

## SEPTEMBER 2004

### COMMISSION DECISIONS AND ORDERS

|            |                            |                 |         |
|------------|----------------------------|-----------------|---------|
| 09-09-2004 | RBS Incorporated           | WEVA 2004-136-M | Pg. 751 |
| 09-10-2004 | Jim Walter Resources, Inc. | SE 2003-160     | Pg. 754 |
| 09-15-2004 | Hoffmann, Inc.             | WEVA 2004-191   | Pg. 757 |

### ADMINISTRATIVE LAW JUDGE DECISIONS

|            |                              |                 |         |
|------------|------------------------------|-----------------|---------|
| 09-13-2004 | Elk Run Coal Company         | WEVA 2003-149   | Pg. 761 |
| 09-24-2004 | Granite Construction Company | WEST 2004-179-M | Pg. 770 |

### ADMINISTRATIVE LAW JUDGE ORDERS

|            |                                      |              |         |
|------------|--------------------------------------|--------------|---------|
| 08-18-2004 | Baylor Mining, Inc. (Corrected copy) | WEVA 2004-36 | Pg. 777 |
|------------|--------------------------------------|--------------|---------|



**SEPTEMBER 2004**

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

Secretary of Labor, MSHA v. Speed Mining, Inc., Docket No. WEVA 2004-187-R, etc.  
(Judge Weisberger, August 12, 2004)

Secretary of Labor, MSHA v. RBS Incorporated, Docket No. WEVA 2004-136-M.  
(Judge Hodgdon, unpublished settlement order dated August 4, 2004)

No case was filed in which Review was denied during the month of September



**COMMISSION ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 9, 2004

|                        |   |                            |
|------------------------|---|----------------------------|
| SECRETARY OF LABOR,    | : |                            |
| MINE SAFETY AND HEALTH | : |                            |
| ADMINISTRATION (MSHA)  | : |                            |
|                        | : | Docket No. WEVA 2004-136-M |
| v.                     | : | A.C. No. 46-00018-25238    |
|                        | : |                            |
| RBS, INCORPORATED      | : |                            |

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

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On August 4, 2004, Administrative Law Judge T. Todd Hodgdon issued a Decision Approving Settlement granting the Secretary of Labor’s Motion for Decision and Order Approving Settlement and dismissing this civil penalty proceeding. Unpublished Order dated August 4, 2004. On August 16, 2004, the Commission received from RBS, Inc. (“RBS”) correspondence which we construe to be a timely petition for discretionary review. For the following reasons, we grant RBS’s petition, vacate the judge’s order, and remand for further proceedings.

In its petition, RBS alleges that the parties negotiated a settlement over the telephone, but the company disputes the terms of the settlement agreement that were set forth in the Secretary’s settlement motion to the judge. PDR. The settlement motion indicates that the Secretary’s Conference and Litigation Representative served the motion on the operator at the same time that he submitted it to the judge. *Id.* RBS asserts that it received the Secretary’s motion on the same day that the judge’s decision was issued, and thus, did not have an opportunity to verify whether the terms of the settlement correctly reflected the parties’ agreement before the judge dismissed the case. *Id.* RBS asks to resume its contest of the remaining disputed issues in this matter. *Id.* On August 20, 2004, the Secretary filed a response to RBS’s petition, stating that she does not oppose granting it. S. Resp.

The judge's jurisdiction over this case terminated when he issued his decision approving settlement on August 4, 2004. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem RBS's request to be a timely filed petition for discretionary review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

The Secretary's representative alone signed the settlement motion, which was served on RBS on July 30, 2004, the same day that it was filed with the Commission. The judge received the motion on August 2, and issued his decision two days later on August 4. Although the parties may have reached an oral understanding to settle the case, it is not clear whether RBS had an opportunity to review the terms of the settlement agreement that was the basis for the Secretary's motion, prior to the judge's dismissal of the proceeding.

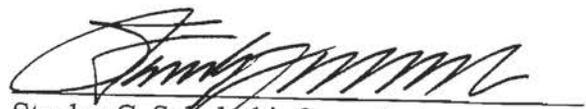
Based on the present record, it appears that the judge may have prematurely dismissed the proceeding. In the interest of justice, we vacate the judge's dismissal order and remand this matter to the judge for further proceedings as appropriate. *See McElroy Coal Co.*, 25 FMSHRC 689 (Dec. 2003).



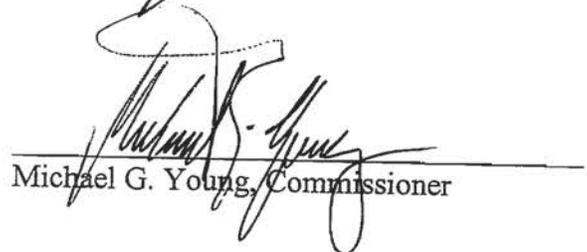
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

Distribution

William Snyder, Vice President  
RBS, Incorporated  
P.O. Box 490  
White Sulphur Springs, WV 24986

Michael Gonos, Jr.  
Conference & Litigation Representative  
U.S. Department of Labor, MSHA  
547 Keystone Drive, Suite 400  
Warrendale, PA 15086

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., 22<sup>nd</sup> Floor West  
Arlington, VA 22209-2247

Administrative Law Judge T. Todd Hodgdon  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 10, 2004

|                            |   |                         |
|----------------------------|---|-------------------------|
| SECRETARY OF LABOR         | : |                         |
| MINE SAFETY AND HEALTH     | : |                         |
| ADMINISTRATION (MSHA)      | : |                         |
|                            | : | Docket Nos. SE 2003-160 |
| v.                         | : | SE 2003-161             |
|                            | : |                         |
| JIM WALTER RESOURCES, INC. | : |                         |

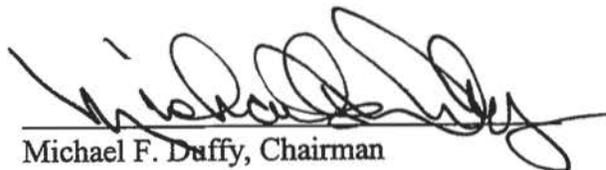
BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000). On August 26, 2004, pursuant to Commission Rule 76, 29 C.F.R. § 2700.76, Jim Walter Resources, Inc. ("JWR") filed with the Commission a petition for interlocutory review of an order issued by Administrative Law Judge David F. Barbour denying JWR's motion for summary decision. 26 FMSHRC 623 (July 2004) (ALJ). Judge Barbour had also denied JWR's motion for reconsideration of his decision, and its request, in the alternative, that he certify his earlier ruling to the Commission for interlocutory review. 26 FMSHRC 734 (Aug. 2004) (ALJ). On August 30, 2004, the Secretary of Labor filed an opposition to JWR's petition for interlocutory review, and JWR subsequently filed a reply to the Secretary's opposition.

