the proposed assessment and requested a hearing on the citations. Voss Sand attached to its request the delinquency notice from MSHA seeking payment of the penalties.

The Secretary states that she does not oppose Voss Sand's request to reopen the proposed assessment. She notes, however, that the proposed assessment was sent by Federal Express to the address of record, but was returned undelivered. The Secretary further urges the operator to take all steps necessary to ensure that, in the future, any penalty assessments are contested in a timely manner. For clarity, the Secretary attached to her response the proposed assessment and Federal Express tracking record.¹

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 On June 9, 2008, the Commission received from Voss an "Answer to Contest the Petition for Assessment of a Penalty." The answer is premature. An operator is required to file an answer within 30 days after service of a petition for assessment of penalty filed by the Secretary. 29 C.F.R. § 2700.29. The Secretary's petition for assessment of penalty is not filed until after the operator submits a timely contest of the proposed penalty assessment. *Id.* Here, Voss did not timely contest the proposed assessment. Voss's May 13, 2008 letter constitutes a request to reopen the assessment. Because the Secretary has not filed a petition for assessment of penalty, Voss is not required to file an answer. Accordingly, we strike the answer filed by Voss from the record.

Having reviewed Voss Sand's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for granting Voss Sand relief from the final order. If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



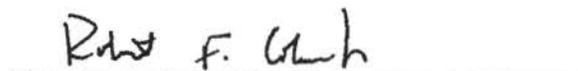
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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October 15, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 2008-565
	:	A.C. No. 46-05978-132359
v.	:	
	:	
JACOB MINING COMPANY, LLC	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On February 19, 2008, the Commission received from Jacob Mining Company, LLC (“Jacob Mining”) a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

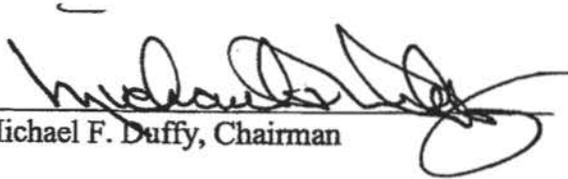
On July 28, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued four citations to Jacob Mining. The company timely filed notices of contest for each of the citations, and the consolidated contest proceeding was stayed pending issuance of proposed penalty assessments for the citations. Jacob Mining states, however, that when penalties for two of the citations were proposed in Assessment No. 000132359, issued by MSHA on November 21, 2007, the assessment was inadvertently placed with other assessments sent to the company’s accounting department for payment. The operator further states that the assessment was consequently paid.

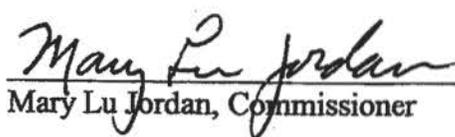
While the Secretary states that she does not oppose Jacob Mining's request to reopen, she also notes that as of March 6, 2008, MSHA had not received the payment of the penalty assessment that the operator alleges it remitted.

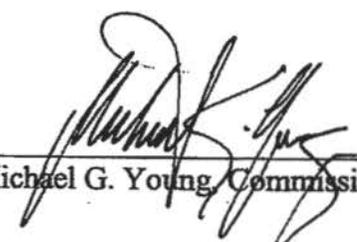
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the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

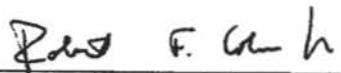
The Secretary's statement that MSHA had not received the penalty payments from Jacob Mining is consistent with her statement earlier this year in the contest proceeding that the penalty payments at issue here were delinquent. It was that statement which prompted the judge in the contest proceeding to issue a Show Cause Order regarding whether the contests should be dismissed because of the apparent failure to contest the penalty assessments, and it is that Show Cause Order that, according to Jacob Mining, prompted it to seek reopening of the penalty assessments. Thus, Jacob Mining's professed reason for seeking reopening—inadvertent payment—is contradicted by the Secretary's records.

Having reviewed Jacob Mining's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Jacob Mining'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 2700.¹


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ The parties should immediately consult with one another, and try to resolve the dispute over whether Jacob Mining paid the two penalties, so as to narrow the issues before the Chief Administrative Law Judge.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

October 22, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2008-483-M
	:	A.C. No. 21-03404-147589
v.	:	
	:	
UNITED TACONITE, LLC	:	

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

ORDER

BY THE COMMISSION:

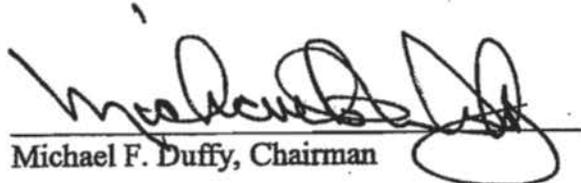
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On June 18, 2008, the Commission received from United Taconite, LLC (“UTAC”) a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On April 17, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a proposed penalty assessment to UTAC for 54 citations MSHA had issued to UTAC in 2007 and 2008. UTAC states that the assessment was forwarded to the UTAC area safety manager, David J. Evans, who was out of the office at the time. UTAC further alleges that, while Evans was gone, the contents of his office were put into storage, so that the UTAC offices could be remodeled. In an affidavit, Evans states that, consequently, he did not learn that the proposed assessment had been issued until counsel informed him on June 4, 2008, that UTAC was delinquent in paying the penalties, at which point he began to look for the form and realized that a contest of the proposed penalties had not been filed. The Secretary states that she does not oppose UTAC’s request to reopen the penalty assessment.

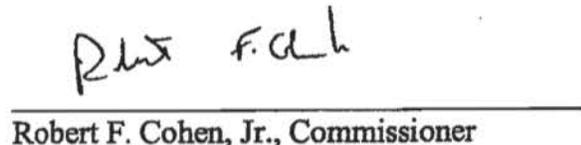
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

Having reviewed UTAC’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 UTAC’s failure to timely contest the penalty proposals and whether relief from the final orders should be granted. If it is determined that such relief is appropriate, 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


Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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October 22, 2008

SECRETARY OF LABOR,	:	Docket No. SE 2008-547-M
MINE SAFETY AND HEALTH	:	A.C. No. 38-00233-134567
ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2008-548-M
	:	A.C. No. 09-00721-134513
	:	
v.	:	Docket No. SE 2008-549-M
	:	A.C. No. 09-01015-134514
	:	
	:	Docket No. SE 2008-550-M
DBS, INC.	:	A.C. No. 09-00955-137103

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On April 4, 2008, the Commission received from DBS, Inc. ("DBS") motions by counsel seeking to reopen four penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued the four proposed penalty assessments to DBS on December 20, 2007, and January 24, 2008.

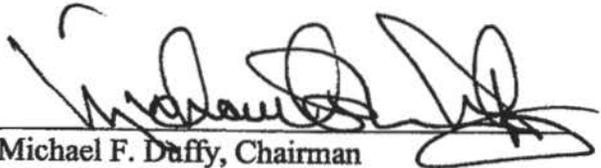
¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers SE 2008-547-M, SE 2008-548-M, SE 2008-549-M, and SE 2008-550-M, all captioned *DBS, Inc.* and involving similar procedural issues. 29 C.F.R. § 2700.12.

DBS had previously contested the citations contained in those assessments, and the Commission had assigned them the following docket numbers: SE 2008-84-RM, SE 2008-86-RM, SE 2008-87-RM, SE 2008-205-RM, SE 2008-206-RM and SE 2008-207-RM.² DBS asserts that it failed to realize that it needed to contest the penalty proposals in addition to contesting the citations. It states that it became aware that the proposed assessments became final on March 26, 2008, when it received the Secretary's Motion to Dismiss the citation contest cases. In response, the Secretary states that she does not oppose the reopening of the penalty assessments.

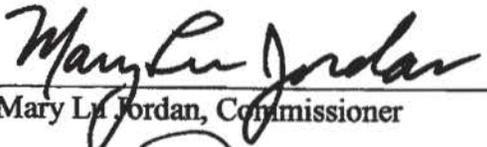
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the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

² We note that DBS failed to timely contest three of the six citations within 30 days of receipt of the citations. *See* 30 U.S.C. § 815(d); Comm. Proc. Rule 20(b), 29 C.F.R. § 2700.20(b). Hence, on July 11, 2008, Chief Administrative Law Judge Robert J. Lesnick issued an Order of Dismissal granting the Secretary's Motion to Dismiss Docket Nos. SE 2008-205-RM, SE 2008-206-RM and SE 2008-207-RM. Unpublished Order dated July 11, 2008 ("Order of Dismissal"). (In a separate order, he denied the Secretary's motion to dismiss the other three citations, finding that the operator's contests were timely filed. Unpublished Order dated July 11, 2008). In the Order of Dismissal, the judge noted that late filing of notices of contest of citations is not permissible under the Mine Act, but that the operator might still be able to contest both the citations and penalties if its motion to reopen the penalty assessments were granted by the Commission.

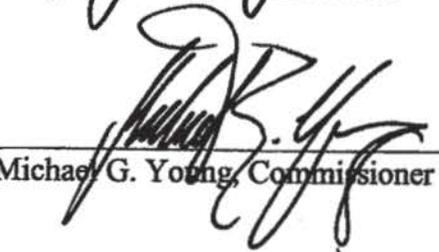
Having reviewed DBS's motion to reopen and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for DBS's failure to timely contest the penalty proposals and whether relief from the final orders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



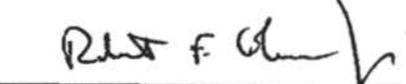
Michael F. Duffy, Chairman



Mary L. Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 22, 2008

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

v.

DIXIE SAND AND GRAVEL, LLC

:
:
:
: Docket No. SE 2008-774-M
: A.C. No. 01-02948-143820
:
:

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On June 17, 2008, the Commission received from Dixie Sand and Gravel, LLC ("Dixie") 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).

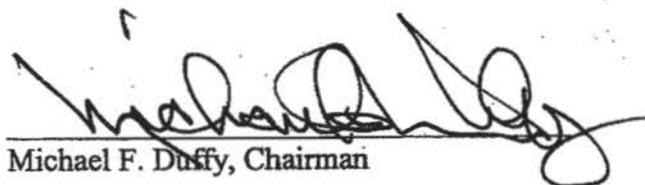
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On March 13, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000143820 to Dixie, proposing civil penalties for six citations that had been issued to Dixie on January 17, 2008. Dixie states that it received the proposed assessment, but due to sudden and drastic personnel reductions the assessment was not acted upon until April 22, 2008. Dixie, mistakenly believing that it had 30 business days, rather than calendar days, to contest the assessment, submitted the contest form to MSHA at that point. According to Dixie, MSHA informed it that its contest could not be accepted because it was two days late. The Secretary states that she does not oppose Dixie's request to reopen the proposed

assessment. However, she urges the operator to take all steps necessary to ensure that, in the future, any penalty assessments are contested in a timely manner.

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).

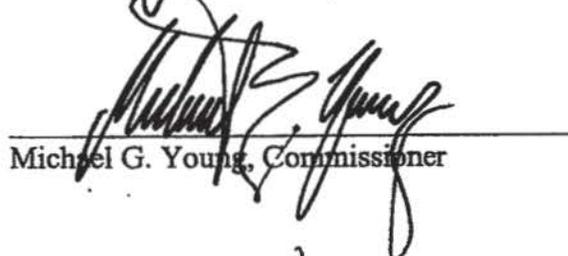
Having reviewed Dixie’s request and the Secretary’s response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Dixie’s failure to timely contest the penalty proposal and whether relief from the final order should 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.



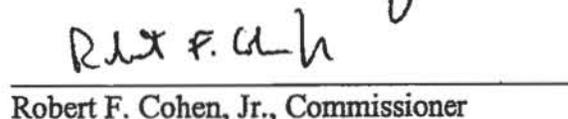
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 28, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2008-278-M
v.	:	A.C. No. 44-00167-114297
	:	
JESSEE STONE COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On May 5, 2008, the Commission received from Jessee Stone Company (“Jessee Stone”) 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 April 3, 2007, the Department of Labor’s Mine Safety and Health Administration issued Proposed Assessment No. 000114297 to Jessee Stone, proposing a civil penalty for Citation No. 6040139. Jessee Stone alleges that the citation is part of an ongoing settlement, and that it was “somehow left out or misplaced.” It further states that it has reached a settlement with MSHA on other citations except Citation No. 6040139.

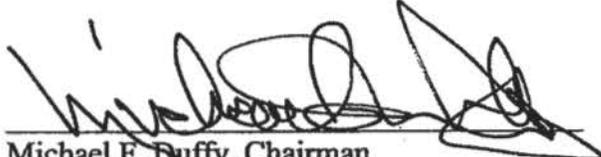
The Secretary responds that she does not oppose the motion to reopen. She notes, however, that this case was never part of the litigation and settlement agreement in Docket Nos. VA 2007-44-M and VA 2007-14-M. The Secretary further submits that this case was never contested, and that MSHA sent the operator a delinquency notice on July 11, 2007.

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), any motion for relief from a final order 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).

According to documents submitted by the Secretary, the proposed assessment became a final order on May 18, 2007. Jessee Stone’s request for relief from that final order was received by the Commission on May 5, 2008. We have determined, therefore, that the request is not barred by the one year time frame set forth in Rule 60(b).

Although the Secretary does not oppose Jessee Stone’s request for relief, the Secretary’s response makes reference to a delinquency notice dated July 11, 2007, that was sent to Jessee Stone. Jessee Stone’s request makes no reference to the delinquency notice.

Accordingly, having reviewed Jesse Stone's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Jesse Stone's failure to timely contest the penalty proposal and whether relief from the final order should be granted. In considering whether good cause exists, the administrative law judge should consider whether Jesse Stone received MSHA's delinquency notice dated July 11, 2007, and, if so, what action the operator took upon receiving it. If it is determined that relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



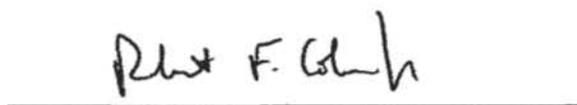
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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**Chief Administrative Law Judge Robert J. Lesnick
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601 New Jersey Avenue, N.W., Suite 9500
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

October 30, 2008

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2008-595-M
v.	:	A.C. No. 03-00479-143012
	:	
STRATCOR, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On June 10, 2008, the Commission received from Stratcor, Inc. ("Stratcor") 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 March 6, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000143012 to Stratcor, proposing civil penalties for 13 citations that had been issued to the company during January 2008. Stratcor states that it did not contest the assessment until after 30 days had passed because it spent the intervening time dealing with, and waiting to hear back from, various MSHA offices on questions Stratcor had regarding the basis for the amounts of the proposed penalties and a review of the proposed penalties in light of the information it had received. The Secretary states that she does not oppose Stratcor's request to reopen the proposed assessment. However, she emphasizes that every proposed assessment states that the operator must contest or pay it within 30 days of its receipt, and that such requirement, having been imposed by statute, is not suspended while the operator is discussing the proposed assessment with MSHA personnel.

