

OCTOBER 2004

COMMISSION DECISIONS AND ORDERS

| | | | |
|------------|------------------------------|-----------------|---------|
| 10-04-2004 | AJ Crushing & Concrete, LLC | WEST 2004-405-M | Pg. 783 |
| 10-06-2004 | Darwin Stratton & Son, Inc. | WEST 2001-528-M | Pg. 787 |
| 10-06-2004 | DeWayne Herren | WEST 2004-311-M | Pg. 791 |
| 10-07-2004 | J S Sand & Gravel, Inc. | YORK 2004-50-M | Pg. 795 |
| 10-12-2004 | Prairie Materials Sales Inc. | LAKE 2004-94-M | Pg. 800 |
| 10-29-2004 | Martin Marietta Aggregates | CENT 2004-234-M | Pg. 803 |
| 10-29-2004 | Lammi Sand & Rock | WEST 2004-502-M | Pg. 807 |

ADMINISTRATIVE LAW JUDGE DECISIONS

| | | | |
|------------|---|------------------|---------|
| 10-07-2004 | APAC-Mississippi, Inc. | SE 2004-83-M | Pg. 811 |
| 10-18-2004 | RAG Cumberland Resources, L.P. | PENN 2000-181-R | Pg. 816 |
| 10-25-2004 | Ronald R. Cole v. Newmont Midas Operation | WEST 2004-442-DM | Pg. 818 |

ADMINISTRATIVE LAW JUDGE ORDERS

| | | | |
|------------|------------------------------|-----------------|---------|
| 10-07-2004 | Jim Walter Resources, Inc. | SE 2003-150-R | Pg. 823 |
| 10-14-2004 | RAG Cumberland Resources, LP | PENN 2000-181-R | Pg. 827 |
| 10-14-2004 | Jim Walter Resources | SE 2003-160 | Pg. 830 |

OCTOBER 2004

Review was granted in the following case during the month of October:

Secretary of Labor, MSHA v. Elk Run Coal Company, Docket No. WEVA 2003-149.
(Judge Weisberger, September 13, 2004)

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

COMMISSION ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 4, 2004

| | | |
|------------------------------|---|----------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket No. WEST 2004-405-M |
| | : | A.C. No. 45-03490-27068 |
| v. | : | |
| | : | Docket No. WEST 2004-406-M |
| AJ CRUSHING & CONCRETE, LLC. | : | A.C. No. 45-03490-24530 |

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”).¹ On July 19, 2004, the Commission received from AJ Crushing & Concrete, LLC. (“AJ Crushing”) correspondence which we construe as a motion to reopen two 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).

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 two proposed assessments (A.C. No. 45-03490-27068 and A.C. No. 45-03490-24530) to AJ Crushing. In its motion, AJ Crushing states that the 30 days to contest the proposed assessments has passed and it asks the Commission to waive the 30 day period and review the assessments. Mot. No documentation is attached to AJ Crushing’s motion. The Commission received a

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2004-405-M and WEST 2004-406-M, both captioned *AJ Crushing & Concrete, LLC.* and both involving similar issues. 29 C.F.R. § 2700.12.

response from the Secretary of Labor stating that, because AJ Crushing has identified no grounds for reopening the penalty assessments, she requires additional information before she can express her position on the operator's motion. Sec'y Resp. at 1-2.

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).

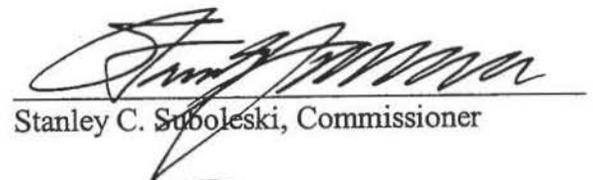
On the basis of the present record, we are unable to evaluate the merits of AJ Crushing's position. We hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for AJ Crushing's failure to timely contest the penalty proposals and whether relief 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



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

October 6, 2004

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket Nos. WEST 2001-528-M
v. : WEST 2001-538-M
 : WEST 2001-557-M
 :
DARWIN STRATTON & SON, INC. :

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

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On April 29, 2002, Administrative Law Judge Richard Manning issued a decision, concluding in part that the Department of Labor’s Mine Safety and Health Administration (“MSHA”) has jurisdiction over the Airport Pit operated by Darwin Stratton & Son, Inc. (“Darwin Stratton”) and that Darwin Stratton violated section 103(a) of the Mine Act, 30 U.S.C. § 813(a), by refusing an authorized MSHA representative entry to its pit. 24 FMSHRC 403, 407-09 (April 2002) (ALJ).