Upon consideration of the pleadings filed by JWR and the Secretary, we have determined that JWR has failed to establish both that the order denying its motion for summary decision involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding. *See* 29 C.F.R. § 2700.76(a)(2). We therefore deny the petition.



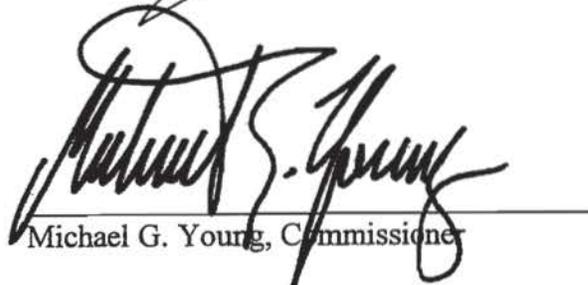
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suholeski, Commissioner



Michael G. Young, Commissioner

Distribution

Timothy C. Means, Esq.  
Crowell & Moring  
1001 Pennsylvania Ave., N.W.  
Washington, D.C. 20004-2595

Edward H. Fitch, Esq.  
Keith E. Bell, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., 22<sup>nd</sup> Floor West  
Arlington, VA 22209-2247

Judith Rivlin, Esq.  
United Mine Workers of America  
8315 Lee Highway  
Fairfax, VA 22031

Administrative Law Judge David Barbour  
Federal Mine Safety & Health Review Commission  
Office of Administrative Law Judges  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 15, 2004

|                        |   |                             |
|------------------------|---|-----------------------------|
| SECRETARY OF LABOR,    | : |                             |
| MINE SAFETY AND HEALTH | : |                             |
| ADMINISTRATION (MSHA)  | : |                             |
|                        | : | Docket No. WEVA 2004-191    |
| v.                     | : | A.C. No. 46-05317-19959 BJS |
|                        | : |                             |
| HOFFMANN, INC.         | : |                             |

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On July 21, 2004, the Commission received from Hoffmann, Inc. (“Hoffmann”) a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On September 22, 2003, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation No. 3577265 to the Goals Preparation Plant of Hoffman, Inc. (“Hoffmann”). The company timely contested the citation. When MSHA subsequently proposed a penalty for Citation No. 3577265, Hoffmann paid it. The company now contends that it made the payment inadvertently, explaining that the penalty was included among proposed penalties for other uncontested citations, and that its accounting department mistakenly paid all of the proposed penalties. Mot. at 2. Hoffmann asserts that it had always intended to contest the validity of Citation No. 3577265, and that, but for its administrative error, it would retain the right to proceed with its contest. *Id.*; *Aff. of Clinton T. Church*. The Secretary states that she does not oppose Hoffmann’s 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.

Having reviewed Hoffmann’s submissions, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Hoffmann’s inadvertent payment 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



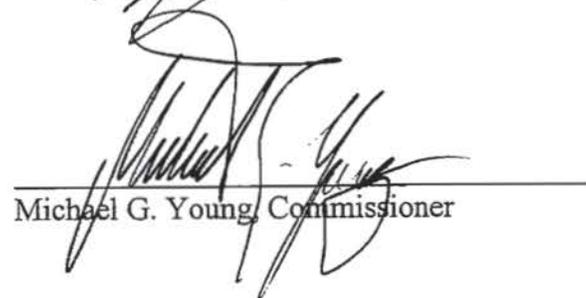
---

Mary Lu Jordan, Commissioner



---

Stanley C. Suboleski, Commissioner



---

Michael G. Young, Commissioner

Distribution

Adele L. Abrams, Esq.  
Law Office of Adele L. Abrams, P.C.  
4740 Corridor Place, Suite D  
Beltsville, MD 20705

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., 22<sup>nd</sup> Floor West  
Arlington, VA 22209-2247

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



ADMINISTRATIVE LAW JUDGE DECISIONS





miner usually mined entries one through three, right to left. After mining right to left in a row, the miner then usually proceeded outby to the next row.

In July 2003, Elk Run ran two production shifts; the day shift from 6:30 a.m. to 3:30 p.m., and the evening shift from 4:00 p.m. to 1:00 a.m. The mid-night shift, which was a maintenance shift and did not produce coal, usually started between 11:00 p.m. to 12:00 p.m., and ended at approximately 8:00 a.m.

On July 23, 2002, MSHA Inspector Danny Meadows, inspected the subject facility. He arrived at the pillar line in question at approximately 9:45 a.m. According to Meadows, an employee was "... tinkering around ..." a continuous miner located between rows C and D in Entry No. 2. (Tr. 67, 145). Coal was not being mined.

Meadows and Phil Saunders, the section foreman on the day shift who accompanied him, observed that the block in row B between Entry Nos. three and four (block 3p), and the block between Entry Nos. Four and five (block 4p) had been mined through. However, the block in row B between Entry Nos. two and three (block 2p) had not been mined all the way through. Also, there were not any timbers set in Entry No. 2 outby row B.

The only blocks in row C that had been completely split were blocks 5p and 6p, between entries five and six, and six and seven, respectively. Block 6p, was the only block in row D between Entry Nos. 6 and 7 that had been mined all the way through.

At approximately 10:00 a.m. Meadows issued an order under Section 104(d) of the Federal Mine Safety and Health Act of 1977 (the Act), alleging that the roof control plan was not being complied with "... in that pillars are not being extracted as the plan requires." The parties agreed that the pertinent language in the roof control plan, which was developed pursuant to 30 C.F.R. Section 75.220(a)(1) provides that during the pillaring mining sequence, "... no more than 2 rows of blocks shall be started until inby blocks are completed."<sup>2</sup> (Government Exhibit 5.p.11)

### **III. The violation of Section 25.220(a)(1) (the roof control plan)**

The roof control plan, as pertinent, provides as follows: "No More than 2 Rows of Blocks Shall Be Started until Inby Blocks Are Completed." In essence, the evidence establishes that, when inspected by Meadows, rows C and D had been started but not completed. The parties appear to be in agreement that the main issue for resolution is whether block 2p in row B, which

---

<sup>2</sup>The order at issue alleges, first, that the roof control plan was not being complied with and that pillars were not being extracted as the plan required. It next alleges that "... [t]hree rows of blocks were started at the same time." The plan does not clearly prohibit the starting of three blocks at the same time. The parties have agreed that the issue in this case is whether page 11 of the roof control plan was violated, i.e., whether the block in row B between Entry Nos. 2 and 3 was completed before two outby blocks were started.

had been partially split, had been completed.