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 Statcor's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Statcor's failure to timely contest the penalty proposals and whether relief from the final orders should be granted. If it is determined that such relief is appropriate, 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



Robert F. Cohen, Jr., Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

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

September 8, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2007-384
Petitioner	:	A. C. No. 46-08751-112972
	:	
v.	:	
	:	
KINGWOOD MINING COMPANY, LLC,	:	Mine: Whitetail Kittanning
Respondent	:	

DECISION

Appearances: Paul A. Marone, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor;
Carol Ann Marunich, Esq., Justin A. Rubenstein, Esq., Dinsmore & Shohl, LLP, Morgantown, West Virginia, on behalf of Kingwood Mining Company, LLC.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges that Kingwood Mining Company, LLC, is liable for twelve violations of the Secretary's Mandatory Safety Standards for Underground Coal Mines, and proposes the imposition of civil penalties totaling \$14,976.00. The parties reached an agreement to settle eleven of the alleged violations, and filed a motion seeking approval of the settlement. That motion will be granted. A hearing was held on the remaining violation in Morgantown, West Virginia, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that Kingwood committed the violation, and impose a civil penalty in the amount of \$500.00.

Findings of Fact - Conclusions of Law

Kingwood Mining Company, a subsidiary of Alpha Natural Resources, LLC, operates the Whitetail Kittanning Mine near Newburg in Preston County, West Virginia. The underground mine produces 12,000 tons of coal daily and employs about 255 persons for two production shifts and one maintenance shift, six days a week. On July 17, 2006, at 8:00 a.m., Grayden Wolfe, an MSHA inspector, visited the Whitetail Mine to conduct a spot methane inspection and collect respirable dust samples. Tr. 26-27. While traveling from the power center through the cross cut on the right side of the East Mains Section, Wolfe noticed a large steel plate leaning against the right rib of the intersection at block 18. Tr. 31. The plate, which Wolfe described as a "very,

very heavy piece of steel,” measured 76 inches long. It was 10 inches wide, with rectangular pieces measuring 20 inches by 21 inches on each end. Tr. 45, 73. Wolfe continued with his inspection and proceeded to an Oldenburg Stamler Belt Feeder to conduct an intake dust reading.

Coal is dumped onto the feeder, which runs it through a crusher to break up oversized pieces before depositing it onto a conveyor belt that transports it out of the mine. The bed of the feeder, upon which the coal is dumped, is approximately eight feet wide and twelve feet long. It is elevated off the mine floor about one foot, and is open on three sides, so that it can be accessed by shuttle cars and scoops from three directions. Tr. 157. The bed consists of a steel pan, approximately six feet wide. Metal flights, approximately six inches wide by three inches high and spaced at two-foot intervals, move along the pan to push the coal into the crusher. The flights are mounted on chains that run on sprockets¹ located at the ends of the pan. The drive sprockets are at the crusher end. Idler sprockets rotate on a stationary shaft at the open end of the feeder bed. There are several inches of space between the shaft and the flights. Tr. 56. The flights are about two inches above the pan when they reach the top of the idler sprockets. They settle onto and slide along the pan as they move toward the crusher. Tr. 43. The area where the idler sprockets rotate, moving the flights from under the pan to the top of the pan, is covered by a steel plate, i.e., the plate found by Wolfe. The wings of the plate were designed to cover the idler sprockets and the ten-inch-wide section covers the area where the flights rotate toward the top of the pan.

The inspection was conducted at the beginning of the day shift on a Monday morning and, when Wolfe approached the feeder, it was not yet operating. Coal was piled on it to a height of about six feet, and was spilling over the edges. Tr. 32. There were two sets of footprints on the pile, over the place where the cover plate should have been. Tr. 32-33. Wolfe was unable to determine whether there was a cover plate in place over the idler sprockets. Tr. 32-33. He observed Richard Kelly, the left side section day-shift foreman, walk directly past the feeder and the detached cover plate. Tr. 35. Wolfe expressed concern to Kelly about the plate leaning against the rib, and inquired whether there was a plate on the feeder. Tr. 53. Kelly indicated that he did not know, and Wolfe instructed him to have the coal removed. Tr. 53. Once the coal was removed, Wolfe could see that there was no cover plate on the feeder, and it was apparent that the steel plate leaning against the rib was the missing cover plate. Tr. 44-45, 56; ex. G-3.

At 9:40 a.m., Wolfe issued Order No. 7143320 to Kingwood pursuant to section 104(d)(1) of the Act, alleging a violation of 30 C.F.R. §75.1722(a), for failure to guard the “tail roller and sprocket” on the open end of the feeder. Tr. 56; ex. G-1. During the course of the inspection, Wolfe learned that there had been previous incidents at the mine in which cover plates had been dislodged from feeders as a result of being struck by shuttle cars. Tr. 168-69, 207. The company’s maintenance report indicated that the cover plate in question had become dislodged just days before, and had been replaced during the morning of Saturday, July 15. Tr. 61-62.

¹ A “sprocket” or “sprocket gear” is a gear that meshes with a roller or silent chain. Am. Geological Inst., *Dictionary of Mining, Mineral, and Related Terms* 531 (2d ed. 1997).

Following issuance of the Order, Robert Maxwell, the section coordinator of the East Mains, along with four other miners, repositioned the plate on the feeder and bolted it down. Tr. 54, 56-57. Maxwell stated that he was unaware that the cover plate had come off until Wolfe brought it to his attention. Tr. 196-97. According to Wolfe, the plate appeared to have been intentionally placed against the rib. Tr. 73, 82. He concluded that it was unlikely that such action would have been taken without the direction of a supervisor. After running the feeder to ensure that the flights were not catching, Wolfe lifted the Order at 10:35 a.m. Tr. 57-58.

At approximately 8:20 a.m., with two miners standing eleven feet away and a shuttle car parked twenty inches from the end of the feeder, the feeder and the belt line were energized. Tr. 34-35, 46-47; ex. G-3. Wolfe did not witness anyone physically energize the feeder, and he is unsure whether the feeder was energized automatically or manually. Tr. 119-20. Feeders may be energized manually or may be set to energize automatically at specific times. Tr. 118. According to Maxwell, the feeder in question is energized manually by hitting a reset button and a switch located on the side of the feeder. Tr. 173. It is mainly operated during the two production shifts, and is typically energized for the entire shift. Tr. 132. Maxwell stated that, although it is not uncommon for the feeder to be operated during the midnight maintenance shift, it is usually only operated to clean spillage or to conduct a maintenance check of the equipment. Tr. 112, 167-68.

The feeder was last operated before the inspection during the day shift on Saturday, July 15. Tr. 76-78, 200. The next shift to work was the midnight shift at the beginning of July 17, during which the feeder was not operated. At 12:00 a.m. on July 17, scoop operator, Dixie Sutton dumped a bucket of coal onto the bed of the feeder, where it remained until Wolfe's inspection. Tr. 164-65. Consequently, the plate was likely dislodged at some point prior to the end of the day shift on July 15.

On a normal day, there could be up to two hundred shuttle car loads dumped onto the feeder in an eight to nine hour period, and a scoop would clean around it one to three times daily. Tr. 157. Occasionally, miners clean coal from the dump area by shoveling it onto the end of the feeder. Tr. 101. Maxwell described the feeder as "dirty, black looking, rusty looking." Tr. 160, 178. He also testified that the area was not well lit, and was primarily lit with "cap lights or lights on the equipment." Tr. 201. Sutton described the area as having "a lot of spillage, a lot of debris," including pieces that tear off of "machinery" and are usually left at the feeder. Tr. 149-51.

It is not unusual for miners to travel past the feeder at the beginning of their shifts to reach their work areas, and during breaks to retrieve their lunch buckets. Tr. 70. Sutton testified that miners are trained not to walk across the feeder. Tr. 138. There are pipes wrapped in blue reflective tape hanging at each corner of the feeder to alert miners to its presence. Tr. 155-56, 187. Should a miner get caught in the flights, there is a "dead-man's switch," activated by a cable strung above the pan, which a miner could use to cut power to the machine. Tr. 120-21, 193-94.

Order No. 7143320

Order No. 7143320 alleges a violation of 30 C.F.R. § 75.1722(a), which provides, in pertinent part:

(a) Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings, shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

The "Condition and Practice" section of the Order stated:

The Operator failed to guard the Oldenburg Stamler Feeder, tail roller and sprocket. This feeder serves the East Mains number 2 Belt, (MMU-007 and MMU-008). The exposed area was covered over with coal, and the cover plate was laying on the corner of 18 Block. The plate measures 76 inches x 10 inches, with 20 inch x 21 inch wings on the ends. The feeder was started at 8:20 A.M. with 2 employees standing in close pro[ximity]. A company mechanical report stated that the cover plate was replaced on 07-15-2006, on day shift. The fireboss report for this East Mains Section, on 07-17-2006 (day shift) 5:50 A.M. - 6:18 A.M. did not state that the cover plate was missing. This uncovered area exposes workers to a turning sprocket and gear, and crusher. This violation is an unwarrantable failure on the Operator's part to comply with a mandatory standard.

Wolfe determined that it was highly likely that the violation would result in a fatal injury, that the violation was significant and substantial ("S&S"), that one person was affected, and that the operator's negligence was high. The Order was issued pursuant to section 104(d)(1) of the Act, and alleges that the violation was the result of Kingwood's unwarrantable failure to comply with the safety standard. A civil penalty in the amount of \$6,600.00 has been proposed for this violation.

The Violation

Kingwood does not dispute the fact that, at the time of Wolfe's inspection, the feeder's cover plate was not in place. Instead, it argues that there was no violation of section 75.1722(a) because the cover plate or "apron" is designed to protect the feeder from scoop and shuttle cars dumping coal, not to guard moving machine parts or protect miners from the moving flights, chains or idler gears and shaft. Kingwood argues that the shaft positioned beneath the cover plate is stationary, it does not rotate, and the design provides for exposed chains and flights that are necessary for the feeder to perform its function. Resp. Br. at 5. It argues that because those moving parts are equally exposed along the length of the machine, the cover plate would have to

cover the entire feeder to function as a “guard,” which would eliminate the machine’s function by preventing the dumping of coal onto the feeder.²

The Secretary argues that, while the feeder is in operation, the absent cover plate exposes the turning steel shaft and gears that interlock with the chains, to which the metal flights are attached, and that those “moving machine parts” would likely cause injury to miners coming into contact with them. The Secretary maintains that these facts prove a clear violation of the standard.

Gears, sprockets, and chains are moving machine parts that are specifically enumerated in section 75.1722(a). When the feeder in question is operational, the idler sprockets rotate on the stationary shaft, guiding the chains on which the flights are mounted. Respondent’s assertion that the chains are exposed by design is incorrect. Pictures of a similar feeder clearly show that the moving chains are covered by protective plates at all locations. Ex. R-1, R-2. Although Respondent is correct in its claim that the flights pose a danger with or without the cover plate in place, the danger is increased when the rotating sprockets and chains are exposed and the flights are moving into place on the top of the feeder bed. The cover appears to serve a dual purpose of protecting the machine parts from damage, as well as preventing contact by miners with these particular moving machine parts.

There is also evidence that miners come in close proximity to the exposed end of the feeder. Miners travel past the feeder at the beginning of their shifts to reach their work stations and during their breaks to retrieve their lunches. A scoop operator cleans the surrounding area one to three times daily, and miners occasionally shovel coal onto the end of the feeder. On the day in question, Wolf observed two miners standing several feet from the end of the feeder, as well as footprints in the coal piled on top of the feeder. The absence of the cover plate exposed miners working near the feeder to additional hazards. I find that the regulation was violated.

Significant and Substantial

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

² Kingwood relies on *Rochester & Pittsburgh Coal Co.*, 10 FMSHRC 1576 (Nov. 1988) (ALJ) for support. Its reliance is misplaced because, unlike the present case, the issue in *Rochester* was whether a conveyor belt fell within the definition of “similar exposed moving machine part,” as stated in section 75.1722(a).

The Commission has explained that:

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

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

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

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

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

The fact of the violation has been established. The measure of danger to safety was contributed to by the exposed sprockets, chains and rotating flights, and any resulting injury would have been of a serious nature. The focus of the S&S analysis, therefore, is whether the violation was reasonably likely to result in an injury. I find that the Secretary has failed to carry her burden as to this issue.

The Secretary argues that miners frequently come in contact with the end of the feeder, and that the twelve-inch gap between the flights and the idle shaft, around which the flights rotate to the top of the pan, increased the measure of danger. The absent cover plate, which would normally protect miners from contact with the sprockets, chains and rotating flights, made it

reasonably likely that a fatal injury would result from a miner's foot, leg, hand or arm becoming caught between the shaft and rotating flights, or wedged between a flight and the feeder bed, which could result in the miner being dragged into the crusher. The Secretary goes on to assert that the frequency with which miners encountered the feeder made it reasonably likely that an injury would occur. Kingwood argues that the measure of danger posed by the feeder remained the same with or without the cover plate in place.

The feeder, by design, is an inherently dangerous machine. The flights travel the full length of the feeder bed, from the open end to the crusher. The feeder can be approached on three of its four sides, presenting three opportunities to contact the dangerous parts of the machine. The feeder's dangerous moving parts are not confined to the sprockets, chains, and flights beneath the cover plate. A miner would be at similar risk of serious injury if contact were made with a flight that had already passed from under the cover plate. As asserted by Respondent, to truly prevent harmful or fatal contact with the feeder would require that the entire machine be covered, which would render it useless.

I accept that miners travel the area around the feeder, but I am not persuaded that miners frequent the immediate vicinity of the feeder when it is operating. Sutton testified that miners generally do not walk in the area of the feeder during the work day, because they risk being run over by the numerous shuttle cars that approach the feeder to dump loads of coal. Wolfe agreed that any miners in the area would normally be in shuttle cars or scoops. Tr. 97. In addition, most of the miners traveling to their work stations at the beginning of the morning shift would have already passed the feeder by the time the feeder and belts were activated. Tr.131.

Although there were two sets of footprints across the pile of coal, it appears that they were made by a miner or miners who, rather than traveling the longer distance around the shuttle car, which was parked nearly up against the feeder, took an easier and quicker route across the pile of coal on the idle feeder. The shuttle car was parked there only because it was not being used on the midnight shift. It would not have been there if mining were ongoing and the feeder were energized, because it would have been used to transport coal. In addition, given that a person has to manually hit a reset button and then a switch on the side of the feeder to energize it, it is unlikely that the feeder would be energized while a miner was walking across it or otherwise on top of the machine. Kingwood's miners are trained not to walk across the feeder, and Wolfe confirmed that such conduct is not condoned or permitted by operators. If a miner were to be caught in the flights, he could activate the dead-man's switch to shut off the machine.

In summation, while the absence of the cover plate exposed moving machine parts that could cause injury, the exposure only marginally increased the dangerousness of the feeder itself, and while miners were occasionally in the area of the feeder, they were not there frequently enough to justify a finding that there was a reasonable likelihood of an injury occurring due to the missing cover plate. I find that the violation was unlikely to result in an injury, but if an injury were to occur, it would have been permanently disabling, and that the violation was not S&S. Unwarrantable Failure - Negligence

Order No. 7143320 was issued pursuant to section 104(d)(1) of the Act, which requires that the alleged violation be both S&S and "caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards." 30 U.S.C. § 814(d)(1). The finding that the violation was not S&S obviates the need to decide whether the violation was the result of the operator's unwarrantable failure.³ However, the issue of negligence must be addressed.