The judge’s jurisdiction in this matter terminated when he issued his decision on April 29, 2002. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission’s procedural rules, 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). Darwin Stratton did not file a petition for discretionary review, nor did the Commission direct review sua sponte. 30 U.S.C. §§ 823(d)(2)(A) and (B). Thus, the judge’s decision became a final decision of the Commission on May 29, 2002. 30 U.S.C. § 823(d)(1).

On August 26, 2002, the Commission received from Darwin Stratton a motion to reopen Judge Manning’s decision under Fed. R. Civ. P. 60(b)(2).¹ In evaluating requests to reopen final

¹ Rule 60(b) provides in pertinent part that a party may be relieved from a final order by reason of “newly discovered evidence which by due diligence could not have been discovered in

orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure. See 29 C.F.R. § 2700.1(b) (“the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993).

In its motion, Darwin Stratton states that it has “recently been made aware of . . . documentation and information and could not [have] brought this evidence before this Administrative Court before now.” DS Mot. at 2. Darwin Stratton does not, however, describe or include copies of any newly discovered evidence in the motion. Rather, Darwin Stratton makes arguments relating to legal issues that were before the judge. *Id.* at 2-19. On September 27, 2002, the Secretary of Labor filed a motion opposing Darwin Stratton’s request, asserting that the operator had failed to meet the requirements of Rule 60(b)(2) because it does not provide any newly discovered evidence to support its request. S. Opp’n at 7-10.²

We conclude that Darwin Stratton’s motion of August 26, 2002, does not satisfy the requirements of Rule 60(b)(2). The Commission has recognized that in order to obtain relief under Rule 60(b)(2), the movant must establish that newly discovered evidence “was in existence at the time of trial but not in the movant’s possession; that even by exercising due diligence, the movant could not have obtained the evidence at the time of trial or in time to move for a new trial . . .; and that the evidence is not merely cumulative and would change the result.” *Bruno v. Cyprus Plateau Mining Corp.*, 11 FMSHRC 150, 153 (Feb. 1989); see also *Sec’y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 1079, 1079-80 (Oct. 1999) (citations omitted) (“the newly discovered evidence must have existed at the time of trial or concern facts that were in existence at time of trial, and must be sufficiently significant that it is likely to change the outcome of the case”). Darwin Stratton does not describe or set forth copies of any newly discovered evidence; it does not explain why, using due diligence, such evidence could not have been brought before the judge; nor does it describe newly discovered evidence that would have changed the outcome of the proceedings. See *Harvey v. Mingo Logan Coal Co.*, 24 FMSHRC 699, 699-701 (July 2002) (denying miner’s request to reopen under Rule 60(b)(2) because miner did not provide newly discovered evidence that would change outcome of decision). Accordingly, we deny Darwin Stratton’s August 26, 2002, request for relief under Rule 60(b)(2).

time to move for a new trial under Rule 59(b).” Fed. R. Civ. P. 60(b)(2).

² On May 14, 2003, the Commission received from Darwin Stratton a document making allegations of judicial misconduct. The Commission has investigated these allegations and found them to be baseless.

For the foregoing reasons, we deny Darwin Stratton's request for relief under Rule 60(b).



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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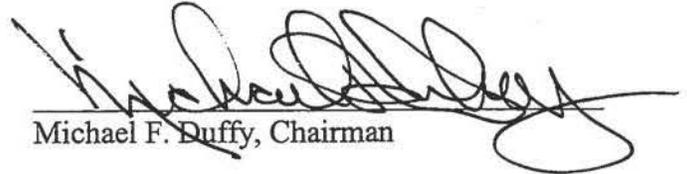
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Aff. at 1-2. The Secretary filed a response to the Herren's request, seeking a remand with the instruction that both parties have an opportunity to present relevant evidence and legal arguments on whether Herren's request to reopen this proceeding should be granted. Sec'y Resp. at 2-3.