It is Elk Run's position that the Secretary has not established that Row B was not complete. Elk Run first asserts that, in essence, under the roof control plan it decides when a row is complete.<sup>3</sup> In this regard Elk Run avers that at the time the inspector issued the order herein, it had decided that row B was complete. This assertion is based on the testimony of Saunders, that when he arrived on the section at the beginning of the day shift on July 23, he inspected the area in question. He testified that he did not go in by up to row B because "[y]ou're not supposed to. At that point in time, that's an abandoned row". (Tr. 331). He indicated that he did not intend to complete the cut in block 2p in row B.

In contrast, the Secretary refers to Meadows' testimony that on July 23, when he spoke to Saunders during his inspection later on in the shift, Saunders told him that his plan was to mine block 2p "... but he was going to wait until I got there." (Tr. 65). On the other hand, Saunders testified regarding his conversation with Meadows, that, in essence, he had initially planned that morning to finish the cut in Row B block 2p, i.e., that it had not been completed, but that when he arrived on the section and observed the condition of the various blocks he had to change his plans.

I find that the weight to be accorded to Meadows' version is diminished somewhat because the record does not contain any explanation as to why Saunders would have told Meadows he had intended to mine block 2p but was going to wait until Meadows arrived. On the other hand, I find Saunders' version more credible inasmuch as he explained, in essence, that he would have considered block 2p row B incomplete, and would have completed it on his shift on July 23, had he not observed, at the beginning of the shift, that block 6p row D had been cut.

Further, I note that Saunders' testimony is somewhat corroborated by Gary Neil, who was the Superintendent at the subject mine on the dates at issue. He testified that Saunders had explained to him that if he (Saunders) were to go back and continue cutting block 2p in row B "... we would mining three rows of blocks." (Tr. 169). Neil indicated that after this conversation it was his "contention" that block 2p had been completed. (Tr. 176 - 177)

Thus, at most, the record indicates that as of approximately 7:30 a.m. on July 23, Elk Run had determined that row B had been completed, and there was not any intent to go back and finish the cut in block 2p, row B. Elk Run argues that, when it was cited by Meadows later in the morning, there was not any violation since row B was complete, and there were only two rows, C and D, that were incomplete.

I do not find Elk Run's argument to be compelling. I agree with the Secretary that Elk Run did not comply with the plan if the record establishes that, at any time prior to the issuance

---

<sup>3</sup>This assertion, based on the testimony of Inspector Mathews on cross examination, is accepted inasmuch as there is not any evidence to the contrary.

of the citation, row B, and two outby rows had not been completed.

The record fails to indicate that any mining of rows B, C and D, occurred on July 23.<sup>4</sup> Hence, the focus must be placed on Elk Run's intention, during the evening shift of July 22, regarding the partial cut of block 2p in row B. In this connection, I note, that in meeting its burden, the Secretary did not proffer the testimony of any miners who were present during the evening shift regarding the sequence in which cuts were actually taken from the various rows in question. Neither did it proffer the testimony of any supervisory personnel who were present during that shift relating to Elk Run's intention during or at the conclusion of the shift regarding the partial cut in block 2p, row B.

The Foreman's Production Report ("Production Report") for the July 22 evening shift (Government Exhibit 5), establishes the following: (1) that the last two full cuts<sup>5</sup> were taken from blocks 5p and 6p, from 9:34 to 10:50, and from 11:24 to 12:10 respectively; (2) that, in normal mining, after mining right to left in a row, i.e., blocks 4p through 6p, the miner proceeded to cut blocks in the next outby row; (3) that on the morning shift on July 23, block 6p row D, block 5p row C, and block 6p row C, had all been cut; (4) that as of the end of the evening shift, July 22, no other blocks had been cut in rows C and D; (5) that in the evening shift July 22, from 12:06 to 12:20, block 2p row B, had been cut only 10 feet, i.e., not all the way through (6) that the roof plan requires "(8) Breaker Post will be set at location (a) promptly after mining inby." (Government Exhibit 4 p. 18); and (7) that, at the commencement of the day shift on July 23, breaker posts had not been set in Entry No. 2 row C outby row B block 2P. Based on these facts,<sup>6</sup> it might reasonably be inferred that, at the conclusion of the July 22 evening shift, row B

---

<sup>4</sup>Mining did take place only in rooms to the left and right of these rows.

<sup>5</sup>Although the production report indicates the time cutting commenced and ended and the depth of cut taken from a particular block, it does not indicate the row where that block was located. However, since it indicates that only a 10 foot cut was taken from block 2p that evening, and since, when inspected on July 23, the only block 2p that had been cut not all the way through was located in row B, it might reasonably be inferred that the partial cut in block 2p which commenced at 12:06 p.m. and ended at 12:20 p.m. was located in row B. Further, the production report indicates that prior to the time that the cut was taken from block 2p at 12:06, mining had commenced in block 6p at 7:50 and the depth of the cut was indicated as "GOB". Also, mining was started at a block 6p at 11:24, and the depth of cut extended 35 feet. Since the record establishes that, when inspected on July 23, blocks had been cut in rows C, (blocks 5p and 6p) and D (block 6p) it may reasonably be inferred that mining had been started in these rows at 12:06, prior to the starting of mining in block 2p in row B. Thus it might be inferred that rows C and D had been started before the final block in row B (2p), had been mined, i.e. before the most inby row (row B) had been completed.

<sup>6</sup>Additionally, the production report indicates that (1) the left continuous miner cut block 2p between 12:06 and 12:20; (2) the men on the shift departed the section 12:25; and (3) there is not any indication explaining why the cut in block 2p was not a full cut. Based on these facts, it might be inferred that the cut was not completed on that shift just because the crew left at the end of the shift, and there was not any intention to abandon the cut at that time and to consider 2p and row B as complete.

had not been completed, as it had not been completely cut, posts had not been set, and rows C and D had been started, but not completed.