The Secretary argues that the violation was the result of Kingwood's high negligence and unwarrantable failure because the condition was obvious and existed for parts of three shifts, that a foreman was seen walking directly past the displaced cover plate, that the company failed to record the condition in a pre-shift examination report, and that the cover plate appeared to have been intentionally placed against the rib, which was likely done at the direction of a supervisor.

The Secretary has failed to prove that Kingwood's conduct rose to the level of reckless disregard or a serious lack of reasonable care. Although the cover plate is large and heavy and was leaning against the rib, the condition was not as obvious as the Secretary urges. The feeder was located in a dimly lit area, and was rusty, dirty, and black due to the constant dumping of coal. The cover plate, which was also rusty and dirty, did not stand out or easily catch the attention of persons in the area. Sutton testified that he worked around the feeder during the previous midnight shift and did not notice the cover. Tr. 149-55. It is plausible and probable that the cover went unnoticed by Kelly, as well as the preshift examiner.

Further, the condition was completely obscured by the large pile of coal. As Wolfe stated, there was "so much coal there I could not tell if there was a cover plate in place or not." Tr. 47. The plate leaning against the rib would only have served as an indicator, leading someone to question whether a cover plate was in place on the feeder. Additionally, while the condition existed for parts of three shifts, it is unclear just how long it posed an actual danger. At most, the danger existed for part of the day shift on July 15. The feeder was not operational during the one full shift that the plate was unattached, and the condition was abated two and one-half hours after the start of the following shift.

There is insufficient evidence to prove that the cover plate was moved at the direction of a supervisor, or that a supervisor was aware of the hazardous condition. Maxwell testified that he was unaware of the condition until he was informed by Wolfe during the inspection. He went on to explain that a supervisor would need to make the decision to reattach a cover plate, but not to move it if it had become dislodged. Sutton testified that no foreman was involved the one

³ As noted in *Lopke Quarries, Inc.*, 23 FMSHRC 705, 711 (July 2001), the unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04.

time he assisted in moving and replacing a cover plate. Tr. 171. Wolfe, admittedly, had no evidentiary support for his conclusion. Tr. 94.

Based on the foregoing, and considering the fact that the Secretary has the burden of proof on all elements of a violation, I find Kingwood's negligence with respect to this violation to have been moderate.⁴

The Appropriate Civil Penalty

The parties stipulated to many of the factors that are to be considered in establishing the amount of a civil penalty. Kingwood Mining Company is a large mine operator that produced 18,314,945 tons of coal in 2005. The Whitetail Kittanning Mine produced 1,509,283 tons of coal in the same year. In the 24 month period immediately preceding the issuance of the Order, Kingwood was assessed a total of 519 citations, based on 539 inspection days. Payment of the proposed penalty will not affect Respondent's ability to continue in business. Kingwood demonstrated good faith in promptly abating the violation. The gravity and negligence associated with the violation have been discussed above.

Order No. 7143320 is modified to a non-S&S citation, issued pursuant to section 104(a) of the Act. Kingwood's negligence was moderate. The violation was unlikely to result in an injury, and any injury would have been permanently disabling. A civil penalty of \$6,600.00 was proposed by the Secretary. The lowering of the levels of gravity and negligence justify a significant reduction in the proposed penalty. I impose a penalty in the amount of \$500.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

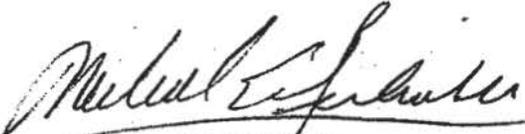
The Settlement

Prior to the hearing, the parties reached an agreement to settle eleven of the violations at issue. The Secretary filed a Motion for Decision and Order Approving Partial Settlement, seeking approval of the settlement agreement. The Secretary has agreed to modify eight of the citations and orders that are the subject of the agreement, and it is proposed that the total penalty for those violations be reduced from \$8,376.00 to \$5,381.00. I have considered the representations and evidence submitted and conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

⁴ In an enforcement proceeding under the Act, the Secretary has the burden of proving all elements of an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd*, *Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998); *ASARCO Mining Co.*, 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987).

ORDER

Order No. 7143320 is modified to a citation issued pursuant to section 104(a) of the Act and is **AFFIRMED, as modified**. Respondent is **ORDERED** to pay a civil penalty in the amount of \$500.00 for that violation. The Motion for Decision and Order Approving Partial Settlement is **GRANTED**, and the citations are hereby amended as proposed in the Motion. Respondent is **ORDERED** to pay civil penalties in the amount of \$5,381.00 for the settled violations. The payments are to be made within 30 days of this decision.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 30, 2008

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2007-325
Petitioner	:	A.C. No. 36-05018-122224
	:	
v.	:	
	:	
CUMBERLAND COAL RESOURCES, LP.,	:	Mine: Cumberland
Respondent	:	

DECISION

Appearances: Jessica R. Brown, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor;
Ralph Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of Cumberland Coal Resources, LP.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of a Civil Penalty filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges that Cumberland Coal Resources, LP, is liable for one significant and substantial (“S&S”) violation of the Secretary’s Mandatory Safety Standards for Underground Coal Mines, and proposes the imposition of a civil penalty in the amount of \$5,800.00. A hearing was held in Pittsburgh, Pennsylvania, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that Cumberland committed the violation, but that it was not S&S, and impose a civil penalty in the amount of \$1,000.00.

Findings of Fact - Conclusions of Law

On September 22, 2006, MSHA coal mine safety and health inspector, Barry Radolec, was conducting a quarterly inspection of Respondent’s Cumberland mine. In the No. 2 entry of the East Mains section, also referred to as the 54 tailgate section, he observed that the roof of the mine had been raised to allow for the future installation of a conveyor belt system. Normal mining height was approximately eight feet. The “high spot” extended some 200 feet, from the section loading point near the No. 84 crosscut inby to the No. 1 crosscut. Its maximum height was approximately 21 feet in the area of the No. 85 crosscut, and it tapered down to a height of 14-15 feet near the feeder and at its inby end near the No. 1 crosscut.

Cumberland is a “gassy” mine, liberating over one million cubic feet of methane per day,

and is subject to spot inspections under the Act. 30 U.S.C. § 301(i). Methane, an explosive gas at concentrations of 5-15%, is lighter than air, and can accumulate in high spots. Methane in a high spot can be drawn down by the passage of mobile equipment, where it can mix with air in the entry and possibly encounter an ignition source. The Secretary's regulations require that the atmosphere in high spots, in intake air courses where equipment is likely to operate, be tested during preshift examinations. 30 C.F.R. § 75.360(b)(8). Testing is required to be made no closer than 12 inches from the roof, and industry practice is to test about one foot from the roof. Tr. 86-88, 150.

Persons conducting preshift examinations of areas where miners are expected to work or travel are required to make notations of the date and time of the examination, and initial the entries, at enough locations to show that the entire work area has been examined. 30 C.F.R. § 75.360(e). Notations are typically made on a post, timber or board, often referred to as a "date board." Examinations of high spots are done with a probe, an instrument to which an atmospheric monitor can be attached and extended to the required testing height. Radolec was aware that date boards and extendable probes had been maintained at other high spots in the mine. Tr. 46-47. There was no probe or date board at the high spot in the No. 2 entry. The nearest probe was about 50 feet away, near the feeder. However, that probe was only 7.5 feet long, too short for a proper test of the atmosphere in the high spot.

Radolec was concerned that the atmosphere in the high spot was not being monitored for methane content. He related his concerns to Fred Evans, a Cumberland safety representative, who accompanied him on the inspection. Radolec tested the atmosphere, using an extendable probe from a continuous mining machine, and found that there was very little methane in the high spot.¹ He decided not to issue a citation because he had some doubt about whether the tests were being conducted.

Radolec returned to the mine on September 25, to conduct a five-day spot inspection for methane. He decided to visit the East Mains section to see if Cumberland had taken any steps to assure that the atmosphere in the high spot was being tested for methane. He traveled with Michael Konosky, a Cumberland senior safety representative. As on his earlier visit, there was no date board or extendable probe at the location. He spoke with Harry Casteel, the section foreman, who had conducted the preshift examination on September 22, and asked him if he had an extendable probe. Casteel responded that he would call outside to get one.² Radolec asked Casteel to get a probe from a continuous miner so that he could test the high spot. Casteel retrieved a probe, and Radolec's test showed a methane concentration of 0.1%, well below its explosive range. Tr. 46. Radolec also tested the atmosphere at the working faces and found 0.0-

¹ Methane tests must be made at faces every 20 minutes when mining is being done. 30 C.F.R. § 75.362(d). Consequently, probes that can be extended into areas where the roof is unsupported are kept on continuous mining machines.

² There are substantial conflicts between Radolec's and Casteel's recollections of their conversation. They are discussed below.

0.4% methane. Tr. 25-26. No active mining was taking place because equipment was being moved from the No. 4 face to the No. 2 face.

Radolec issued Citation No. 7076359, alleging that Cumberland failed to test the atmosphere in the high spot. Cumberland timely contested the citation and proposed penalty.

Citation No. 7076359

Citation No. 7076359 alleges a violation of 30 C.F.R. § 75.360(b)(8), which requires that persons conducting preshift examinations test for methane in “[h]igh spots along intake air courses where methane is likely to accumulate, if equipment will be operated in the area during the shift.”

The “Condition and Practice” section of the Citation stated:

The person conducting the pre-shift examination for hazardous conditions and testing for methane and oxygen deficiency failed to examine in high spots along intake air courses where methane is likely to accumulate. This condition existed on the active coal producing section of East Mains, 026-0 (M.M.U.) development mining section of mine, in the number 2 entry, inby the section loading point, at number 85 cross-cut to number 1 cross-cut (as viewed on section working mine map). This area is from 15 feet to 21 feet above the mine floor, in an area where immediate mine roof has been elevated to provide for future mining conveyor systems. [grammatical and punctuation errors corrected]

Ex. G-1.

Radolec determined that it was highly likely that the violation would result in a permanently disabling injury, that the violation was S&S, that six persons were affected, and that the operator’s negligence was high. A specially assessed civil penalty in the amount of \$5,800.00 has been proposed for this violation.

The Violation

Cumberland contends that the high spot was not located in an “intake air course,” and that testing was not required by the regulation, but was done as a matter of good practice. Under Cumberland’s approved ventilation plan, air was supplied to the East Mains section through the No. 3 and No. 4 entries. At the No. 84 crosscut, the air flow was split, such that in the No. 2 entry part of it flowed inby, past the feeder toward the face, and part flowed outby along the belt. The No. 1 entry was the return entry. Cumberland contends that only entries which carry the main flow of intake air are “intake air courses” within the meaning of the regulation and, since the No. 2 entry carried only a split of intake air, it was not an “intake air course.”

Cumberland's argument is based upon the testimony of Robert Bohach, its manager of safety, who was accepted as an expert in the field of mine ventilation.³ Tr. 154. While Bohach described the No. 2 entry as an "intake entry," he declined to classify it as an "intake air course," because it was not one of the main entries supplying air to the section. Tr. 155. Dennis Swentosky, an MSHA supervisory mine safety and health specialist, who has been a ventilation specialist for over twenty years, was also accepted as an expert witness in the field of mine ventilation. Tr. 78-82; ex. G-4. He referred to the Secretary's regulations which define intake air, in pertinent part, as "[a]ir that has not yet ventilated the last working place on any split of any working section." 30 C.F.R. § 75.301. Conversely, return air is air that "has" ventilated the last working place on any split of any working section. *Id.* An air course is defined as "[a]n entry or a set of entries separated from other entries by stoppings, overcasts, other ventilation control devices, or by solid blocks of coal or rock so that any mixing of air currents between each is limited to leakage." *Id.* The No. 2 entry in by the feeder met the definition of an air course. As Swentosky explained, entries through which intake air is coursed to working places are intake air courses. Tr. 92-93.

The area of the high spot in the No. 2 entry was to become part of the belt entry. Tr. 58. The Secretary's regulations provide that a belt air course must not be used as a return air course, and must be separated from return air courses "and from *other intake air courses.*" 30 C.F.R. § 75.350(a)(1) (emphasis added). Cumberland's overly restrictive interpretation of the term "intake air course" is unsupported by the regulations, and is inconsistent with the use of the term in the regulatory scheme. Bohach agreed that his narrow definition of an intake air course is not found in the regulations. Tr. 156. Cumberland section foreman, Charles Fisher, also referred to the No. 2 entry as an intake entry, and agreed that it was an intake air course, "but not the main intake air course." Tr. 148-50. I accept Swentosky and Radolec's testimony, and find that the high spot was located in an intake air course. There was considerable mobile equipment traffic in the area and, under the regulation, the atmosphere in the high spot was required to be tested for methane content during preshift examinations.

Radolec was concerned that testing was not being done because, unlike other high spots in the Cumberland mine, there was no probe at that location sufficient to reach to the required testing height, and there was no date board to indicate that a preshift examiner had visited the location and, presumably, taken the test. He was guided by a provision in MSHA's Program Policy Manual, stating that the lack of some method to safely make such tests, e.g., ladders, tubes, or methane detectors with probes, "would be a good indication that tests were not being made or not properly being made." Ex. G-5. His concerns were heightened by the fact that the situation had not changed since his September 22 inspection, when he specifically discussed the problem with Evans.

There are several significant conflicts in the testimony regarding conversations that Radolec had with Casteel. Radolec testified that Casteel told him that he was not conducting the

³ Bohach has served as ventilation coordinator for Cumberland, and holds a degree in mining engineering and a masters degree in safety management.

tests because he did not have anything to test with. Tr. 41-42. Casteel denied making that statement. Tr. 122. Casteel's alleged response, which would have been a critical admission, is not reflected in Radolec's field notes.⁴ Tr. 42-43; ex. G-2 at 6. The notes reflect that Radolec asked for a probe, and that Casteel responded that he did not have one, but would call outside to get one. Radolec testified that he interpreted Casteel's reply as a "suggestion" that he did not know that there was an extendable probe on the continuous miner, or that he did not want to take a probe from a continuous miner. Tr. 52-53. Radolec also contradicted Casteel's testimony that he stated that he used a probe from a continuous miner to conduct tests. Tr. 45.

I place no weight on Radolec's testimony regarding his conversations with Casteel. I find that Casteel, most likely aware that Radolec wanted a probe left at the high spot, responded to his inquiry by stating that he would call outside for one. That would have been a reasonable reaction and, most likely, the only way to procure a probe that could have been left permanently at the high spot. Radolec's testimony indicates that he substantially misinterpreted Casteel's communication.