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

Having reviewed Herren's motion 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 Herren'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



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 7, 2004

| | | |
|-------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | Docket No. YORK 2004-50-M |
| MINE SAFETY AND HEALTH | : | A.C. No. 30-03325-05501 |
| ADMINISTRATION (MSHA) | : | |
| | : | Docket No. YORK 2004-51-M |
| | : | A.C. No. 30-03325-05502 |
| | : | |
| v. | : | Docket No. YORK 2004-52-M |
| | : | A.C. No. 30-03325-05503 |
| | : | |
| J S SAND & GRAVEL, INC. | : | Docket No. YORK 2004-53-M |
| | : | A.C. No. 30-03325-08141 |

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

ORDER

BY: Duffy, Chairman; Suboleski, and Young, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”).¹ On June 29, 2004, the Commission received from J S Sand & Gravel, Inc. (“JSSG”) a letter from its president which included a request that the Commission 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). On July 8, 2004, the Secretary of Labor filed a Response to Request to Reopen Penalty Assessments.

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers YORK 2004-50-M, YORK 2004-51-M, YORK 2004-52-M, and YORK 2004-53-M, all captioned *J S Sand & Gravel, Inc.*, and all involving similar procedural issues. 29 C.F.R. § 2700.12.

a final order of the Commission. 30 U.S.C. § 815(a). In its petition, JSSG gives no reason for its failure to contest any of the four penalty assessments.

A. Docket Nos. YORK 2004-50-M, YORK 2004-51-M, and YORK 2004-52-M

Based on the Secretary's submission, MSHA issued proposed assessment A.C. No. 30-03325-05501 (YORK 2004-50-M) to JSSG on May 11, 2001, JSSG received the proposed assessment on May 17, 2001, and it became a final order on June 22, 2001. S. Resp. at 1 & Attach. A. Similarly, MSHA issued proposed assessment A.C. No. 30-03325-05502 (YORK 2004-51-M) to JSSG on August 30, 2002, JSSG received it on September 6, 2002, and it became a final order on October 11, 2002. *Id.* at 2 & Attach. B. In addition, MSHA issued proposed assessment A.C. No. 30-03325-05503 (YORK 2004-52-M) to JSSG on January 16, 2003, JSSG received it on January 24, 2003, and it became a final order on February 27, 2003. *Id.* at 2 & Attach. C. JSSG provides no reason in its request to reopen why it did not timely contest any of the three assessments.

The Secretary opposes reopening all three proposed assessments because JSSG's requests were filed approximately three years, 20 months, and 16 months, respectively, after the assessments became final. S. Resp. at 1-2. The Secretary attached to her response copies of the proposed assessments, signed return receipt verification cards indicating JSSG had received the proposed assessments, and MSHA's delinquent payment notice for each assessment. *Id.*, Attach. A to C. JSSG did not reply to the Secretary's response.

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. 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. For instance, relief from a final Commission judgment or order is available to a party under Rule 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. We have 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 to a penalty petition, the case may be reopened and appropriate proceedings on the merits permitted. See *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

However, under Rule 60(b) any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered. Fed. R. Civ. P. 60(b). Here, JSSG has requested reopening of the three proposed assessments more than one year after each assessment became a final Commission order, and has provided no explanation of why it never responded to the correspondence it received from MSHA. Consequently, we deny JSSG's motion for relief from the final orders in Docket Nos. YORK 2004-50-M, YORK 2004-51-M, and YORK 2004-52-M.

B. Docket No. YORK 2004-53-M

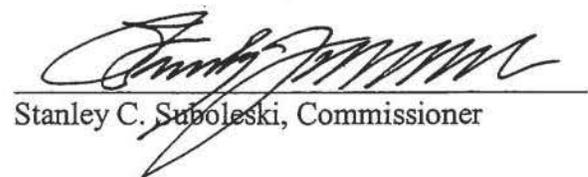
JSSG also requests the Commission to reopen another proposed assessment, A.C. No. 30-03325-08141 (YORK 2004-53-M). According to JSSG, that assessment issued on September 11, 2003. The Secretary responds that because JSSG identifies no grounds for requesting reopening of the assessment, the Commission should direct JSSG to provide a detailed explanation of why it believes circumstances warrant reopening. S. Resp. at 3.