Elk Run failed to produce probative evidence to rebut these inferences. Elk Run did not proffer the testimony of any persons who were present on the evening shift of July 22 to explain the precise sequence in which cuts had been taken, the reason why only a partial cut had been taken from block 2p row B, and whether at the end of the evening shift Elk Run's agents determined that mining had been completed in block 2p row B, and the basis for this determination. Nor did Elk Run adduce evidence of any physical conditions in the mine in the area of block 2p row B that would have made it prudent for Elk Run to have determined that after cutting only ten feet mining had been completed. Nor did it proffer the testimony of any miner present on the evening shift of July 22 to indicate why pillars had not been set at location "A" outby block 2p row B. (See, Government Exhibit 2).

Thus, taking into account all the above, I find that the preponderance of the evidence, and reasonable inferences drawn therefrom establishes that by the end of the evening shift on July 22 row B had not been completed, and outby rows C and D had been started but not completed. Accordingly, I find that Elk Run was in violation of its roof control plan, and, by extension, Section 75.220(a), *supra*.

#### **IV. Unwarrantable Failure**

Unwarrantable failure has been determined by the Commission to be aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.* 9 FMSHRC 1997, 2001 (Dec. 1987). In *VA Slate Co.*, 23 FMSHRC 482, 486, (May 2001) the Commission set forth the various facts and circumstances to be considered in determining whether conduct is aggravated within the context of unwarrantable failure. The Commission held as follows:

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to

determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

Elk Run asserts that the extent of the violative condition, and danger presented were both non-significant. Elk Run argues, in support of these assertions, that on July 23, mining was not taking place in rows B and C, and no employees went into these areas. Also, that a continuous miner blocking entry No. 2 would block the entry of miners to the cited areas as effectively as breaker posts. Elk Run also refers to the presence of solid coal on every corner of rows D and C as mitigating any danger of a roof fall. Further, Elk Run argues that there was not any evidence presented that it had been put on notice that greater efforts were necessary for compliance with the roof control plan. Additionally, Elk Run asserts that the violative condition was not obvious, inasmuch as Saunders believed that row B had been abandoned, and Gary Neil, who was the superintendent at the mine and testified he did not have any reason to believe that any violation existed when he arrived on the day shift. Accordingly, it is argued by Elk Run that there was a lack of evidence presented that it knew the roof control plan had been violated.

In evaluating whether Elk Run's conduct herein was aggravated, I note that Meadows found the violative condition of cuts from blocks in three rows to have been obvious. Significantly, Saunders also readily observed the condition when he first arrived at the first section earlier that morning.

It is clear that cuts were taken from blocks during the evening shift on July 22. The next shift was a non-production shift, and there is no evidence that any cuts were taken on the morning shift July 23, prior to the time Saunders arrived at the area in question. Accordingly, I find that the violative condition of cuts in three rows existed at least since the end of the evening shift on July 22.

As explained by Meadows, the hazard of a roof fall is inherent in pillar mining. The record does not indicate that any action was taken during the midnight shift to protect miners from the hazards attendant upon the uncompleted condition of row B. There is not any evidence that breaker posts (timbers) were installed to impede travel inby that point, and to warn miners not to travel inby.

On the other hand, I take cognizance of the fact that the length of time the violative condition existed unabated was during the non-production midnight shift. I observed Saunders' demeanor and found his testimony trustworthy, that, in essence, when he arrived on the section in the morning on June 22 and observed three rows of blocks had been mined, he sent Larry Helmick, a scoop operator, to obtain supporting/warning timbers.

I note that according to Meadows, when he arrived on the section at the pillar line shortly after 9:30 a.m. on July 23, no timbers were in place, and he did not observe any timbers on the section. Meadows was asked on direct examination whether Saunders said anything to him about his plans to place timbers in the area just in the entry just outby pillar 2p row B, and he indicated

that "... we never did discuss any timbers there." (Tr. 67). He was asked next whether Saunders mentioned anything about a plan to timber that area. He answered as follows: "No. I don't recall timbers even being mentioned." (Tr. 67). However, on cross-examination he was asked "Isn't it true that [Saunders] told you that he had sent an employee outby to get timber to set them in location A." Meadows gave the following answer: "I don't remember him saying that. I'm not disputing it, but I don't remember him telling me that." (Tr. 125). Thus, I find Meadows' testimony is not of sufficient probative value to dilute the weight to be accorded Saunders' testimony that he ordered timbers. I observed Saunders' demeanor while testifying on this point and find him credible. I thus place more weight on his testimony that he had in fact ordered timbers to be brought to the section "... because we probably would have to basically block that entry off." (Tr. 280).<sup>7</sup>

Within the framework of the above evidence, I place considerable weight on the following: (1) Saunders' efforts in abating the violative condition by ordering timbers to be brought to the section at the start of the shift on July 22; (2) the relatively short time the violation had existed, i.e., from the end of the night shift July 22 continuing only through the non-production mid-night shift up until cited by the inspector the morning of July 23; (3) the fact that the operator had not been placed on notice that greater efforts were necessary for compliance; (4) the fact that the degree of danger posed by the violative condition is mitigated by the fact that it existed mainly during a non-production shift, and there is not any evidence that during that shift men regularly entered the violative area, and (5) the fact that there was not any production in the area or men exposed to working in the area during the morning shift on July 23, until the time the conditions were cited.

Taking into account all the above, I find that it has not been established by a preponderance of evidence that the operator's conduct herein was aggravated. Thus I find that it has not been established that the violation was as a result of the operator's unwarrantable failure.

#### **IV. Significant and Substantial**

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the

---

<sup>7</sup>I note that on direct examination Saunders was asked when the timbers that he had sent for were set he indicated that "... it would have been probably around 9:00 a.m. . . . We took care of setting those timbers while Danny was on the section." (Tr. 275). I find this testimony not credible in light of Meadows testimony that there were not any timbers outby block 2p row B in the No. 2 Entry when he was on the section on July 23, 2002. Also, importantly, the parties agreed that there were not any timbers at that location. However, although Saunders testimony was not credible on this point, I decline to apply the principle of *falsus in uno, falsus in omnibus*. I find Saunders' testimony credible, for the reasons set forth above, that shortly after arriving on the section he had ordered timbers brought to the section.

violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, Nat'l Gypsum Co.*, 3 FMSHRC 825 (April 1981).