Nevertheless, while it is possible, if not likely, that some of Cumberland's preshift examiners properly tested the high spot, I find that it was not properly tested during preshift examinations at the time the citation was issued. Cumberland had an established procedure for testing high spots. An extendable probe and a date board were placed at the location. The absence of a readily available extendable probe is evidence that tests were not being performed, or were not being performed properly. Cumberland's witnesses described two methods of conducting the test, both of which were cumbersome and time consuming. Casteel stated that he retrieved an extendable probe from a continuous miner, brought it back to the high spot, performed the test, and returned it to the miner. When the miner was in the No. 4 face, which it had been on the day that the citation was issued, it was some 320 feet away from the high spot. While Casteel claimed that it took only five minutes to retrieve the probe, perform the test, and return it, it most likely would have taken longer, especially if the miner were operating.

Fisher and Thomas Illar, a section supervisor, did not use a probe from the miner to examine the atmosphere in the high spot. Rather, they testified that they used the shorter, more readily available probe near the feeder, and were able to reach the required height by climbing onto the operator's canopy of a shuttle car, approximately six feet high. Miners typically took a dinner break about 4:00 a.m., and they instructed a shuttle car operator to position the car under the high spot where a test could be made. Tr. 130, 147. Fisher, who conducted the preshift examination for the day shift on September 23, was a reasonably convincing witness as he described how he walked up the inby end of the shuttle car and onto the canopy. Tr. 147, 150.

⁴ Radolec's field notes were either made, or edited, after the citation was issued, i.e., after Radolec had exited the mine and typed the citation into his computer, which generated the citation number. Tr. 66. Radolec explained that he wrote the notes after issuing the citation, in order to justify the gravity of the alleged violation, and that he "cleans them up," and may add to them as he gets further information. Tr. 65-66.

He may well have conducted tests in that fashion and would have been able to reach the required height.

Illar conducted the preshift examination for the day shift on September 25. Tr. 127-28; ex. R-1 at 69. Unlike Fisher, his description of his test methodology was unconvincing. He hesitated when asked to explain how he mounted the canopy, and then explained that he used an opening near a light to start his ascent. Tr. 132. His demeanor conveyed the distinct impression that he had never taken the test in the manner he described.

The high spot had existed for approximately one month, and preshift examinations had to be performed more than once each day. Tr. 124. I find it incredible that experienced miners would repeatedly perform the tests in the manners described, when a much better alternative was readily available, i.e., obtaining an extendable probe to be kept at that location. Retrieving a probe from a continuous miner would have required a considerable expenditure of time and effort. Climbing up onto the canopy of a shuttle car, which may have had to be re-positioned, would have been dangerous. Neither Fisher, nor Illar deenergized the shuttle car before climbing onto it. The area was admittedly dark, and the shuttle cars were typically dirty and slippery. Tr. 136. Neither of them described using fall protection. Not surprisingly, Bohach, who was not aware that preshift examiners were climbing onto the canopies of shuttle cars, would have directed them to obtain and use an extendable probe. Tr. 157.

Illar testified that he used the shorter probe at the feeder, because it had been used for testing the high spot "when it wasn't so high," and that it was "still there." Tr. 129. I find that preshift examiners routinely continued to use the shorter probe. They did not climb onto shuttle car canopies, but tested the atmosphere at the maximum height they could reach, approximately 15-16 feet. Readings for methane in that intake entry, in the area of the high spot, had always been very low, and testing at the lower height was most likely deemed sufficient. Tr. 147.

I find that the Secretary has proven, by a preponderance of the evidence, that Cumberland violated the regulation, by not conducting a proper test of the atmosphere in the high spot during preshift examinations. I concur with Radolec's assessment that Cumberland's negligence was high and that six persons were affected by the violation.

Significant and Substantial

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

The Commission has explained that:

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

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

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

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

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

The fact of the violation has been established. The measure of danger to safety was contributed to by the failure to properly test the atmosphere in the high spot, and any injury resulting from an ignition of methane would have been of a serious nature. The focus of the S&S analysis, therefore, is whether the violation was reasonably likely to result in an injury. I find that the Secretary has failed to carry her burden of proof on this issue.

The preamble to the latest amendments to the regulation notes that methane liberation is highly unpredictable, and that "the potential for a dangerous accumulation of methane in a high spot is influenced by mine ventilation, particularly the air velocity in the entry." Ex. G-6. There was no evidence of insufficient air flow in the entry, and there is no evidence of the existence of methane, in other than trace concentrations, in the entry or the high spot. Radolec had tested the

air in the No. 2 entry, and found no methane. Tr. 60. At the apex of the high spot, he found only 0.1% methane, and Fisher testified that he had never found more than 0.2% methane in that area, although his measurements may not have been taken at the proper height. Tr. 147.

As evidenced by the requirement for frequent tests at working faces, the greatest volume of methane is generally liberated where coal is being cut. Radolec was concerned about methane accumulating in the high spot because of an interruption in mine ventilation, including the moving of line curtains. Tr. 61. However, he did not explain how the moving of a line curtain, downstream in the air flow from the high spot, could affect air flow, or produce an accumulation of methane in that area. As Swentosky stated, methane liberated in the working section would be swept out the return, not back to the feeder. Tr. 95-96. In addition, I have found that Cumberland conducted tests of the atmosphere in the high spot, but did not do so at the proper height. Consequently, the hazard contributed to by the violation was a potential accumulation of methane in the relatively smaller area above 15 feet. While passing mobile equipment might draw down an accumulation of methane immediately above the normal mining height, there is no evidence that methane in the upper reaches of the high spot would be drawn down by passing equipment. Certainly, passing equipment would have considerably less tendency to disturb atmosphere nine feet above it.

I find that the Secretary has failed to prove, by a preponderance of the evidence, that the violation was S&S.

The Appropriate Civil Penalties

The parties stipulated to many of the factors that are to be considered in establishing the amount of a civil penalty. The Cumberland mine has an annual coal production of approximately 7,515,984 tons, and Cumberland Coal Resources, LP, is a large operator that produces approximately 71,492,892 tons of coal annually. In the 24 month period immediately preceding the issuance of the Citation, Cumberland was assessed a total of 472 violations, over 827 inspection days. Payment of the proposed penalty will not affect its ability to continue in business. Cumberland demonstrated good faith in promptly abating the violation. The gravity and negligence associated with the violation have been discussed above.

Citation No. 7076359 is affirmed. However, the violation is found to be non-S&S. A civil penalty of \$5,800.00 is proposed by the Secretary. The lowering of the level of gravity justifies a significant reduction in the proposed penalty. I impose a penalty in the amount of \$1,000.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

ORDER

Citation No. 7076359 is **AFFIRMED, as modified**, and Respondent is **ORDERED** to pay a civil penalty in the amount of \$1,000.00, within 30 days of this decision.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001-2021
TELEPHONE: 202-434-9900 / FAX: 202-434-9949

October 10, 2008

BLUE DIAMOND COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. KENT 2004-220-R
	:	Citation No. 7542869; 05/07/2004
	:	
	:	Docket No. KENT 2004-221-R
SECRETARY OF LABOR,	:	Citation No. 7542870; 05/07/2004
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Calvary No. 80
Respondent	:	Mine ID 15-16349
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2005-31
Petitioner	:	A.C. No. 15-16349-39259
v.	:	
	:	
BLUE DIAMOND COAL COMPANY	:	MINE: Calvary No. 80
Respondent	:	

ORDER GRANTING MOTION FOR SUMMARY DECISION

Before: Judge Weisberger

This case arises out of a fatal accident that occurred on February 5, 2004, and the two resulting citations that were issued as a result of the fatality.¹ On July 11, 2008, Blue Diamond Coal Company (“Blue Diamond”) filed a Motion for Summary Decision (“Motion II”) in the above-captioned case. The Secretary of Labor (“Secretary”) filed her Response to Motion for Summary Decision on August 5, 2008.

Citation Number 7542869 alleges a violation of 30 C.F.R. § 77.1710(g), which requires that “[e]ach employee working in a surface coal mine or in the surface work areas of an underground coal mine shall be required to wear protective clothing and devices as indicated below: (g) Safety belts and lines where there is a danger of falling.” The citation states as follows:

¹ The balance of the facts are not relevant to the disposition of this motion, and are set forth in an order issued on August 10, 2007, denying Respondent’s Motion for Summary Decision (“Motion I”) filed January 4, 2006.

The maintenance supervisor, an employee of Chas Coal, Inc., failed to wear a safety belt or harness when on February 3, 2004, he was in the Simon Telelect aerial bucket The maintenance supervisor was thrown from the bucket from approximately 22 feet in height when the concrete imbedded wooden post he was pulling suddenly came out of the concrete floor releasing the deflected aerial boom. As a result the victim fell to his death

Citation Number 7542870 alleges a violation of 30 C.F.R. § 77.404(a), which provides that “[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.” The citation states as follows:

The Simon Telelect aerial bucket . . . was used improperly and for a purpose for which it was not designed. The maintenance supervisor, an employee of Chas Coal, Inc., while riding in the aerial bucket, attempted to use the upper boom on which the bucket is attached to pull a wooden post out of the concrete floor wherein it was embedded. The maintenance supervisor was pulling up and rotating the boom left and right to loosen and remove the post when the post came loose causing the boom to move violently throwing him out of the bucket. As a result the victim fell to his death

Under Commission Rule 67, 29 C.F.R. § 2700.67, summary decision may be granted if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and declarations, shows: (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law. I find that Blue Diamond is entitled to summary decision in this case for the reasons set forth below.

Citation Number 7542870 / 30 C.F.R. § 77.404(a)

It is Blue Diamond’s position that there was not any violation of section 77.404(a) and, therefore, summary decision is appropriate, because MSHA has stipulated that the truck was in safe operating condition. The victim may have used the truck improperly, argues Blue Diamond, but improper use of equipment that was properly maintained does not constitute a violation of the section.

The Secretary counters that argument by asserting that the standard for finding a violation of section 77.404(a) is whether a reasonably prudent person, familiar with any facts peculiar to the mining industry, would recognize a hazard warranting corrective measures. The Secretary argues that under this standard, the facts demonstrate that the accident was the direct result of the victim’s use of the truck as a hoist – which is not the purpose for which the truck was designed – and that any reasonably prudent person with knowledge of the truck’s operation and design would know that this usage was potentially hazardous. As such, it is the Secretary’s contention that the issue is not whether the truck was safe for use as an elevated platform, the use for which

it was designed, but rather whether it was safe for use as a hoist, the use for which it was actually used.

Section 77.404(a) provides that machinery must be “maintained” in safe operating condition. This language is clear and unambiguous in its meaning, and as such, “effect must be given, if possible, to every word, clause, and sentence.” *Cannelton Industries, Inc.*, 26 FMSHRC 146, 149–50 (Mar. 2004) (quoting 2A Norman J. Singer, *Sutherland Statutory Construction*, § 46.06, at 181 (6th ed. 2000)).

“Maintain” is defined as “to keep in a state of repair, efficiency, or validity: preserve from failure or decline.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (Unabridged), 1362 (2002 ed.). Given this clear definition, it is evident that the concept of “maintenance” is plainly distinct from the concept of “usage.” Therefore, the Secretary’s argument that “usage” should be implied into the meaning of section 77.404(a) is without merit. In addition, because the language and meaning of section 77.404(a) is clear and unambiguous, there is no need to apply the reasonably prudent person test. Therefore, because it is stipulated that the vehicle was in safe operating condition, it was in compliance with section 77.404(a). As such, Blue Diamond’s Motion for Summary Decision (Motion II) with regard to Citation Number 7542870 is granted.

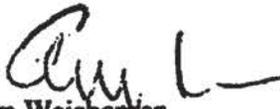
Citation Number 7542869 / 30 C.F.R. § 77.1710(g)

Blue Diamond argues that summary decision is appropriate for disposition of Citation Number 7542869 because the language of section 77.1710(g) requires that the individual in question be an “employee” of the cited entity, and in the case at bar it is undisputed that the victim was not an employee of Blue Diamond. Blue Diamond advances the rule of *expressio unius est exclusio alterius* to support its position.

The principle of *expressio unius est exclusio alterius* dictates that “the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded.” *Cannelton Industries, Inc.*, 26 FMSHRC at 158 (quoting *United States v. Newman*, 982 F.2d 665, 673 (1st Cir. 1992)). Applying this principle to the case at bar, the classification of “employee,” as contained in 77.1710(g), is a specific classification pertaining to individuals who are employed at Blue Diamond. The usage of this specific classification precludes any implication that the statute intended to encompass any broader classification, and the Secretary has not asserted any contrary facts. Therefore, it must be found that there was no violation of section 77.1710(g), and Blue Diamond’s Motion for Summary Decision (Motion II) must be granted.

ORDER

It is **ORDERED** that Blue Diamond's Motion for Summary Decision (Motion II) is **GRANTED**. As such, Citation Number 7542869 and Citation Number 7542870 are vacated. The case is accordingly **DISMISSED**.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 Speer Boulevard, #280
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October 27, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2007-156
Petitioner	:	A.C. No. 12-02010-120893
	:	
v.	:	
	:	Air Quality #1 Mine
BLACK BEAUTY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Travis W. Gosselin, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Manning

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

I. BACKGROUND AND SUMMARY OF THE EVIDENCE

Black Beauty is an underground coal mine in Knox County, Indiana. This case involves Citation No. 6666262, issued on January 17, 2007 under section 104(d)(1).¹ The citation was issued by MSHA Inspector David Cox and alleges a violation of section 75.360(b). The citation states, in part:

An adequate preshift examination of the #63 crosscut between the 4MNA belt and travelway (approach to 2L4N seal construction area) was not performed. An area of roof in this crosscut is loose and

¹ This citation was originally issued as a section 104(d)(2) order. This order was modified to a section 104(d)(1) citation by order of law. (Stips. ¶ 11 and ¶ 12).

broken (approximately 4 feet by 8 feet by 2 inches to 6 inches thick). Miners are required to travel through this area to the seal construction area.

Inspector Cox determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. 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 the person conducting a preshift examination "shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in the proper direction at the following locations: (1) roadways, travelways and track haulage ways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift." The Secretary proposes a penalty of \$10,300.00 for the violation.

Inspector Cox inspected the mine with David Wininger, a safety technician in Black Beauty's safety department. Inspector Cox testified that during his inspection on January 17, he observed a large rock hanging off two straps that were "bowed down." (Tr. 19). The inspector determined that the rock was loose and it posed a hazard to anyone who had to travel through the #63 crosscut. He observed the condition as the inspection party traveled in a vehicle after having been in the seal area. He did not observe the condition when they traveled under the rock to the seals. He is not sure why he did not see the cited condition as he traveled in by toward the seals. (Tr. 44-45). When the inspection party traveled away from the seals, Inspector Cox observed the rock "hanging there off these two 16 inch straps." (Tr. 20). The straps were covered in rust and they were about six inches wide. The straps were bent down.

Any miners traveling to the seal area would have to travel through this crosscut. The inspector testified that the condition was obvious and it presented a hazard. The inspection party had already driven past the rock on the way out of the area when the inspector told Wininger to stop the vehicle. After walking back to the area, the inspector determined that he would issue a citation for failing to adequately support the roof. He also stated that he would look at the preshift examination books to see if the condition had been noted.