JSSG has provided no explanation for its failure to timely contest the proposed assessment. On the basis of the present record, we are thus unable to evaluate the merits of JSSG's request to reopen. We hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for JSSG'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.

Accordingly, we deny JSSG's request to reopen the penalty assessments in Docket Nos. YORK 2004-50-M, YORK 2004-51-M, and YORK 2004-52-M and the proceedings are hereby dismissed, and we remand Docket No. YORK 2004-53-M for further proceedings as appropriate.



Michael F. Duffy, Chairman



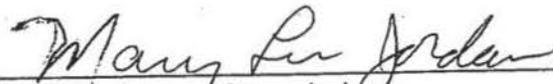
Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

Commissioner Jordan, concurring in part and dissenting in part:

I agree with the majority's decision to deny JSSG's request to reopen the penalty assessments in Docket Nos. YORK 2004-50-M, YORK 2004-51-M, and YORK 2004-52-M. However, I would also deny the operator's request for relief from the final order in YORK 2004-53-M. Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, we have previously afforded a party relief from a final order on the basis of inadvertence or mistake. Slip op. at 2. However, JSSG has failed to provide any explanation to justify its failure to timely contest the proposed penalty assessment. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995) (denying request to reopen final Commission order where operator failed to set forth grounds justifying relief). I also note that this matter involves four proposed penalty assessments issued between May 22, 2001 and September 11, 2003 which the operator failed to timely contest. Consequently, I respectfully dissent.


Mary Lu Jordan, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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October 12, 2004

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

v.

PRAIRIE MATERIALS SALES INC.

:
:
:
:
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:
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:

Docket No. LAKE 2004-94-M
A.C. No. 11-02972-21590

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) ("Mine Act"). On September 27, 2004, the Commission received from Prairie Materials Sales Inc. ("Prairie Materials") a letter seeking review of an order of Chief Administrative Law Judge Robert J. Lesnick entering a default judgment for the Secretary of Labor in this case.

The Chief Judge's jurisdiction in this matter terminated when his default order was issued on September 2, 2004. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We construe the letter from Prairie Materials to be a timely filed petition for discretionary review.

On July 21, 2004, Chief Judge Lesnick issued a show cause order to Prairie Materials stating that it had failed to file an answer to a petition for penalty assessment sent to it by the Secretary of Labor on May 13, 2004, and that Prairie Materials would be found in default if it did not file an answer or show good cause for not doing so within 30 days of the order. On September 2, 2004, Chief Judge Lesnick issued an order finding that Prairie Materials had failed to respond to the show cause order and entering a judgment by default for the Secretary.

On September 27, 2004, the Commission received a letter from Dave Mashek, the Safety Director of Prairie Materials, seeking review of the Chief Judge's default order. The letter did not provide reasons regarding why the company had not answered the petition nor responded to the show cause order but instead briefly discussed the merits of the citation in question. In her response to the letter, the Secretary opposed the granting of Prairie Materials' petition for discretionary review because it does not address the basis for the Chief Judge's default order.

Because the petition for discretionary review filed by Prairie Materials does not address the validity of the Chief Judge's default order nor provide any reasons why the default order should be vacated,¹ we hereby deny the petition.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

¹ The Commission has 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). *See also* Rule 60(b) of the Federal Rules of Civil Procedure. If Prairie Materials can justify its failure to answer the petition for penalty assessment and to respond to the show cause order, it may submit a request to the Commission, with supporting documentation, asking it to reopen this case.

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601 NEW JERSEY AVENUE, NW

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October 29, 2004

| | | |
|----------------------------|---|----------------------------|
| SECRETARY OF LABOR, | : | |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA) | : | Docket No. CENT 2004-234-M |
| | : | A.C. No. 14-01506-32400 |
| v. | : | |
| | : | |
| MARTIN MARIETTA AGGREGATES | : | |

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) ("Mine Act"). On September 3, 2004, the Commission received from Martin Marietta Aggregates ("Martin Marietta") a motion 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).