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

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

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

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

As set forth above, I found that there was a violation herein of Section 75.220(a) supra, and the roof control plan. According to Mathews, whose testimony I find credible at this point, pillar mining itself weakens roof support and places stress on the section. Further, according to Meadows, leaving three rows of blocks that have not been completed exacerbates the hazard. Also, the fact that breaker posts had not be installed to prevent any roof fall continuing outby further contributes to the hazard. I thus find that the first and second elements of Mathies, supra have been established.

In regard to the third element set forth in Mathies, supra , the Secretary must establish, by a preponderance of evidence, a reasonable likelihood of an injury producing event, i.e., a roof fall. In this connection Meadows testified that "... numerous people have been killed as a result of retreat mining." (Tr. 102). Also, that the presence of three incomplete rows without appropriate supporting timbers increases the risk of exposing miners to roof fall. However, in analyzing the likelihood of an injury producing event, ie., a roof fall, I note, as argued by Elk Run, that there was not any evidence adduced that the roof was undergoing any specific type of

stress that could lead to a roof fall. Nor does the record contain evidence that the roof had ever fallen in this particular section of the mine. I thus find that the Secretary has not established by a preponderance of evidence that there was a reasonable likelihood of a roof fall. I thus find that it had not been established that the violation was significant and substantial.

#### V. Penalty

Essentially, for the reasons set forth above, (*III, infra*) I find that the violation herein contributed to the hazard of a roof fall which could have caused serious injury to miners. Hence I find that the gravity of the violation was relatively high. I note that in the two year period preceding the date of the order at issue the operator was cited for one hundred and sixteen significant and substantial violations of which eight were violations of Section 75.220(a)(1), *supra*, and by reference, the roof control plan. I note that it has been stipulated that the proposed penalty would not have an effect on the operator's ability to continue in business.

On the other hand I note, for the reasons set forth above, (*III, infra*), that the level of Elk Run's negligence was only moderate. Additionally, the Secretary conceded that Elk Run acted in good faith abating the violation and in making efforts at abatement. I adopt these conclusions as they are supported by the record. Considering all the above factors, I find that a penalty of \$1,000.00 is appropriate.

#### Order

It is ordered that: (1) Order No. 4623160 be **Amended** to a Section 104(a) citation that is not significant and substantial, and (2) within 30 days of this Decision, Elk Run pay a civil penalty of **\$1,000.00** for the violation found herein.



Avram Weisberger  
Administrative Law Judge

Distribution:

Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd.,  
22<sup>nd</sup> Floor West, Arlington, VA 22209-2247

David J. Hardy, Esq., Spilman, Thomas & Battle, PLLC, 300 Kanawha Blvd, East, P.O. Box  
273, Charleston, WV 25321

/sb

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

September 24, 2004

|                               |   |                            |
|-------------------------------|---|----------------------------|
| SECRETARY OF LABOR,           | : | CIVIL PENALTY PROCEEDING   |
| MINE SAFETY AND HEALTH        | : |                            |
| ADMINISTRATION (MSHA),        | : | Docket No. WEST 2004-179-M |
| Petitioner                    | : | A.C. No. 04-00107-16715    |
|                               | : |                            |
| v.                            | : |                            |
|                               | : | Felton Quarry              |
| GRANITE CONSTRUCTION COMPANY, | : |                            |
| Respondent                    | : |                            |

**DECISION**

Appearances: John D. Perez, Conference and Litigation Representative, Mine Safety and Health Administration, Vacaville, California, for Petitioner;\* William R.E. Jackson, Director of Safety, Granite Construction, Inc., Watsonville, California, 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 Granite Construction Company ("Granite Construction"), 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.

**I. BACKGROUND AND SUMMARY OF THE EVIDENCE**

Granite Construction operates a sand and gravel mine near Felton, California, in Santa Cruz County. On December 16, 2003, James Weisbeck, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection of the quarry. During his inspection, Inspector Weisbeck issued Citation No. 6353461 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.12030. The body of the citation states:

---

\* Isabella M. Del Santo, Esq., of the Department of Labor's Office of the Solicitor in San Francisco, also appeared for Petitioner.

A potentially dangerous condition exists in that the positive and negative welder lugs were not protected in the side compartment of the International maintenance truck #4-030 creating hazards of shocks and flash burns to the operator reaching into the area of energized parts. The OCV rating was rated at 80. The compartment is used to store tools and supplies along with control adjustments, giving exposure to persons reaching into the area. The truck is used around the mine site as needed for maintenance.

The inspector determined that it was unlikely that anyone would be injured as a result of this condition and that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not of a significant and substantial nature and that Granite Construction's negligence was moderate. The cited safety standard provides that "[w]hen a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized." The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Weisbeck testified that as he was inspecting the maintenance truck he noticed that the lugs on the portable welder at the back of the truck were not protected from inadvertent contact. (Tr. 11). These lugs are the points where the welding cables are attached to the welder with metal nuts. These lugs are energized when the welder is in use. The parties stipulated that there were no insulating covers on these lugs at the time the citation was issued. (Ex. S-1 ¶ 4). Inspector Weisbeck estimated that the lugs were about waist high inside a compartment that was about six feet tall and three feet wide. Employees reach into this compartment to get tools and other equipment. (Tr. 11; Exs. G-3 & G-4). Controls for the welder are also located near the lugs. Inspector Weisbeck believes that the alleged violation would be obvious to anyone who worked around the welder. (Tr. 36; 55). He believes that the condition should have been observed during required workplace examinations. (Tr. 56). There was no evidence that the lugs had previously been protected.

The inspector believes that the condition he cited creates a potentially dangerous condition because if someone were to inadvertently come into contact with both lugs when the welder was on, he could be injured by the electric shock. The welder operates at about 80 volts and pulls about 300 amps. (Tr. 14-15; 37-38). Inspector Weisbeck stated that if a person came into contact with the lugs, he could sustain an electric shock or flash burns. He also testified that there was a plug on the welder near these lugs that was used to energize other electric equipment. He noted that oxygen and acetylene bottles were also stored in this compartment. The hose for the oxygen bottle was defective in that the outer jacket was separated from the hose inside the jacket. Inspector Weisberg believes that this condition created a slight risk of an explosion in the event of an arc flash. He also testified that equipment, including welding rods and a welding hood, were stored in the compartment. These factors increased the risk that someone might touch the lugs while reaching into the welding compartment.

Because a confluence of factors would have to occur for an accident to happen, the inspector determined that an injury was unlikely. (Tr. 18; 38-39). The welder would have to be turned on and there would have to be contact between the two lugs. If the conditions were right, a person might also suffer a shock if he were touching the truck and the positive lug. (Tr. 39).