Inspector Cox testified that the rock was easy to see when traveling out of the seal area. (Tr. 22). The rock was not "supported or controlled." The inspector believes that the crosscut was not required to be preshifted until miners began working on the seals because miners would otherwise not travel through the crosscut. Once work began on the seals, the preshift examiner should have regularly traveled through the crosscut and preshifted the area. The straps under the rock were supplemental support and they were not part of the roof control plan. (Tr. 25, 38; Ex. S-4). These straps are designed to control the thinner overlying strata that may break loose. The roof support used in the area were five feet long, fully grouted resin bolts. (Tr. 39). The loose rock was about four feet wide and eight feet long. It was six inches thick at one end and tapered down to about two inches thick. (Tr. 25). The straps were six inches wide and a sixteenth of an inch thick. He estimates that the rock weighed several hundred pounds. Inspector Cox determined that the straps were very distorted because they had been "pulled down" by the rock. (Tr. 26, Ex. S-4). He was

concerned that the rock could fall if the strap pulled through any of the roof bolt heads used to support the strap. A miner would likely suffer a fatal injury if the rock were to fall on him. Even if a small portion of the rock were to fall, it could seriously injure a miner.

Inspector Cox testified that the preshift examination book did not contain any notations about the cited rock. Miners rely on these books to assure themselves that everything in a given area is safe. If a hazard is noted, the condition can be corrected. There were two miners working at the seals at the time of this inspection. The inspector determined that the company's negligence was high because the condition was obvious and extensive. The preshift examiner should have noted the condition of the roof and reported it in the preshift book. (Tr. 31, 58). The inspector did not talk to the preshift examiner about the condition. (Tr. 47). Inspector Cox testified that he has issued numerous citations to Black Beauty for inadequate preshift examinations and he has talked to mine management about it. The inspector also believes that the cited condition must have existed for at least five shifts because there was "roadway dust" on the rock. (Tr. 33). Exposure to the mine environment increases the likelihood that the rock and straps will deteriorate and the rock will fall. (Tr. 34).

Inspector Cox also testified that the cited condition was a result the operator's unwarrantable failure to comply with the safety standard because this mine had been issued numerous citations by several inspectors for violations of section 75.360. The inspector has personally counseled management about improving preshift examinations at the mine. (Tr. 34-35). Inspector Cox testified that the condition was extensive and obvious. He said that the preshift examiner must have been "dreaming" when he conducted his examination in this area. The failure to report the cited condition in the record book constituted aggravated conduct.

David Winger testified that one of his duties is to travel with MSHA inspectors during their inspections. He has been a preshift examiner for about 18 years and he is a certified mine examiner. (Tr. 60-61). He was also a roof bolter for about five years. On the day of Cox's inspection, he was driving an open-topped, three-passenger diesel vehicle. (Tr. 62; Ex. BB-5). The mine roof is clearly visible from the vehicle. The inspection party traveled through crosscut #63 on their way to the seals. (Tr. 63, Ex. BB-1). The inspector did not make any comments about the cited rock on the way to inspect the seal project. Crosscut #63 is about two miles from the active areas of the mine. (Tr. 77).

On the way back out from the seals, Winger drove past the cited rock into the main travelway when the inspector asked him to stop because he wanted to go back and look at something. (Tr. 65-66). Inspector Cox walked back into the crosscut to observe the rock. Winger tried to pry the rock down with a bar for about five minutes but he could not get it to move. Winger testified that there were two straps across the rock plus at least one roof bolt through the rock. After he could not get any of the rock down, Winger was convinced that the rock was secure. (Tr. 67-69, 71). A roof bolting machine was subsequently brought into the area to get the rock down. Winger does not believe that the rock presented a hazard. (Tr. 68). He also believes that the straps were still viable despite any rust. He was not able to get the straps to break with his pry bar. Winger does

not believe that the rock needed to be recorded in the company's book because it did not create a safety hazard. (Tr. 76).

Thomas Burnett also testified for Black Beauty. At the time that citation was issued, he was on the outby crew building the seals. (Tr. 79). The seal construction project was scheduled to last a couple of weeks. He could not recall how long he had been constructing these seals but it would have been at least a couple of days. (Tr. 81). After Inspector Cox ordered that the rock be taken down, Burnett and his coworker at the seals, Emery Caine, tried to take it down with pry bars. They also tried to break the straps apart with the pry bars but "we couldn't do that either." (Tr. 84). It "didn't take long to figure out that we were not going to do anything with two pry bars," so a rock bolting machine was brought into the area. (Tr. 82-83). They used the bolting machine to break the rock into smaller pieces by slamming drill steel into the rock with the hydraulic boom. It took them about 45 minutes to an hour of actual work time to get all of the rock down. (Tr. 83). He believes that the rock would still be in the roof if it had not been taken down on January 17, 2007. (Tr. 86). Roof bolts and the straps were adequately supporting the rock. (Tr. 90). He does not believe that the effectiveness of the bolts and straps had been compromised. (Tr. 91-92). The rock had only separated from the top a small amount. (Tr. 94). He believes that the plates that were installed with the roof bolts to secure the straps were flush with the roof but he does not know how tight they were. (Tr. 95-96).

Craig House is the mine examiner who performed the preshift examination in the area of the seals on January 17, 2007, including crosscut #63. (Tr. 100; Ex. BB-3 p.20). House testified that he performs his examinations along roadways using a small, open-top vehicle. He did not see any hazards in crosscut #63 that day. (Tr. 103). He did note other hazards during his examination on the January 17, including loose roof bolts in other areas. (Tr. 104). House would have looked at the subject rock because he is constantly scanning the roof during his examinations, but he did not see any loose roof. (Tr. 110). House does not believe that the cited rock presented a hazard to miners. (Tr. 108, 111). The rock was held up by straps that were not loose. The rock was pushed up tight against the roof by the straps. (Tr. 112). He did not notice any changes in the rock or the straps over the period of time that he had been performing preshift examinations along crosscut #63. (Tr. 115).

Roland Madlem was a safety manager for Black Beauty in January 2007. He has held many jobs at the mine since he started working there in 1993. When he was a roof bolter, he developed a good feel for "what's actually in the roof." (Tr. 120). There have been no injuries from roof falls in outby areas of the mine in the past five years. Madlem testified that straps are used to help support the skin of the roof, but that straps are not the primary means to control the roof. The skin of a roof tends to weather and wants to fall away from the roof. The straps are designed to hold the deteriorating skin up against the roof. By examining the roof, a preshift examiner can determine whether a rock is weathering. (Tr. 128). He looks for rocks separating from the roof and folding around the straps. The roof control plan did not require straps but they were permitted in the plan. (Tr. 121). Straps were used when the mine opened in 1993. Since 2003, wire mesh has been used because it provides increased coverage. The straps bend to conform to the shape of the rock as the

roof bolts and plates used to install the straps are tightened against the roof. (Tr. 122). Mr. Madlem took photographs of the roof after the rock had been removed and additional bolts had been installed. (Tr. 123; Exs. G-3, G-4). The straps were significantly damaged during the process of taking down the rock.

Madlem also testified that Mr. House is a very competent examiner. (Tr. 124). He notices when bolts have been installed too far from the rib and when bolts are loose. Madlem testified that House did an adequate examination of crosscut #63 on January 17, 2007. The straps were doing their job in keeping the skin against the roof so it would not fall. *Id.* Rocks at the mine are frequently supported by straps. Mr. House did not see the rock in question as creating a hazard because the rock was not putting so much stress on the straps that it was actually “folding down away from the roof between the straps.” (Tr. 125). The fact that the rock was difficult to take down shows that it was not a hazard to miners. (Tr. 129). It is unlikely that a rock the size of the one at issue would fall without first putting heavy stress on the straps and separating away from the roof. In addition, the rock was not located in an active area of the mine. He does not believe that it was reasonably likely that the rock would fall or that anyone would be injured. It is extremely rare for straps to fail. Indeed, they usually only fail when they are struck by a piece of machinery. (Tr. 127).

II. BRIEF SUMMARY OF THE PARTIES’ ARGUMENTS

The Secretary argues that Black Beauty violated section 75.360(b) because it failed to conduct an adequate preshift examination of the #63 crosscut on January 17, 2007. Inspector Cox clearly testified that he observed a large rock hanging on two metal straps that were attached to the mine roof. The straps were about 1/16th of an inch and about 6 inches wide. The straps appeared to be distorted, bent, bowed down, and covered with rust. Although these straps are designed to bend, their integrity is compromised if they are twisted, bent, and distorted. The straps are designed to hold up the skin of the roof where needed but not to hold up large rocks.

Drawing on his 40 years of underground mining experience and his experience as a preshift examiner, Inspector Cox determined that the rock posed a hazard to miners and should have been noted on the mine’s preshift examination books. At least two miners were working at the seal construction site on the day of the inspection and they would have traveled through the #63 crosscut.

Preshift examinations are of fundamental importance in assuring a safe working environment. Preshift examiners must identify conditions that could pose a hazard to miners and record these conditions in the preshift book so that the condition can be eliminated. The Secretary contends that the preshift examiner’s failure to note the dangerous condition in the record book created a significant and substantial hazard and demonstrated aggravated conduct that is imputable to Black Beauty.

Black Beauty states that Craig House was an experienced miner who had been conducting

examinations for several years. He was also an experienced roof bolter, which increased his ability to understand and evaluate roof conditions. The evidence establishes that his examination that day had been thorough and complete. House did not believe that the conditions identified by the inspector created a hazard to miners. He observed the rock supported by roof-bolted straps and, based on his experience, determined that the rock did not present a hazard. He had examined the #63 crosscut over several weeks and he had not observed any changes in the roof.

Mr. House's judgment is confirmed by the amount of effort it took to take down the rock. The miners tried to bring down the rock using pry bars. These miners were unable to bring down the rock, break the rock apart, or tear open the straps. The rock was only brought down when a roof bolting machine was brought in. The boom was used to break the rock and bring it down. It took 45 minutes of continuous effort by the operator of the roof bolting machine to bring down the rock. The effort required to bring down the rock demonstrates not only that no hazard was present but that Mr. House's evaluation of the rock during his preshift examination was correct.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

It is well recognized that roof falls pose one of the most serious hazards in underground coal mines. *United Mine Workers of America v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989). The roof in underground coal mines is inherently dangerous and roof falls have historically been a leading causes of fatal accidents. A mine examiner must be unceasingly vigilant when inspecting the roof to protect miners who work or travel in the area. It is critical that preshift examiners conduct thorough and detailed examinations of the mine and that they pay particular attention to the condition of the roof.

The #63 crosscut where the rock was located was a roadway or travelway through which miners were scheduled to pass during the shift. Thus, the crosscut was required to be preshifted. There is also no question that Craig House conducted an examination in the #63 crosscut. The issue is whether the rock in question was a "hazardous condition" that was required to be recorded in the mine's record book.

Both Mr. House and Inspector Cox are experienced underground coal miners. In addition, they are both experienced mine examiners. Inspector Cox testified as to why he believes that the rock presented a hazard and Mr. House testified as to why he did not believe that the rock was hazardous. A review of the evidence is necessary to resolve this issue.

The rock in question was made up of laminated shale material. (Tr. 129, 133). It was supported by at least one roof bolt and two metal straps that had been installed when the area was developed. The rock was being held against the roof by these straps. Three different miners, together and individually, tried to pry down the rock without success. They also tried to break up the rock and tear open the straps. The rock was eventually brought down using a diesel roof bolter. The operator of the roof bolter fractured one end of the rock and then used the boom of the bolter to push the rock off the other straps. It took about 45 minutes of continuous work to bring down the

rock. (Tr. 83-84).

Mr. House testified that he had inspected the crosscut several times in the week prior to January 17, 2007, and he did not notice any changes in the roof. During his examination, House reported a rib roll and a loose roof bolt in other areas that he examined. (Tr. 104, Ex. BB-3, p. 20). On other days, Mr. House reported roof bolts that were too far from the rib. (Tr. 105, Ex. BB-3, p. 14). The evidence shows that Mr. House pays attention to detail when he conducts his examinations and the testimony of Mr. Madlem confirms this fact.

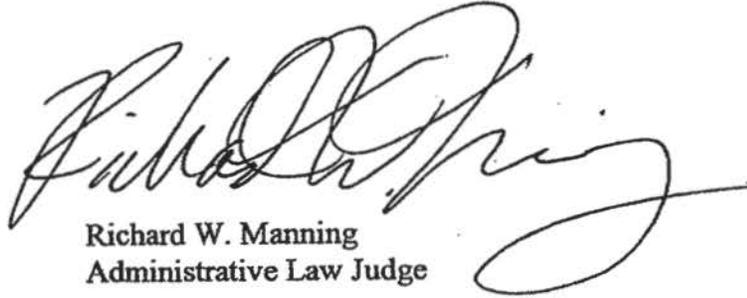
I find that the Secretary failed to establish a violation of section 75.360(b). I credit the testimony of Wininger, Burnett, House, and Madlem as to the condition of the rock and the efforts that the company took to bring down the rock. There was only a small gap between the rock and the roof because the roof-bolted straps were holding the rock against the roof. Witnesses for Black Beauty credibly testified that, when the straps were installed, they were bent to conform to the shape of the rock. Four rock bolts with plates were installed evenly along each of the 16 foot long straps. (Tr. 134). The straps bend to conform to the shape of the rock as the roof bolts are installed. I credit the testimony of Black Beauty's witnesses that the effectiveness of the roof bolts and the straps had not been compromised. Consequently, it does not appear that the straps had been "pulled down" by the weight of the rock. Although there was some rust on the straps, miners using pry bars could not get to straps to break. In addition, the rock in question was about two miles from the active areas of the mine. There is no evidence that the top in or around crosscut #63 was working or otherwise sloughing off. Mr. House credibly testified that the roof in the crosscut had not changed over the week or so that he had been conducting examinations in the area.

I find that the rock did not create a hazard to miners on January 17, 2007. It took a significant effort to remove the rock. As stated above, a rock bolting machine was brought in and the boom on the machine was used to thrust drill steel into the rock to break it. I credit the testimony of the company's witnesses that it was unlikely that the entire rock or pieces of the rock would have fallen on January 17 or at anytime soon thereafter. It may well be that at some time in the future the rock would have pressed down against the straps and presented a hazard that was required to be reported. I find, however, that the preponderance of the evidence establishes that on January 17, the rock did not present a hazardous condition. As a consequence, Mr. House was not required to report it in the mine's outby preshift record book.

I recognize that Inspector Cox has been a mine examiner and has worked in several underground coal mines, including the subject mine, but his inspection of crosscut #63 was, by necessity, short. He reached his conclusion that the rock posed a hazard after a brief look at the rock. I do not doubt that he genuinely believed that the rock posed a hazard to miners that should have been recorded. The evidence shows, however, that the rock was stable, was sufficiently supported, and did not present a hazard. The evidence also shows that Mr. House was a competent mine examiner and that he takes his responsibility seriously. It is crucial that preshift examinations at the mine be conducted in a thorough and competent manner so that hazardous roof conditions are promptly corrected.