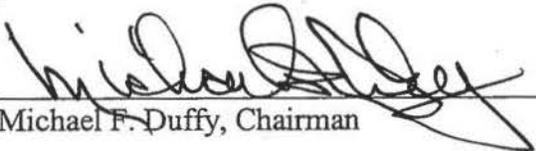
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

The Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed assessment (A.C. No. 14-01506-32400) to Martin Marietta on July 19, 2004. In its motion, Martin Marietta states that, due to its internal routing of the assessment form, its counsel did not receive a copy of the form until September 1, 2004, past the 30-day deadline to contest the assessment. Mot. at 1. Martin Marietta seeks a reopening of the penalty assessment because of its mistake or inadvertence. Mot. at 2. The Secretary of Labor has filed a response, stating that she does not oppose the request to reopen. Sec'y Resp.

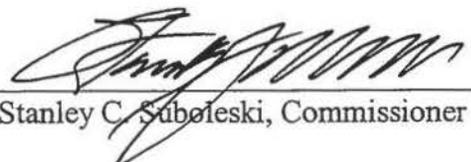
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim*

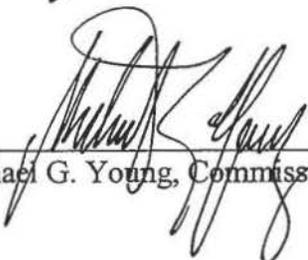
Walter Res., Inc., 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the 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).

On the basis of the present record, we are unable to evaluate the merits of Martin Marietta's position. We hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Martin Marietta'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


Stanley C. Suboleski, Commissioner


Michael G. Young, 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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 29, 2004

| | | |
|------------------------|---|----------------------------|
| SECRETARY OF LABOR, | : | Docket No. WEST 2004-502-M |
| MINE SAFETY AND HEALTH | : | A.C. No. 35-03117-18572 |
| ADMINISTRATION (MSHA) | : | |
| | : | Docket No. WEST 2004-503-M |
| | : | A.C. No. 35-03117-23217 |
| | : | |
| v. | : | Docket No. WEST 2004-504-M |
| | : | A.C. No. 35-03117-12325 |
| | : | |
| LAMMI SAND & ROCK | : | Docket No. WEST 2004-505-M |
| | : | A.C. No. 35-03117-28447 |

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) (“Mine Act”).¹ On September 27, 2004, the Commission received from Lammi Sand & Rock (“Lammi”) a motion to set aside defaults in 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).

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).

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2004-502-M, WEST 2004-503-M, WEST 2004-504-M, and WEST 2004-505-M, all captioned *Lammi Sand and Rock* and all involving similar procedural issues. 29 C.F.R. § 2700.12.

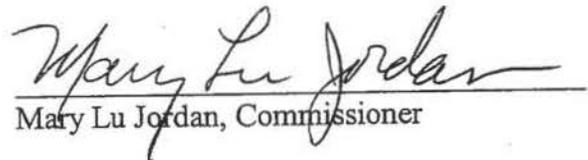
The Department of Labor's Mine Safety and Health Administration issued the four proposed assessments to Lammi between November 4, 2003, and June 8, 2004. In its motion, Lammi states that the four assessments are related to two earlier assessments which Lammi did properly contest, Docket Nos. WEST 2004-206-M (A.C. No. 35-03317-16754) and WEST 2004-319-M (A.C. No. 35-03317-25938). Mot., Aff. at 1. The six assessments are for 51 citations that were issued as a result of the same inspection. Lammi seeks reopening of the four uncontested penalty assessments because it inadvertently failed to contest the proposed penalties, and to have the six assessments decided together. Mot., Aff. at 1-2. The Secretary of Labor has filed a response, stating that she does not oppose the request to reopen the four assessments. Sec'y Resp.

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).

On the basis of the present record, we are unable to evaluate the merits of Lammi's position. We hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Lammi's failure to timely contest the four penalty assessments 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.