The inspector determined that the violation was the result of Granite Construction's moderate negligence because, although the violation was obvious, the company had only recently brought the truck onto the mine property. (Tr. 19). Although he was not sure how the condition was abated, he testified that MSHA accepts the installation of a rubber flap over the lugs, the use of battery terminal covers, or the installation of lug terminal covers.

Inspector Weisbeck testified that the web site maintained by the welder manufacturer states that covers must be secured over terminals and other exposed electrical parts before operation of welders. (Tr. 21; Ex. G-8 p. 3). Inspector Weisbeck also made reference to fatalities and injuries caused by shocks received from welders, but none of these accidents were caused by someone coming into contact with unprotected welder lugs. (Tr. 24-29, 38; Exs. G-9 - G-11). In November 2002, Granite Construction received a similar citation involving welder lugs at its Bradshaw Pit. (Tr. 29-30; Ex. G-12). The penalty for the citation was paid by Granite Construction. (Ex. G-13).

The inspector further testified that it has been the policy of MSHA to require protection for welder lugs since before the time he started working for MSHA in 1999. (Tr. 43). He was not sure how much insulation would be required to provide protection, but he did not believe that much insulation would be necessary. (Tr. 44-46).

Although Granite Construction listed three witnesses in its response to my notice of hearing, it chose not to call any witnesses at the hearing. Instead, it made several arguments, as discussed below.

## **II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Granite Construction maintains that the cited safety standard is "too vague and ambiguous to specify what behaviors are required or prohibited." (Tr. 67). It argues that although the inspector testified that "there was a possibility of an injury," the Secretary did not present any evidence that any injuries have occurred as a result of unprotected welder lugs at any mine in the United States. *Id.* It contends that the Secretary's evidence is all based on speculation. The Secretary does not dispute that the welder was sold by the manufacturer without lug covers. In addition, the manufacturer's web page that the Secretary introduced at the hearing has a 2004 publication date, so its recommendation that welder terminals be protected should not be considered. (Ex. G-8, p. 3). As a consequence, the record does not establish that Granite Construction was "given adequate notice of what behavior was expected by the Agency" with respect to the welder lugs. (Tr. 67).

I find that the Secretary established a violation. First, the Secretary proved that a “potentially dangerous condition” existed. Having exposed terminal connectors (lugs) in a compartment where tools and supplies are kept creates a potentially dangerous condition. When the welder is running, the lugs are energized with low-voltage power that can cause an injury to anyone who comes in contact with them. Granite Construction did not present evidence to dispute the Secretary’s evidence on this issue at the hearing.

The safety standard at issue is “simple and brief in order to be broadly applicable to myriad circumstances.” *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981). When faced with a challenge that a broadly written safety standard fails to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. *BHP Minerals International, Inc.*, 18 FMSHRC 1342, 1345 (August 1996). The appropriate test is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). In order “to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be ‘so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application.’ ” *Id.*, quoting *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982) (citations omitted).

Section 56.12030 must be construed in light of its underlying purpose: the protection of miners working around electrical circuits and electric equipment. Any overly narrow or restrictive reading of the scope of this safety standard cannot be reconciled with the purpose of the Secretary’s safety standards or with the protective ends of the Mine Act. A safety standard “must be interpreted so as to harmonize with and further . . . the objectives of” the Mine Act. *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10<sup>th</sup> Cir. 1984).

I find that a reasonably prudent person would recognize the hazard presented by the cited condition. A potentially dangerous condition exists if there are exposed energized terminals in a compartment where employees reach in to retrieve tools and equipment and to adjust control knobs. Although this citation involves a welder, the hazard would be the same if exposed terminals of any other low-voltage electrical circuit were similarly situated. Unprotected eighty volt terminals that carry electric current at 300 amps present a potential hazard that cannot be denied. The lugs on other welders at the Felton Quarry were provided with appropriate protection. (Tr. 20-21). In addition, although no citations had been issued at the Felton Quarry for exposed welder lugs, Granite Construction had received at least one other citation for the same condition at another quarry. Thus, Granite Construction knew what the standard required with respect to welders.

During cross-examination of Inspector Weisbeck, Granite Construction raised issues regarding the adequacy of the protection required. The standard does not provide that any shield covering the lugs must furnish a particular level of insulation. Other safety standards provide

that splices in power conductors and electric cables must be insulated to a degree at least equal to that of the original. (*See* § 56.12013(b)). The standard at issue here does not include that degree of specificity. The inspector testified that any thick rubber shield, such as conveyor belting, would provide enough insulation. I find that Granite Construction's argument that the standard is too vague because it fails to specify the degree of insulation required is not well taken in this case. If Granite Construction had a guard over the lugs and MSHA issued a citation because the guard was inadequate, such a vagueness argument might have some merit. In this case, however, Granite Construction was cited because no protection was provided at all. The safety standard provides reasonable notice that an insulated guard was required.

Finally, Granite Construction argues that, because the cited condition was not "found" by the operator, the citation should be vacated. The evidence establishes that the violative condition was not hidden. I credit the testimony of Inspector Weisbeck that the bare welder lugs would be obvious to anyone working in the area. (Tr. 36, 55: Ex. G-3 & 4 ). Examinations required under section 56.18002(a) should have revealed the hazard. Under that standard, workplace examinations for "conditions which may adversely affect safety or health" must be conducted by the operator each shift and corrective action must be promptly initiated if such conditions are found. Records of such examinations are required to be kept. Thus, although the operator had not "found" the cited condition, it should have been aware of the condition. The fact that the exposed lugs had not been discovered is a result of Granite Construction's own negligence.

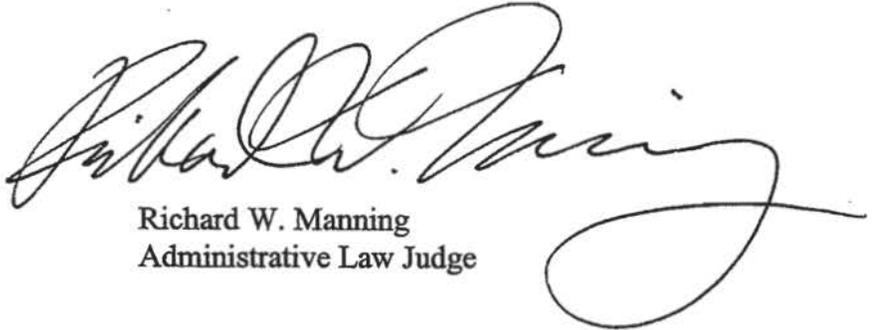
### **III. APPROPRIATE CIVIL PENALTIES**

I find that the citation should be affirmed as written by Inspector Weisbeck. Section 110(i) of the Mine Act sets out six criteria to be considered in determining an appropriate civil penalty for a violation. I affirm the inspector's determinations with respect to the gravity of the violation. Although there was a potential hazard presented by the violation, I credit the inspector's testimony that an injury was not reasonably likely. Granite Construction did not present any evidence or convincing argument to rebut Inspector Weisbeck's determination that its negligence was moderate. The record supports the inspector's negligence determination.