IV. ORDER

For the reasons discussed above, Citation No. 6666262, issued on January 17, 2007, is **VACATED** and this proceeding is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 29, 2008

JIM WALTER RESOURCES, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. SE 2008-389-R
v.	:	Citation No. 7691158; 03/04/2008
	:	
SECRETARY OF LABOR	:	Mine ID 01-01401
MINE SAFETY AND HEALTH	:	Mine: No. 7
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. SE 2008-521-R
	:	Citation No. 7691159; 03/04/2008
	:	
	:	Mine ID 01-01247
	:	Mine: No. 4

SUMMARY DECISION

Before: Judge Bulluck

These cases are before me on Notices of Contest filed by Jim Walter Resources, Incorporated (“JWR”), against the Secretary of Labor, acting through her Mine Safety and Health Administration (“MSHA”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(d). JWR challenges citations issued by MSHA under section 104(a) of the Act, alleging violations of the Secretary’s mandatory safety standard found at 30 C.F.R. § 75.507.

The parties have filed cross Motions for Summary Decision.¹ The Commission rule governing summary decisions, Rule 67(b), provides as follows:

¹ The parties’ Motions for Summary Decision reference Docket No. SE 2008-389-R and Citation No. 7691158 in JWR’s No. 7 Mine only. However, JWR filed, unopposed, a Motion for Consolidation of Docket Nos. SE 2008-521-R and SE 2008-389-R, asserting that the citations in the dockets are “identical, other than the fact that the pump at issue in [SE 2008-521-R] is located at JWR Mine No. 4 and the pump at issue in Docket No. SE 2008-389-R is located at JWR Mine No. 7. The issues of fact and law will be the same in both contests.” JWR’s Motion is hereby **GRANTED**, and the cases are **CONSOLIDATED**. Notwithstanding the limited focus of the Motions, the arguments made therein also pertain to Citation No. 7691159 in Docket No. SE 2008-521-R, and this Decision disposes of both dockets.

A motion for summary decision shall be granted only if the entire record . . . shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). Based upon the stipulations and uncontested facts represented by the parties, I find that there is no genuine issue as to any material fact. Having reviewed the parties Motions, I conclude that, for the reasons stated below, JWR is entitled to summary decision as a matter of law.

I. Stipulations

The parties stipulated as follows:

1. The Administrative Law Judge and the Federal Mine Safety and Health Review Commission have jurisdiction to hear and decide this [contest] proceeding pursuant to section 105 of the Federal Mine Safety and Health Act of 1977;
2. JWR is a mine operator subject to the jurisdiction of the Federal Mine Safety and Health Administration;
3. JWR is the owner and operator of the No. 7 Mine located in Tuscaloosa County, Alabama;
4. Operations at the No. 7 Mine are subject to the requirements of the [Federal] Mine Safety and Health Act;
5. MSHA Inspector John M. Church was acting in his official capacity as an authorized representative of the Secretary of Labor when he issued Citation No. 7691158; and
6. Citation No. 7691158 was served on JWR or its agent as required by the Act.

JWR Mot. at 1.

II. Factual Background

These matters concern JWR's use of non-permissible deep well submersible pumps in sealed areas of its No. 4 and No. 7 Mines. JWR's operation of these pumps in No. 7 was challenged by MSHA in October of 2004, under section 75.507-1.² JWR duly contested the

² 30 C.F.R. § 75.507-1 provides, in pertinent part, that "[a]ll electric equipment, other than power-connection points, used in return air outby the last open crosscut in any coal mine shall be permissible"

citation, and the case was heard and adjudicated by me. See *Jim Walter Resources, Inc.*, 27 FMSHRC 968, 978 (Dec. 2005) (ALJ) (“*JWR-I*”). In its Motion for Summary Decision, JWR asserts that the instant proceeding and *JWR-I* involve the same parties and controlling facts. JWR Mot. at 5. The Secretary does not challenge this assertion. As in *JWR-I*, here MSHA cited the submersible “deep well” pump systems in No. 4 and No. 7 Mines, with both surface and underground components, which JWR uses to remove vast accumulations of water from permanently sealed, worked-out underground areas where coal was formerly mined.

The conditions in the areas being dewatered remain consistent with the description set forth in *JWR-1*:

Once the permanent seals are erected, the sealed areas are totally isolated and inaccessible; they cannot be traveled, examined, inspected or ventilated. The water that collects in the sealed area at issue forms a large underground lake that requires constant management, so as to prevent the water from compromising the seals and inundating the active workings of the No. 7 Mine. The pumps, therefore, are situated at the lowest elevations of the sealed areas in natural water collection basins. In addition to the pumps, as part of its methane drainage system, JWR has numerous degas wells situated at intervals throughout the sealed area, which are the sole means of determining atmospheric conditions in the otherwise inaccessible area.

27 FMSHRC at 969-70 (footnote and citations omitted).

The pumps at issue are active electric submersible pumps, utilized in the sealed area of No. 7 since 1987, and are described in *JWR-1* as follows:

All electric controls for the pump are housed above ground in a pump starter unit. From the starter unit, a high voltage power conductor cable, encased in a steel pipe, runs some 2,000 feet underground to the original mine floor, and an additional 200 feet beneath that surface, where the electric motor and pump assembly are situated in a sump. The steel casing, at ground level on the surface, is capped by a metal well head. The motor sits at the bottom of the sump and is 30 feet high, there is a 5-foot seal between the motor and the pump, and the pump, itself, also 30 feet high, sits on top of the seal. According to the manufacturer’s specifications, in order for the pump to operate, there must be at least 30 feet of water (“head”) above the inlet of the pump, so that the motor and pump assembly require 65 feet of water in which to operate. Inside the steel casing is also a metal discharge pipe. The casing is slotted just below the water level, allowing water into the casing where it is forced down a second set of slots at the bottom, where it cools the electric motor. The pump, with a 500-gallon-per-minute capacity, then transports the water up the discharge pipe to a surface settlement pond. A vacuum sensor, located on the surface, automatically shuts off the power from the pump starter to the entire system, if it detects that the water level had dropped below 30 feet of head above the pump.

Additionally, JWR has installed a redundant safety system, undercurrent protection, that will also disable the system.

Id. at 970 (citations omitted).

III. Procedural Background

The enforcement history associated with JWR's deep well submersible pumps is set forth in *JWR-I*, as well:

JWR's submersible pumps . . . had always been inspected by MSHA under Part 77 regulations applicable to surface areas of underground mines, and the National Electric Code ("NEC"). Under Part 77, the pumps were not required to be permissible. Sometime in 2003, in response to inconsistent enforcement in the districts, i.e., some were inspecting submersible pumps under Part 75 while others were applying Part 77, MSHA's Safety Division decided to impose uniform, nationwide compliance under Part 75. As a consequence, in order to continue use of nonpermissible pumps behind the seals underground, operators who had been inspected under Part 77 were required to file Petitions for Modification under section 101(c) of the Act.

JWR opposed MSHA's application of Part 75 underground standards and when extensive informal discussions about the safety of JWR's pumps proved unfruitful, JWR filed a Petition for Modification with MSHA on July 22, 2003, seeking approval to continue operation of its nonpermissible submersible pumps in sealed areas of its Alabama mines, including No. 7 herein at issue. In the meantime, before issuing its decision on the Petition, MSHA issued Program Information Bulletin No. P03-26 ("PIB"), clarifying compliance requirements for nonpermissible electric submersible dewatering pumps installed in sealed areas, return air courses or bleeder entries in underground coal mines. The PIB notified the mine industry of MSHA's application of section 75.507 to submersible pumps, that the pumps are located in return air for purposes of the regulation, and that they are required to be permissible, unless a modification is approved by MSHA.

MSHA issued its Proposed Decision and Order ("PDO") on June 17, 2004, authorizing JWR to continue use of its submersible pumps under specific detailed conditions. JWR found the conditions unacceptable and appealed the PDO, arguing, *inter alia*, that section 75.507 does not apply to the pumps at issue.

Id. at 970-71 (footnote and citations omitted).

On October 14, 2004, MSHA cited JWR for operating a nonpermissible deep well

submersible pump in “return air” in violation of 30 C.F.R. § 75.507-1. *Id.* at 971-72. JWR contested this citation which, after an evidentiary hearing, was vacated. Pending the outcome of that proceeding, JWR’s appeal of the PDO was stayed by the Department of Labor’s presiding ALJ. After the case was decided, on joint motion of the parties, the judge dismissed the appeal as moot. JWR Mot. at 2, 4.

The instant consolidated proceeding arises from section 104(a) Citation Nos. 7691158 (No. 7 Mine) and 7691159 (No. 4 Mine), issued to JWR by MSHA Inspector John Church on March 4, 2008. Both citations allege a violation of 30 C.F.R. § 75. 507 and describe the “Condition or Practice” as follows:

The mine operator utilizes deep well pumps with power connection points that are outby the last open crosscut and are not in intake air and permissible power connection units are not being used.

JWR timely contested the citations and, in its Motion for Summary Decision, challenges MSHA’s application of section 75.507 to the company’s non-permissible deep well submersible pumps, arguing that the standard does not apply to the sealed areas of its mine. JWR Mot. at 10. In her Motion for Summary Decision, the Secretary argues that she is “entitled to judgment as a matter of law [because the] pumps are indisputably outby the last open crosscut, are indisputably not located in intake air and [are] indisputably not permissible.” Sec’y Mot. at 3.

IV. Findings of Material Fact and Conclusions of Law

JWR and the Secretary essentially agree that the material facts upon which each is entitled to judgment as a matter of law are as follows:

1. The deep well pumps installed behind the seals at the JWR Number 7 Mine have power connection points that are not permissible;
2. The power connection points on the deep well pumps are located outby the last open crosscut; and
3. The deep well pumps installed behind the seals at the JWR Number 7 Mine are not located in intake air.

Sec’y Mot. at 2; JWR Mot at 2-7.³

³ Although JWR argues in its Reply to the Secretary’s Motion for Summary Decision that “[n]one of these facts . . . are material to this contest,” JWR Reply at 1, these three facts, alone, would establish the Secretary’s allegation of a violation of section 75.507, were I to conclude that the Secretary’s interpretation of section 75.507 is correct. Thus, these facts are critical to disposing of the issue before me.

The cited regulation provides as follows:

Except where permissible power connection units are used, all power-connection points out by the last open crosscut shall be in intake air.

30 C.F.R. § 75.507. This regulation codifies, with only a slight change in syntax, section 305(d) of the Act, which provides:

All power-connection points, except where permissible power connection units are used, out by the last open crosscut shall be in intake air.

30 U.S.C. § 865(d).

The issue upon which these cases turn is whether section 305(d) of the Act, codified in the Secretary's regulations at 30 C.F.R. § 75.507, was intended to reach beyond areas of underground coal mines that are ventilated to those areas permanently cut off from normal ventilation. As there is a statutory provision at issue, the first inquiry is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If section 305(d) is clear and unambiguous, effect must be given to its language. See *Chevron*, 467 U.S. at 842-43; accord *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). In determining whether Congress had an intention on the specific question at issue, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Local Union 1261*, 917 F.2d at 44.

As mentioned previously, the material facts of these cases would seem to establish, at first blush, the elements of a violation of section 75.507. The power connection points on JWR's deep well submersible pumps are, contrary to the requirements of the regulation, not permissible, out by the last open crosscut, and not in intake air. This result, however, can be achieved only by formulaically applying section 75.507 out of context and in such a way that ignores the Secretary's regulations "as a whole." *K Mart Corp.*, 486 U.S. at 291. When viewed in their entirety, the vast majority of the Secretary's regulations can only be applied reasonably to accessible areas of a mine that, of necessity, require ventilation. As pointed out in *JWR-I*, "[b]y definition and operation, intake and return air circulate and work, consistent with the demands of active mining in the *accessible* parts of the mine." 27 FMSHRC at 977 (emphasis added). Here, however, the pumps are situated in inaccessible parts of the mines where, after the areas were sealed, dramatic atmospheric changes occurred within a relatively short period of time due to permanent separation from ventilation controls and circulated air systems. When seals were erected, the resultant stagnant environment behind the seals was entirely dissimilar to that in the active areas of the mine. In answer to the question posed in *Chevron*, I conclude that Congress did not speak to "the precise question at issue." 467 U.S. at 842. Section 305(d) was intended to regulate use of equipment in an underground mine's ventilated areas, where intake and return air

systems circulate to provide miners with fresh breathable air, and prevent contaminated air, laden with combustible byproducts of mining activities, from exposure to ignition sources. This statutory provision was not intended to regulate permanently sealed areas of mines comprised of atmospheres wholly dissimilar to that of the active working areas.

To further illustrate the misapplication of the cited standard, I point to another standard in Subpart F of 30 C.F.R. Part 75. JWR's pumps are electric equipment which, following the formulaic logic of the Secretary, would be subject to the requirements of section 75.512. This regulation is also the codification of a statutory provision, and provides that "[a]ll electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions." 30 C.F.R. § 75.512. Given that the submersible pumps are in a "no man's land" that cannot be examined at all, much less frequently, compliance with section 75.512 is an impossibility.

I recognize that, as to sealed areas of underground coal mines, the Secretary has legitimate safety concerns. These concerns, however, are subject to the proposition that "a regulation cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982) (citations omitted). When, in 2003, the Secretary issued PIB No. P03-26, notifying mine operators that MSHA would henceforth apply section 75.507 to submersible pumps, she attempted to graft onto section 75.507 a new substantive requirement, i.e., she widened the ambit of section 75.507 to include sealed areas, which imposed new obligations that significantly affected private interests. See *Drummond Co.*, 14 FMSHRC 661, 684-85 (May 1992) (distinguishing between substantive rules, which require notice and comment rulemaking, and procedural rules, which do not). The Secretary's continued attempt to do so is contrary to well established principles of administrative law, as set forth in *Drummond*.

Even the Secretary's own regulations, however, both undercut her interpretation of section 75.507 and illustrate the unreasonableness of attempting to fit the square peg of regulating stagnant atmosphere in sealed areas into the round hole of provisions clearly intended to regulate accessible, ventilated areas. The Secretary's ventilation regulations contained in Subpart D of 30 C.F.R. Part 75 include a provision entitled "Construction and repair of seals," which states, in relevant part:

- (a) The mine operator shall maintain and repair seals to protect miners from hazards of sealed areas.
- (b) Prior to sealing, the mine operator shall – (1) Remove insulated cables, batteries, and other potential *electric ignition sources* from the area to be sealed when constructing seals, *unless it is not safe to do so*. If ignition sources cannot safely be removed, seals must be constructed to at least 120 psi[.]

30 C.F.R. § 75.337 (emphasis added). Here, when JWR sealed areas that required constant

dewatering in its No. 4 and No. 7 Mines, it placed in those sealed areas pumps that were potential electric ignition sources. Whether it was unsafe to do so is a question that is not before me, nor is JWR cited in the instant matters for violating the requirements of section 75.337. The Secretary would be well advised, it would seem, to reconsider the issue in light of section 75.337, which, at least, recognizes the unique "hazards of sealed areas," and also contemplates utilizing "electric ignition sources" within sealed areas, so long as they are isolated from the active mine workings by seals constructed in accordance with the specification in the standard.