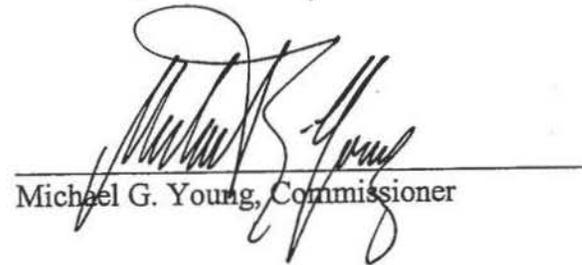
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Stanley C. Suboleski, Commissioner



Michael G. Young, Commissioner

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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, DC 20001-2021

October 7, 2004

| | | |
|-------------------------|---|--------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. SE 2004-83-M |
| Petitioner | : | A.C. No. 22-00672-16273 |
| v. | : | |
| | : | |
| APAC-MISSISSIPPI, INC., | : | |
| Respondent. | : | Robinson Pit |

DECISION

Appearances: Gwen Y. Anderson, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, GA; for the Secretary.
Julie K. Hackworth, Esq., APAC-Mississippi, Inc., 50 E. River Center Blvd., P.O. Box 391, Covington, KY 41012; for the Respondent.

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (Secretary) pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 (the Act) alleging violations by APAC Mississippi, Inc., (APAC) of 30 C.F.R. §§ 56.11012 and 56.9300(a). In addition, APAC challenges the issuance of an order under Section 104(b) of the Act, relating to the alleged violation of Section 56.9300, supra. Pursuant to notice, this case was scheduled and heard in Jackson, Mississippi on August 31, 2004.

I. Citation No. 6101104

Citation No. 6101104 asserts that a walkway on a floating dredge had not been provided with railings to prevent a person from falling into the water when traversing the walkway to check the dredge cutter head. The citation alleges a violation of 30 C.F.R. §56.11012.

In support of the violation, the Secretary called as a witness, Fred Poss, APAC's Superintendent for three mines, including the operation at issue. He indicated that a metallic horizontal platform (ladder) attached to the dredge pump is in use daily. Poss conceded that employees do walk on the platform to inspect the cutter head. He indicated that this can occur twice a day, but on an average this occurs three to six times a year. According to Poss, in order to perform maintenance on the pump, the platform must be raised, which necessitates moving the dredge from the lake to the shore. He also indicated that maintenance is not performed when the dredge is on the lake.

MSHA Inspector Delilah Tessaro, testified that when she inspected the subject facility on November 5, 2003, she spoke to the dredge operator and he referred to the ladder as a walkway. According to Tessaro, the operator told her that anytime he needed to check the cutter head he would use the ladder. However, she conceded that the operator did not tell her specifically how often he used the walkway to access the cutter heads.

After the Secretary rested, APAC rested, and made a motion for a directed verdict. After hearing argument on the motion, the motion was granted. The bench decision on the motion is set forth below.

Because both parties rested, the entire record must be reviewed to see if the Secretary has met its burden of establishing a violation of Section 56.11012, supra, as alleged in the citation at issue.

Section 56.11012, supra, requires protection by railings, barriers, or covers in areas where there are openings above, below, or near travelways. Travelway is defined in Section 56.2 as “a passage, walk, or way regularly used and designated for persons to go from one place to another.” The key phrase here is “regularly used.”

At best, the hearsay statements that the operator made to the inspector that he goes on the walkway anytime the cable or cutter have to be maintained, raises an inference that the platform at issue is “regularly used.” However, I find this inference, based on hearsay, to be outweighed by Poss’ testimony, based on his personal knowledge, that on an average the ladder is used to access the cutter head four to six times a year. There is not any other evidence in the record as to how often the platform is used to access the cutter heads. If the dredge operator had been called as a witness, perhaps he could have testified in more detail, based on his personal knowledge, as to how often he actually uses the ladder to do maintenance work. However, the Secretary chose not to call him.

Based on the record before me, I find that the Secretary’s evidence falls short of establishing that the cited area was a travelway. The weight of the evidence does not establish that the ladder was regularly used and designated for persons to go from one place to another. Accordingly, it has not been established by the Secretary that APAC violated Section 56.11012, supra. Therefore, APAC’s, motion is granted.