Granite Construction Company is a rather large operator, but the Felton Quarry is a small mine. MSHA has issued about six citations at the Felton Quarry in the two years preceding December 2003. The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect on Granite Construction's ability to continue in business. Based on the penalty criteria, I find that the penalty proposed by the Secretary is appropriate.

#### IV. ORDER

As set forth above, Citation No. 6353461 is **AFFIRMED** without modification. Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess a penalty of \$60.00 for the violation. Granite Construction Company is **ORDERED TO PAY** the Secretary of Labor the sum of \$60.00 within 30 days of the date of this decision.



Richard W. Manning  
Administrative Law Judge

Distribution:

John D. Perez, Conference & Litigation Representative, Mine Safety & Health Administration,  
2060 Peabody Road, Suite 610, Vacaville, CA 95687-6696 (Certified Mail)

William R.E. Jackson, Director of Safety, Granite Construction, Inc., Box 50085, Watsonville,  
CA 95077-5085 (Certified Mail)

RWM



**ADMINISTRATIVE LAW JUDGE ORDERS**



# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

601 New Jersey Avenue, N.W., Suite 9500

Washington, DC 20001

August 18, 2004

|                        |   |                          |
|------------------------|---|--------------------------|
| SECRETARY OF LABOR,    | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : |                          |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 2004-36  |
| Petitioner             | : | A.C. No. 46-08593-11714  |
|                        | : |                          |
| v.                     | : |                          |
|                        | : |                          |
| BAYLOR MINING, INC.,   | : | Jim's Branch No. 3a      |
| Respondent             | : |                          |

## **ORDER GRANTING, IN PART,** **AND** **DENYING, IN PART, MOTION TO COMPEL**

This case is before me on a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Respondent filed a request for production of documents with the Secretary. Citing the “work product” privilege, the “informant’s” privilege and the “deliberative process” privilege, the Secretary declined to furnish 12 documents in response to the Respondent’s request.<sup>1</sup> Consequently, the Respondent has filed a Motion to Compel disclosure of the documents. Relying on the privileges previously asserted, the Secretary opposes the motion. For the reasons set forth below, the motion is granted, in part, and denied, in part.

The documents at issue are: (1) The inspector’s September 10, 2003, notes; (2) An August 6, 2003, Special Investigation Report; (3) A September 19, 2003 Memo from the special investigator to the Acting Director of the Office of Assessments; (4) An April 14, 2003, signed miner witness statement; (5) An April 10, 2003, unsigned miner witness statement; (6) A May 30, 2003, Memorandum of Interview of a miner witness; (7) and (8) Two June 9, 2003, Memoranda of Interview of members of management; (9) A June 6, 2003, Memorandum of Interview of a member of management; (10) A June 13, 2003, signed miner witness statement; (11) A May 30, 2003 Memorandum of Interview of a “private” individual; and (11) A June 19, 2003, Memorandum of Interview of a miner witness.

With the exception of the inspector’s notes, the Secretary’s Conference and Litigation Representative argues that the remaining 11 documents are covered by the “work product”

---

<sup>1</sup> It is not clear whether the Secretary withheld 11 or 12 documents since, as will be seen *infra*, the Secretary has already furnished the inspector’s notes.

privilege. The work product privilege has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure.<sup>2</sup> The Commission has held that:

In order to be protected . . . under Fed. R. Civ. P. 26(b)(3), the material sought in discovery must be:

1. "documents and tangible things;"
2. "prepared in anticipation of litigation or for trial;" and
3. "by or for another party or by or for that party's representative."

*Asarco, Inc.*, 12 FMSHRC 2548, 2558 (Dec. 1990) (*Asarco I*). The documents clearly meet (1) and (3), so the question is whether they were prepared "in anticipation of litigation or for trial."

The investigation in this case was carried out in response to a section 103(g) complaint, 30 U.S.C. § 813(g).<sup>3</sup> As evidence that the investigation was in anticipation of litigation, the Secretary has submitted the affidavits of the Supervisory Special Investigator and the investigator. The supervisor's affidavit states:

I assigned Robert W. Simmons, Special Investigator, to conduct an investigation of this complaint. Because of the allegation of possible falsification of records, one of the purposes of Mr. Simmons' investigation was to recommend whether civil penalty assessments should be proposed and whether the matter

---

<sup>2</sup> Commission Rule 1(b), 29 C.F.R. § 2700.1(b), incorporates the Federal Rules of Civil Procedure, so far as practicable, on any procedural question not regulated by the Act, the Commission's procedural rules, or the Administrative Procedure Act.

<sup>3</sup> Section 103(g)(1) provides, in pertinent part, that:

Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representation has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. . . . Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists. . . .

should be referred to the United States Attorney form [sic] possible criminal action. In addition, it was known that Mr. Lucas had been killed in a subsequent accident at the Jim's Branch No. 3a Mine and that there was ongoing litigation concerning his death. As such, the work performed by Investigator Simmons as part of this investigation was performed in anticipation of possible litigation.

Special Investigations conducted pursuant to Section 103(g) of the Act are not conducted in the ordinary and routine course of MSHA's business. Normally, a 103(g) complaint is assigned to a regular inspector to investigate. However, because this case involved an allegation of falsification of records, it was assigned to a Special Investigator and a special investigation was conducted. This investigation was conducted with the understanding that litigation was a possibility.

(Sec'y. Resp., Attach. B., Aff. of James G. Jones, Paras. 4 & 5.) The affidavit of Simmons contains essentially identical language. (Sec'y. Resp., Attach. C., Aff. of Robert W. Simmons, Paras. 4 & 8.)

The affidavits are relevant because the belief of the party preparing the document, that litigation will result, if objectively reasonable, is the initial focus of whether a document was prepared in anticipation of litigation. *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3rd Cir. 1993). Consequently, finding the affiants' beliefs to be objectively reasonable, I find that the Secretary has met the first step in sustaining her claim of the privilege.