Because I find that the Secretary's interpretation of section 75.507, as applied to deep well submersible pumps operating in sealed areas, impermissibly expands the scope of section 75.507, no violation has been committed by JWR, and Citation Nos. 7691158 and 7691159 are hereby vacated.

ORDER

Accordingly, for the reasons set forth herein, JWR's Motion for Summary Decision is **GRANTED**, the Secretary's Motion for Summary Decision is **DENIED**, and Citation Nos. 7691158 and 7691159 are **VACATED**.


Jacqueline R. Bulluck
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 12, 2008

AGAPITO ASSOCIATES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2008-1451-R
	:	Citation No. 7697010; 7/24/2008
v.	:	
	:	
SECRETARY OF LABOR,	:	Crandall Canyon Mine
MINE SAFETY AND HEALTH	:	Id. No. 42-01715
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER DENYING MOTION FOR STAY OF PROCEEDINGS
ORDER STAYING DISCOVERY

This case is before me on a notice of contest filed by Agapito Associates, Inc. (“Agapito”) against the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (the “Mine Act”).¹ The Secretary filed a motion to stay this proceeding along with a memorandum in support of the motion. This case involves a citation issued to Agapito following the coal pillar failure at the Crandall Canyon Mine on August 6, 2007, that resulted in the deaths of six miners. As grounds for the motion, the Secretary states that MSHA made a criminal referral to the United States Attorney for the District of Utah (“U.S. Attorney”) and that the criminal referral arises out of the same facts, events, and conditions that lead to MSHA’s issuance of the citation at issue in this case. On September 3, 2008, the U.S. Attorney requested that the Secretary seek a stay of all civil proceedings, including discovery in all civil proceedings, in response to this criminal referral. The Secretary represents that the stay is necessary to “avoid interference with or infringement upon the criminal enforcement process which would arise from a related civil enforcement proceeding, including a proceeding related to jurisdictional issues.” Agapito opposes the Secretary’s motion for a stay primarily because it is not seeking an adjudication on the merits. Instead, it is seeking a ruling that it was not subject to Mine Act jurisdiction at the Crandall Canyon Mine.

The letter of the U.S. Attorney states that his office received a criminal referral from Congress and MSHA regarding the Crandall Canyon Mine. “Given the pending criminal

¹ Agapito entered a “special appearance for the purpose of contesting the Federal Mine Safety and Health Review Commission’s jurisdiction over the Contestant pursuant to section 3(d) of the” Mine Act. It also filed a motion for expedited consideration subject to its special appearance.

referrals, we request that MSHA petition the designated Administrative Law Judge for a stay of the pending civil actions pertaining to the Crandall Canyon mine until such criminal matters are resolved.” (Ex. A to Secretary’s Motion). The letter goes on to state that Agapito is “currently a subject in the pending criminal investigation as to their involvement in the potential criminal activity at the Crandall Canyon mine.” *Id.* The U.S. Attorney states that because the “evidence gathered to determine criminal liability may significantly overlap with the evidence needed to prove civil liability . . . this office has an interest in ensuring that neither [Agapito] nor any other entity obtain discovery from a civil proceeding that would unduly circumvent the more limited scope of discovery available in criminal matters.” *Id.* The U.S. Attorney explains that he is particularly concerned that Agapito will try to use this proceeding to conduct discovery which “would provide potential criminal targets with access to witnesses and documents which they would not otherwise be entitled to while the investigation is pending.” *Id.*

In the motion, the Secretary relies on the five factors set forth in *Buck Creek Coal, Inc.*, 17 FMSHRC 500 (April 1995). She argues that all five factors support her motion for stay. Agapito argues that these factors support its opposition to the motion for stay.

I. BRIEF SUMMARY OF THE PARTIES’ ARGUMENTS

A. The Commonality of Evidence in the Civil and Criminal Matters.

The Secretary argues that the civil and criminal matters involve common evidence. She also contends that the underlying civil jurisdictional issue raised by Agapito in this case is intertwined with the merits of this case and with the criminal investigation. Agapito contends that, because it is only seeking a determination on the issue of jurisdiction, there will not be much common evidence. It maintains that the universe of facts applicable to the jurisdictional analysis is already well known to both parties so the jurisdictional question will primarily be a legal one. It argues that, if need be, the jurisdictional issue can be resolved by applying the facts set forth in MSHA’s investigation report on the accident that was issued on July 24, 2008.

B. The Timing of the Stay Request.

The Secretary contends that the timing of her motion favors a stay. The criminal referral was made without undue delay following the issuance of the citation and the motion for stay was filed immediately thereafter. In addition, the civil penalty case for the citation has not yet been docketed. Agapito states that no indictments have been issued and no grand jury has been empaneled. It maintains that its case could hang in limbo for the duration of the five-year statute of limitations based on a mere referral to the Department of Justice. Agapito contends that the timing of the request supports a denial of the motion.

C. Prejudice to the Litigants.

The Secretary argues that the only prejudice to the litigants would come from a denial of her motion. Allowing “a civil case and civil discovery to proceed at the same time as a parallel criminal investigation may interfere with the criminal prosecution and may prejudice the parties.” (S. Motion at 8) (citations omitted). She contends that the strong potential for civil discovery to interfere with the criminal proceedings by the U.S. Attorney weighs heavily in favor of a stay. Agapito argues that resolving the jurisdictional question simplifies litigation for all parties and reduces significant prejudice against Agapito. Granting a stay will significantly prejudice Agapito if it has to defend itself in a highly public criminal investigation especially if it is later absolved of liability on jurisdictional grounds. It will have suffered irreparable harm to its goodwill and it will have expended substantial resources on an unnecessary criminal defense.

D. The Efficient Use of Agency Resources.

The Secretary argues that, if her request for a stay is denied and the parties proceed with discovery in preparation for a hearing, the Secretary would seek to depose Agapito’s principals and managers. With a criminal investigation underway, it can be expected that many if not all of Agapito’s witnesses will assert their Fifth Amendment privilege at such depositions. Granting a stay would conserve resources since all issues could be litigated in one setting rather than piecemeal. Agapito argues that the Commission has a longstanding policy of encouraging the resolution of threshold issues before reaching substantive determinations on the facts. Resolving the jurisdictional issue up front will result in the efficient use of the resources of the Commission and the Secretary.

E. The Public Interest.

The Secretary argues that the public interest is served when the government is able to criminally prosecute miner operators and their employees who willfully violate the Mine Act, safety standards, or other federal statutes without interference or prejudice from related civil proceedings. She maintains that the public interest is best served by the fair and orderly adjudication of civil and criminal cases. Agapito argues that granting a stay would impede the public’s interest in the expeditious resolution of Commission cases. The only matter currently pending is the resolution of the jurisdictional issue and that matter can proceed most swiftly to its conclusion by denying the stay.

II. DISCUSSION

A stay is not automatically granted when there is a potential that criminal proceedings may be brought against a mine operator or its employees. Indeed, general civil litigation and criminal litigation often proceed at the same time. The burden is on the Secretary to establish that a stay is warranted. A Commission administrative law judge has the discretionary authority to stay a civil proceeding pending the outcome of a parallel criminal case when the interests of

justice so require. This authority allows a court to “stay civil proceedings, postpone civil discovery or impose protective orders and conditions when the interests of justice seem to require such action.” *Securities & Exch. Comm’n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir.1980) (en banc). In determining whether to stay the proceeding or impose a stay on discovery, the court must balance the interests of the litigants, nonparties, the public and the court. *See, e.g., Bridgeport Harbor Place LLC v. Ganin*, 269 F. Supp.2d 6, 8 (D. Conn. 2002).

The only issue on the table in this case at the present time is whether MSHA has jurisdiction to enforce the citation it issued to Agapito. Agapito was not the “owner, lessee, or other person” who operated, controlled or supervised the Crandall Canyon Mine at the time of the subject accident. 30 U.S.C. § 802(d). The Secretary contends that Agapito was an “independent contractor performing services or construction” at the mine. In her motion, the Secretary states that she will argue that the “services provided by Agapito . . . in determining mine design [at Crandall Canyon], no matter where Agapito personnel were located when they performed the services, are sufficient to establish jurisdiction over Agapito as an operator.” (S. Motion at 4). The Secretary relies, in part, on *Joy Technologies, Inc., v. Secretary of Labor*, 99 F.3d 991 (110th Cir. 1996) and *Black Wolf Coal Co., Inc.*, 28 FMSHRC 699, 711-14 (July 2006) (ALJ) in making this argument. Agapito, on the other hand, contends that it was not an independent contractor who performed “services or construction” at the mine. It states that it is a geological consulting company that provides “advice, analysis, and consultation to mine operators” from its office in Grand Junction, Colorado. (A. Opposition at 2). As a consequence, it contends that it was not a mine operator subject to the jurisdiction of MSHA.²

Agapito is not seeking to adjudicate the merits of the citation it was issued but is only seeking a ruling from the Commission that it was not subject to the jurisdiction of the Mine Act at the Crandall Canyon Mine. The Secretary argues that Agapito’s status as an independent contractor is unavoidably intertwined with the issue of its liability both under the Mine Act and other relevant criminal statutes. “Discovery into the jurisdictional facts cannot be meaningfully segregated from that necessary either for prosecution of the pending citation or involved in the criminal proceeding.” (S. Motion at 3).

The common thread in the Secretary’s arguments is that, because civil discovery is broader than the discovery available during a criminal investigation, denying the motion for a stay would allow Agapito to unfairly obtain information about the government’s criminal investigation. On the other hand, the Secretary contends that she will need to conduct discovery to determine what services were rendered by Agapito to support her claim of jurisdiction. She states that she needs this information in part because key Agapito personnel refused to cooperate

² The citation at issue alleges a violation of 30 C.F.R. § 75.203(a). It states that Agapito “inaccurately evaluated the conditions and events at the mine when determining if areas of the mine were safe for mining” and, based on its results, “recommended to the operator that mining methods were safe and pillar and barrier dimensions were appropriate when in fact they were not.”

with MSHA's accident investigation. She argues that this same information would be highly relevant to a criminal inquiry.

A determination whether Agapito was subject to Mine Act jurisdiction at Crandall Canyon is rather straight forward. Jurisdiction either existed or it did not; there can be no shades of grey. Whether the company was an independent contractor at the mine is an important preliminary issue that must be decided before the merits of the citation can be considered. Agapito is entitled to a resolution of this issue as long as it does not unduly interfere with the criminal investigation. Agapito is prepared to resolve this issue without discovery. Agapito states the "universe of facts applicable to the jurisdiction" issue is already known by both parties. (A. Opposition at 6). The Secretary insists that discovery is necessary so that she can determine the purpose of visits to the mine by Agapito personnel.

MSHA's accident investigation report discusses Agapito's work for the Crandall Canyon Mine in great detail.³ Although Agapito does not "concede the substantive truthfulness or accuracy of the report," it has consented to "arguing case law relevant to the jurisdictional analysis based on the record as disclosed in the report." (A. Opposition at 6 n. 5).

Taking into consideration the factors set forth by the Commission in *Buck Creek*, I find that the Secretary did not provide sufficient justification to stay this proceeding for the limited purpose of determining whether Agapito was an independent contractor under the Mine Act. It is clear that the Secretary carefully analyzed the services that were performed by Agapito and, based on this analysis, determined that Agapito was subject to MSHA jurisdiction. This information is set forth in her accident investigation report, which is available to the public. The Secretary also describes in her report the trips that Agapito personnel made to the mine as part of the services it provided. I hold that discovery is not necessary to resolve the jurisdictional issue and, as a consequence, all discovery is suspended until further notice. The facts related to the merits of the citation are not so intertwined with the jurisdictional facts as to merit delaying the resolution of the issue.

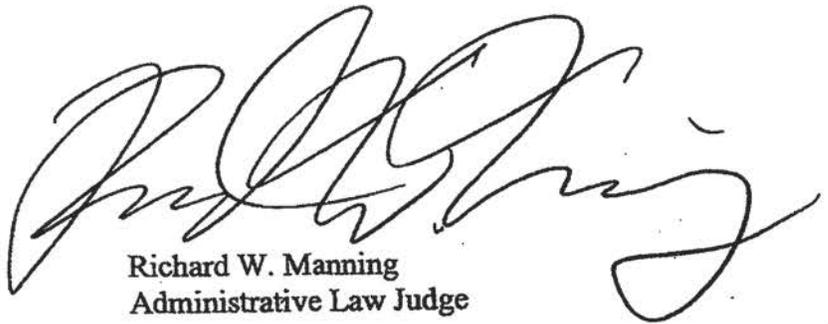
The U.S. Attorney's investigation of Agapito has only just begun. When Commission judges stay cases because of a criminal referral, the criminal issues typically do not get resolved for many years. In such instances, Commission cases are significantly delayed. Such a lengthy delay in resolving the jurisdictional issue in this case is unnecessary and would unfairly penalize Agapito. Resolving the jurisdictional issue now will not unduly interfere with the criminal investigation, especially since all discovery is suspended. In addition, deciding the jurisdictional issue at the present time is an efficient use of agency resources and is in the public interest. This Commission was created in large part to "secure the just, speedy, and inexpensive determination of all proceedings." 29 C.F.R. § 2700.1(c).

³ <http://www.msha.gov/Fatals/2007/CrandallCanyon/FTL07CrandallCanyon.pdf>

The Secretary's accident investigation report is an official record of MSHA and I can take official notice of its contents. I am amenable to resolving the jurisdictional issue based on this report and briefs filed by the parties. In the alternative, one or both parties may wish to request a hearing on this issue. If the Secretary believes that she needs to further develop the record as to the nature of the services were rendered to the mine operator, she is free to do so at a hearing.

III. ORDER

The Secretary's motion to stay this proceeding is **DENIED**. For the reasons set forth above, all pending and proposed discovery in this case is **STAYED** until further notice. The parties shall confer and counsel shall schedule and initiate a conference call with me to discuss suggested methods for proceeding in this case.