II. Citation No. 6101107

APAC operates a sand and gravel pit. Trucks regularly enter the mine, travel north to the pit on a two-way thoroughfare, and return on the same road to exit the mine. Trucks that are loaded with materials from the pit, leave the pit along this thoroughfare, then divert west to a dirt

covered "ramp" that is not elevated, and extends approximately 100 to 120 feet to a scale which is in a direct line with the ramp.

The scale is a metal surface 10 feet wide, and approximately 60 feet in length.¹ The scale is in direct line of the ramp and 28 to 30 inches above the ramp. On the date cited there was a unguarded edge running along the length of the scale that extended approximately 30 feet. Tire tracks were observed approximately four inches from the edge of the scale.

After trucks stop on the scale and are weighted,² they continue to travel in a direct line down a similar ramp 100 to 120 feet in length, until it joins a two way road. The trucks then travel south along the road to exit the mine.³ The parties stipulated, as pertinent, as follows:

x x x

10. Robinson Pit Mine began operations in October 1993.
11. Regarding Citation No. 6101107, the over the road truck scale had three openings which did not have berms or guardrails.
12. The truck scale had three unguarded openings which were approximately 24", 10' and 30'.
13. At various points on the bank of the truck scale, the unguarded openings had a drop-off ranging from approximately 37" to 42".
14. Inspector Tessaro observed tire prints four inches from the edge of the scale.
15. The scale is used daily.

x x x

APAC was cited for violating Section 56.9300(a), supra, which provides, as pertinent, that berms or guardrails shall be provided "... on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons or equipment."

¹The trucks that travel on the scale are approximately 50 feet long, and 8 feet wide.

²The scale is used by trucks 15 to 20 times a day. At times up to 50 trucks a day travel on the scale to get weighed.

³Trucks entering the mine empty for the first time take a similar route so the empty truck can be weighed.

(Emphasis added.)

The main issue in this case is whether the cited scale is a roadway. The parties presented argument on this issue and a decision was rendered at the hearing, holding that, based upon the common meaning of a roadway, the scale is considered part of a roadway. That decision, is set forth below, with the exception of corrections of matters not of substance, and the addition of wording that had been inadvertently omitted.

I have not been referred by counsel to any authority, or case law that established a precedent as to whether the scale in this case is to be considered a roadway. I haven't found any cases. Also, Part 56 the Code of Federal Regulations, does not define roadway. Hence, I place reliance on the common meaning of the term "roadway" as set forth in the Webster's Third New International Dictionary, (1993 ed.). Webster's defines roadway as "specif: "[t]he part of a road over which the vehicular traffic travels." (See *Pappy's Sand & Gravel*, 20 FMSHRC 647, 651) (June 1998). Webster's defines "road" as pertinent, as follows: "... 3(c): the part of a thoroughfare over which vehicular traffic moves... ." Webster's goes on to define "thoroughfare" as pertinent as follows: "1: a way or place through which there is passing"

In arguing that the scale is not a roadway, APAC points out that these definitions denote a route going from point A to point B. In this connection, APAC argues that the scale, a piece of equipment used to weigh trucks, is a destination and not part of a route the pit to the mine exit. APAC, in essence, refers to Poss' testimony that trucks have never traveled along the ramp, across the scale, and along the next ramp without stopping to get weighed.

In analyzing the common meaning of the various terms, I find that APAC arguments and interpretations to be too restrictive. There isn't any connotation in any of the definitions that movement must be continuous, or that movement must be without stopping.

To adopt the interpretation urged by APAC would lead to a conclusion that a truck traveling from a ramp to the scale is on a roadway going to the scale. However, the scale which is in a direct line from that ramp would not to be considered a roadway, because it is a piece of equipment and the truck stops there. And then, once the truck continues down the ramp which is in a direct line from the scale, it would be traveling again on a roadway.