Next, the Secretary correctly argues that "it is well recognized that such special investigations are conducted by MSHA in anticipation of litigation." (Sec'y. Resp. at 5.) Indeed, in *Asarco I*, the Commission held that MSHA special investigations under sections 110(c) and (d), 30 U.S.C. § 820(c) and (d), are undertaken in anticipation of litigation. *Id.* at 2559. Section 110(d) deals with criminal penalties for operators who "willfully violate[] a mandatory health or safety standard." Thus, it appears that the investigation, although initially triggered by a 103(g) complaint, falls within the protection of the privilege by the possibility of criminal charges.

Further, it does not appear that MSHA arrived at this rationale in response to the instant motion. The August 6 memorandum, written well before the citation was issued, states as its subject: "Special Investigation Report Under Section 110 . . . ." This also supports the claims in the affidavits that the investigation was undertaken with litigation a possibility.

Finally, even though there is no evidence that criminal charges resulted from the investigation, the privilege would still apply in this case. As the Commission said in *Asarco I*, "documents prepared for one case have the same protection in a second case, if the two cases are closely related." *Id.* at 2558. The Commission went on to say:

It is our understanding that no charges have been brought as a result of Everett's special investigation. Nevertheless, this civil penalty case, brought under section 110(a), 30 U.S.C. § 820(a), is closely related litigation and it further appears that it could fairly be said that the document was prepared in anticipation of that litigation.

*Id.* at 2559 (citations omitted). In this case, the civil penalty case for inadequate task training is more than just closely related to the investigation; lack of task training was one of the allegations in the 103(g) complaint. (Sec'y. Resp. Attach. A.)

In conclusion, I find that the Secretary has met her burden of establishing that the documents in question were prepared in anticipation of litigation. Documents 2 and 3 are clearly covered by the privilege as they are documents prepared in anticipation of litigation by the Secretary's investigator. Documents 4, 5 and 10, the signed and unsigned miner witness statements, taken by the investigator during the investigation also fall within the privilege. See *Brennan v. Engineered Products, Inc.*, 506 F.2d 299, 303 (8th Cir. 1974); *Brock v. Frank V. Panzarino, Inc.*, 109 F.R.D. 157, 159 (E.D.N.Y. 1986). Finally, Documents 6, 7, 8, 9, 11 and 12, the memoranda of interviews, are also covered by the privilege. *Consolidation Coal Co.*, 19 FMSHRC 1239, 1243 (July 1997). Accordingly, I hold that the work product privilege applies to all 11 documents.

Having found that all 11 of the documents are entitled to work product immunity, "they are subject to discovery 'only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.' Fed. R. Civ. P. 26(b)(3)." *Asarco I*, 12 FMSHRC at 2558. In this case, the Respondent argues that the documents "presumably motivated the Secretary's enforcement action and contain information needed by Baylor to prepare its defense over two and one-half years after the event." (Mot. at 9.)

This assertion may meet the substantial need part of the test, but it does not demonstrate that Baylor is unable without undue hardship to obtain the substantial equivalent of the materials by other means. This is not a case where the Secretary obtained the information back in 2001 when memories were fresh. The Secretary got the information a year ago. That is about the same length of time that proceeds most cases before the Commission.

Baylor has access to the same individuals with knowledge of the alleged inadequate task training as did the investigator and can question them in the same manner, under *subpoena*, if necessary. *Asarco, Inc.*, 14 FMSHRC 1323, 1331 (Aug. 1992) (*Asarco II*). Other than a lapse in time, which is essentially the same for both parties, the Respondent has made no showing that it attempted to question witnesses and they could not remember what happened, that some witnesses are no longer available, that it would have to go to unusual expense to obtain the information contained in the documents or that some other *actual* reason prevents the operator

from obtaining this information. Accordingly, I conclude that the Respondent has not met the undue hardship test and that documents 2-12, with the exception of documents 7, 8 and 9 need not be disclosed.<sup>4</sup>

With respect to documents 7-9, which are memoranda of interviews of Baylor managerial employees, Fed. R. Civ. P. 26(b)(3) provides that: "A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party." Since Baylor, the party, is a corporation, it follows that it may obtain the statements of its agents without the required showing of substantial need and undue hardship. Inasmuch as the Secretary has not asserted any other privilege with regard to these documents, they must be furnished to the Respondent.

This disposes of all of the documents except the inspector's notes dated September 10, 2003. The Respondent requests "the inspector's notes redacted only, if applicable, of identifying information regarding informant witnesses and the mental impressions, conclusions, opinions or legal theories of any attorney or other representative party concerning the case." (Mot. at 14.) In response, the Secretary's representative states:

With respect to the inspector's notes that the respondent [*sic*] seeks produced, those notes were taken after the issuance of the citation at issue and relate to a follow-up inspection to determine whether the violation had been abated. The only material that was redacted from those notes was the social security and phone numbers of persons who were interviewed.

(Sec'y. Resp. at 8.) Thus, it appears that the Secretary has already produced the inspector's notes.

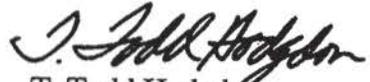
### Order

As discussed above, the Motion to Compel is **GRANTED** to the extent that the Secretary is **ORDERED** to provide to the Respondent Documents 7, 8 and 9, the memoranda of interview

---

<sup>4</sup> Having found that the work product privilege applies to these 11 documents, I do not reach the Secretaries assertion of the "informant's" and "deliberative process" privileges.

of management. In all other respects, the Motion to Compel is **DENIED** and the Secretary need not disclose the two memoranda from the investigator or the witness statements or other memoranda of interviews.<sup>5</sup>

  
T. Todd Hodgdon  
Administrative Law Judge  
(202) 434-9973

Distribution: (Certified Mail)

James F. Bowman, Conference & Litigation Representative  
U.S. Department of Labor, MSHA, 100 Bluestone Road, Mt. Hope, WV 25880

Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor  
1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209

David J. Hardy, Esq., Spillman, Thomas & Battle, PLLC  
Spillman Center, 300 Kanawha Boulevard, East, P.O. Box 273, Charleston, WV 25321

/hs

---

<sup>5</sup> The Respondent will be receiving the names of the Secretary's miner witnesses two days before trial. At that time, counsel for the Respondent should also receive all statements made by those miners who will be witnesses. *Asarco II*, 14 FMSHRC at 1331.