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

September 19, 2008

ROCKHOUSE ENERGY MINING CO.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 2008-1483-R
	:	Citation No. 8216019; 7/23/2008
	:	
	:	Docket No. KENT 2008-1484-R
	:	Citation No. 8216020; 7/23/2008
	:	
	:	Docket No. KENT 2008-1485-R
	:	Citation No. 8216024; 7/24/2008
	:	
	:	Docket No. KENT 2008-1486-R
	:	Citation No. 8216025; 7/24/2008
	:	
v.	:	Docket No. KENT 2008-1487-R
	:	Citation No. 8216033; 7/25/2008
	:	
	:	Docket No. KENT 2008-1488-R
	:	Citation No. 8216034; 7/25/2008
	:	
	:	Docket No. KENT 2008-1489-R
	:	Citation No. 6660866; 7/31/2008
	:	
	:	Docket No. KENT 2008-1496-R
	:	Citation No. 6660752; 7/2/2008
	:	
	:	Docket No. KENT 2008-1497-R
	:	Citation No. 6660753; 7/2/2008
	:	
SECRETARY OF LABOR,	:	Docket No. KENT 2008-1498-R
MINE SAFETY AND HEALTH	:	Citation No. 6657617; 7/11/2008
ADMINISTRATION (MSHA),	:	
Respondent.	:	Docket No. KENT 2008-1499-R
	:	Citation No. 6657618; 7/11/2008
	:	
	:	Docket No. KENT 2008-1500-R
	:	Citation No. 6657619; 7/11/2008

: Docket No. KENT 2008-1501-R
: Citation No. 8216001; 7/11/2008
:
: Docket No. KENT 2008-1552-R
: Citation No. 8216067; 8/25/2008
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: Docket No. KENT 2008-1553-R
: Citation No. 8216068; 8/25/2008
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: Docket No. KENT 2008-1554-R
: Citation No. 8216072; 8/25/2008
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: Docket No. KENT 2008-1555-R
: Citation No. 8216073; 8/25/2008
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: Docket No. KENT 2008-1556-R
: Citation No. 8216075; 8/25/2008
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: Docket No. KENT 2008-1557-R
: Citation No. 8216082; 9/02/2008
:
: Docket No. KENT 2008-1558-R
: Citation No. 8216083; 9/02/2008
:
: Docket No. KENT 2008-1559-R
: Citation No. 8216084; 9/03/2008
:
: Mine ID 15-17651

ORDER CONSOLIDATING PROCEEDINGS
ORDER GRANTING MOTION TO FILE OUT OF TIME
ORDER DENYING MOTION TO EXPEDITE
AND
NOTICE OF HEARING

In these contest proceedings filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act) (30 U.S.C. § 815(d)) Rockhouse Energy Mining Co. contests the validity of 21 citations issued pursuant to section 104(a) of the Act. 30 U.S.C. § 814(a). The citations were issued at the company's Mine No. 1, an underground bituminous coal mine, located in Pike County, Kentucky. In addition to alleging violations of the Secretary of Labor's (Secretary's) mandatory safety standards for underground coal mines, the citations allege the violations were significant and substantial contributions to a mine safety hazard (S&S).

CONSOLIDATION OF THE PROCEEDINGS

The cases initially were docketed in three groups: KENT 2008-1496-R through KENT 2008-1501-R; KENT 2008-1552-R through KENT 2008-1559-R; and KENT 2008-1483-R through KENT 2008-1489-R. The cases present similar issues. Counsels and I agree the cases should be consolidated for hearing and decision.

MOTIONS

The contests have been filed with two attendant motions: (1) a motion to file the contests of the citations in Docket Nos. KENT 2008-1496-R through Kent 2008-1501-R out of time, and; (2) a motion to expedite all of the proceedings pursuant to Commission Rule 52. 29 C.F.R. § 2700.52.¹

MOTION TO FILE OUT OF TIME

The contested citations in Docket Nos. KENT 2008-1496-R through KENT 2008-1501-R were issued on July 2, 2008 (KENT 2008-1469-R and KENT 2008-1497-R), and on July 11, 2008 (KENT 2008-1498-R through KENT 2008-1501-R). The notices of contest were received by the Commission on August 22, 2008. Under Section 105(d) of the Act, upon issuance of the citations, Rockhouse had 30 days in which to file its contests. The contests were filed untimely by 20 and 12 days respectively. Rockhouse asserts its mine is currently being evaluated by the Secretary's Mine Safety and Health Administration (MSHA) for designation as having a pattern of violations (POV) status pursuant to section 104(e) of the Act.² Rockhouse states it is subject "to initial screening pursuant to 30 C.F.R. [§] 104.2 and [§] 104.3, and MSHA will base its final determination of the POV in part on the validity of these citations, as well as the findings of . . .

¹Because Rockhouse moved to expedite all of the proceedings, the contests were not automatically stayed pending the filing of the related civil penalty proceedings. *See* Order of Assignment (September 10, 2008) (no indication of automatic stay). Therefore, I need not act on counsel for Rockhouse's Motion to Lift Stay.

²Section 104(e) states in part:

If an operator has a pattern of violations of mandatory health or safety standards in the . . . mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal . . . mine health or safety hazards, he shall be given written notice that such pattern exists.

S&S.³ Rockhouse also states the company's safety director discussed the validity of the citations and the inspector's gravity, negligence and S&S findings during a July 18 conference with MSHA. On July 21, Rockhouse was advised MSHA would not modify the citations. Because Rockhouse's representative did "not understand the POV determination would occur before penalties on these citations [were] assessed and [the] citations were set for hearing in the normal . . . litigation process," Rockhouse did not contest the citations. Timeliness Motion 2. Therefore, Rockhouse should be permitted to late file. *Id.*

Counsel for Rockhouse, counsel for the Secretary, and I discussed the motion. Counsel for the Secretary orally questioned its propriety, but chose not to formally object to it. Given the fact the contests were untimely by only a few days, given the lack of prejudice to the Secretary, and given the new and complex nature of the Secretary's POV procedures and resulting understandable lack of knowledge of them by Rockhouse's safety director, I conclude the

³The agency's procedures for determining whether an operator has established a POV are set forth at 30 C.F.R. § 104.1 *et seq.* Section 104.2 specifies the information MSHA will review in its annual initial screening process, including information regarding "The mine's history of . . . [S&S] violations." 30 C.F.R. § 104.2(1). Section 104.3 specifies the information MSHA will use to identify mines with a potential pattern of violations. It states:

(a) The criteria of this section shall be used to identify those mines with a potential pattern of violations. These criteria shall be applied only after initial screening conducted in accordance with § 104.2 . . . reveals that the operator may habitually allow the recurrence of violations of mandatory safety or health standards which . . . [are S&S]. These criteria are:

(1) A history of repeated [S&S] violations of a particular standard;

(2) A history of repeated [S&S] violations of standards related to the same hazard; or

(3) A history of repeated [S&S] violations caused by unwarrantable failure to comply.

(b) Only citations and orders issued after October 1, 1990, and that have become final shall be used to identify mines with a potential [POV].

motion to allow the untimely filing should be granted.⁴

⁴While MSHA has had the statutory authority to put mines under a POV designation since the passage of the Act, the agency only recently has begun to exercise that authority by promulgating and by starting to enforce 30 C.F.R. § 104 *et seq.* It is fair to say the policy and procedures that ultimately may lead the agency to determine a mine should be given a POV designation are little understood by many in industry and the bar, and I include myself among those who have difficulty deciphering the process.

30 C.F.R. §104 establishes a four-step procedure: (1) initial screening (section 104.2); (2) identification by MSHA of mines with a potential POV through application of the regulatory criteria (section 104.3); (3) designation of POV status and issuance of the designation to the operator (section 104.4); and (4) termination of POV status (section 104.5). For operators the critical steps in the process are 1, initial screening; 2, identification as having a potential POV; and 3, designation of POV status.

With regard to S&S violations, in steps 1 and 2, MSHA's Office of Assessments reviews the 24-month violation history of a mine to determine if it exhibits a potential POV. Among the criteria are all alleged S&S violations cited at the mine in the previous 24 months. According to section 104.3(b) "[On]ly citations and orders . . . **that have become final** shall be used to identify mines with a potential pattern of violations." Thus, an operator may be notified its mine exhibits a potential POV only on the basis of final S&S allegations. If an operator is issued a notification its mine exhibits a potential POV, the operator has not more than 20 days within which to do the following: (1) Review all documents on which it has been evaluated for the designation and provide additional information to MSHA; (2) Submit a written request for a conference with the MSHA District Manager; and/or (3) Provide a written corrective action plan to institute a program to avoid repeated S&S violations. *See* Pattern of Violations Procedures Summary, www.MSHA.gov/POV/POVprocedures. If an operator chooses not to submit an improvement plan to MSHA, within 60 days of the operator's receipt of notification of a potential POV designation MSHA will conduct a complete inspection of the mine and the District Manager will analyze the results of the inspection to determine whether the operator has reduced the frequency rate of S&S violations by 30% or has achieved a frequency rate for S&S violations that is at or below the industry average. (If the operator chooses to submit an improvement plan, MSHA will conduct the complete inspection no later than 90 days from the date the operator submitted the plan, and the District Manager will analyze the results of the inspection to determine whether the operator has reduced the frequency rate of S&S violations by 30% or has achieved a frequency rate for S&S violations that is at or below the industry average.) The frequency rates for S&S violations will be based on the S&S designation in all citations and orders issued since the receipt of notification or since the receipt of the improvement plan. **The citations and orders need not be final orders of the Commission.** *Id.* Based on a report he or she receives from the District Manager concerning the results of the complete inspection, MSHA's Administrator will decide whether to issue a Notice of Pattern of Violations to the operator. *Id.*

MOTION TO EXPEDITE PROCEEDINGS ⁵

The motion to expedite is based on the fact that Rockhouse “is currently being evaluated for a . . . POV pursuant to Section 104(e) of the . . . Act” and that “MSHA will base its final determination of the POV in part on the validity of [the contested] citations as well as the findings of . . . S&S . . .” Rockhouse contends MSHA will “make its POV determination before a hearing on the merits of the citations can be held in the normal course.” Notice and Motion at 13.

Counsel for the Secretary responds an expedited hearing requires an operator to show “extraordinary or unique circumstances resulting in continuing harm or hardship.” Sec.’s Response 3, *citing Consolidation Coal Co.*, 16 FMSHRC 495 (February 1994) (ALJ Feldman) (the contestant bears the burden of “showing extraordinary or unique circumstances resulting in continuing harm or hardship.” 16 FMSHRC at 496.) Counsel maintains Rockhouse has not given any reason why being evaluated by MSHA for a “POV” designation constitutes extraordinary harm or hardship. Sec.’s Resp. 4. According to counsel, if the mine is given a POV designation, it can result in Rockhouse being required to immediately abate any subsequent S&S violations issue at the mine.⁶ However, like the possibility an operator may be

⁵The written motion was submitted as part of Rockhouse’s notices of contest. The motion did not state the view of the Secretary’s counsel. As properly noted by counsel, the motion, therefore, is procedurally flawed. Commission Rule 52 states a motion to expedite must be made in writing pursuant to Commission Rule 10 (30 C.F.R. § 2700.10), and Commission Rule 10(b) states a written motion “shall be set forth in a document separate from other pleadings.” In addition, Commission Rule 10(c) states a motion other than a dispositive motion “shall state . . . whether any other party opposes or does not oppose the motion.” However, the motion’s defects do not warrant its defeat. Counsel for Rockhouse’s failure to observe the letter of the rules has not prejudiced the Secretary. Therefore, the motion is accepted as filed, but Counsel is reminded to fully observe the requirements of Rule 10 in future filings before the Commission.

⁶In explaining the consequences of a Notice of POV, MSHA’s Procedures Summary states:

Following notification to the operator of the issuance of a Notice of [POV], the District shall initiate appropriate inspection activities to ensure that the operation is inspected in its entirety during the following 90-day period and each succeeding inspection cycle until the [POV] order is terminated.

If an . . . [inspector] finds any [S&S] violation

subject to an order issued pursuant to section 104(d) of the Act, 30 U.S.C. § 814(d), the possibility an operator may be subject to a POV notice does not warrant an expedited proceeding.

As I understand Rockhouse's situation, Mine No. 1 has been identified by MSHA as having a potential POV, and the company has been given written notification to this effect. In response, Rockhouse has submitted a corrective action plan to avoid repeated S&S violations. MSHA has conducted a complete inspection of the mine to determine whether or not pursuant to its plan Rockhouse has achieved a 30% reduction in its S&S rate or whether its S&S rate is at or below the industry average. The 21 contested citations are all of the S&S citations issued by MSHA during the complete inspection. The company has not achieved a 30 % reduction, and its average rate of S&S violations is above the industry's rate. However, if three of the 21 S&S allegations are found to be invalid, the mine will meet the 30% reduction goal.

According to MSHA's procedures summary, once the inspection has been completed and the calculation is made, the District Manager will report to the Administrator, and the calculation will be one of the bases upon which the Administrator will decide whether to issue a Notice of POV to Rockhouse. According to counsel for the Secretary, in this instance, the District Manager's report must be sent to the Administrator by September 25, 2008. The Administrator must decide whether or not to issue a Notice of POV within 30 days of his receipt of the Report. Pattern of Violations Procedures Summary³⁻⁴; www.MSHA.gov/POV/POV_procedures. It seems reasonable to expect the decision to be made on or shortly after October 27, 2008 (October 26 is a Saturday).

I agree with Rockhouse that it is entitled to a speedy review of the validity of the citations and the S&S findings therein. As the Commission noted in *Energy Fuels Corp.*, 1 FMSHRC 299, 307 (May 1979), an operator may have legitimate interests in seeking a determination of the validity of a citation and its findings prior to a penalty being proposed. Abatement may be expensive. More than that, "The citation may . . . contain special findings . . . that may start a series of events culminating in an order that miners be withdrawn from some areas of the mine." *Energy Fuels* at 307. (The Commission was referring to section 104(d) of the Act, but it just as easily could have been referring to section 104(e)).

. . . during the inspection conducted while an operator is subject to a Notice of [POV], the inspector shall issue an **order** requiring the operator to withdraw all persons in the area affected by the violation except those listed in [section] 104(c) of the . . . Act. All persons except as listed in [section] 104(c) . . . shall also be prohibited from entering that area until the inspector determines . . . such violation has been abated.

In addition, I agree with the Secretary that an expedited hearing is not required. Because the District Manager has not yet sent his report to the Administrator, a decision as to whether to issue a Notice of POV is not imminent. There is no need to convene a hearing within the next five days or even within the next two weeks. Nonetheless, Commission Administrative Law Judge Jerold Feldman once noted that some cases that might not require an expedited hearing still should be heard on an expeditious basis. *Consolidation Coal Co.*, 16 FMSHRC 495, 496. In my opinion, Rockhouse's interest in avoiding the effects of a Notice of POV and the likelihood of a POV decision on or shortly after October 27 warrant accelerating the trial schedule so the cases can be heard and decided before the time within which the Administrator must act on the District Manager's POV recommendation expires.

ORDER AND NOTICE OF HEARING

For the foregoing reasons, the captioned cases **ARE CONSOLIDATED** for hearing and decision. Rockhouse's motion to file its contests out of time **IS GRANTED**. Its motion for an expedited hearing **IS DENIED**. The parties are advised these contest proceedings will be called for hearing on **October 7, 2008, in Pikeville, Kentucky at 8:30 a.m.** (A specific hearing site will be designated later.) At issue will be whether the violations alleged in the citations occurred and, if so, the validity of the inspector's allegations regarding gravity, negligence and S&S. In preparing for the hearing, counsels are directed to confer regarding limiting discovery. It appears depositions are unnecessary. If the Secretary provides Rockhouse with all relevant inspectors' notes and photographs (assuming such exist) and Rockhouse provides the Secretary with all relevant pre- and on-shift inspection reports and photographs (assuming such exist), no further discovery will be required. Counsels are also directed to provide by facsimile and first class mail copies of intended exhibits and a witness list to one another and to me one week prior to the hearing.



David F. Barbour
Administrative Law Judge

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