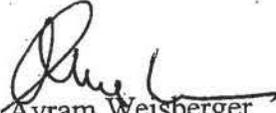
I find this interpretation too restrictive. I find that, in harmony with the dictionary definitions, ie., the common meanings of the terms at issue, the entire route traveled by the trucks is to be considered a roadway. The route consists of traveling from the two-way road, along a ramp and scale in the same line, and

continuing from the scale in the same direct line down the next portion of the ramp back to the road.

After the decision was rendered, the parties discussed settlement and reached an agreement that the operator pay a total civil penalty for this violation of \$250.00. Considering the record, in this case, I find the settlement a fair resolution, and consistent with the Act. Accordingly, I approve it. Also, it was agreed that APAC will no longer contest the 104(b) order (Order No. 6101131).

ORDER

It is **Ordered** that (1) Citation No. 6101104 be **Dismissed**, (2) Respondent pay a total civil penalty of **\$250.00** for the violation cited in Citation No. 6101107, and (3) Order No. 6101131 be affirmed.


Avram Weisberger
Administrative Law Judge

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/sb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 18, 2004

| | | |
|---|---|--------------------------------|
| RAG CUMBERLAND RESOURCES, LP, Contestant | : | CONTEST PROCEEDINGS |
| | : | |
| v. | : | Docket No. PENN 2000-181-R |
| | : | Citation No. 3657290; 7/6/2000 |
| | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent | : | Docket No. PENN 2000-182-R |
| | : | Citation No. 3657291; 7/6/2000 |
| | : | |
| | : | Cumberland Mine |
| | : | Mine ID 36-05018 |
| | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner | : | CIVIL PENALTY PROCEEDING |
| | : | |
| v. | : | Docket No. PENN 2001-63-A |
| | : | A.C. No. 36-05018-04200 |
| | : | |
| | : | |
| RAG CUMBERLAND RESOURCES LP, Respondent | : | Cumberland Mine |
| | : | |

DECISION ON REMAND

Before: Judge Feldman

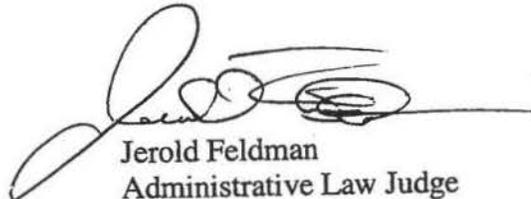
These consolidated contest and civil penalty matters have been remanded by the Commission for reassessment of the civil penalty for Citation No. 3657291 for RAG Cumberland Resources LP's (Cumberland's) failure to immediately correct hazardous bleeder conditions as required by the mandatory safety standard in section 75.363(a). 26 FMSHRC 639, 653, 658 (August 2004). The initial decision imposed a \$10,000.00 civil penalty for Citation No. 3657291. 23 FMSHRC 1241 (November 1999) (ALJ).

In its remand, the Commission directed reassessment of the civil penalty in light of its determination that Cumberland's violation of 75.363(a) was not unwarrantable. 26 FMSHRC at 659. The Commission also determined that consideration of Cumberland's conduct as an aggravating factor based on my finding that Cumberland had breached a fundamental goal of the Mine Act was improper because it went beyond the scope of the statutory civil penalty criteria in section 110(i) of the Act. 30 U.S.C. § 820(i). *Id.* at 658-59.

On September 29, 2004, the Secretary filed a joint stipulation with respect to the reassessment issue. The parties stipulated as follows:

This case has been remanded to this Court to reassess a civil penalty for Citation No. 3657291 in accordance with the terms of the Decision by the Review Commission dated August 10, 2004. In light of the fact that neither party can pursue an appeal of the Commission Decision until the penalty becomes final, the parties have agreed to stipulate to the assessment of a civil penalty in the amount of \$3,000 for Citation No. 3657291. The parties enter into this stipulation to expedite further review of the Commission decision.

In view of the Commission's decision, I conclude that the parties' agreement to impose a \$3,000.00 civil penalty for Citation No. 3657291 is consistent with the penalty criteria set forth in section 110(i) of the Mine Act. Accordingly, **IT IS ORDERED** that RAG Cumberland Resources LP pay a civil penalty of \$3,000.00 in satisfaction of Citation No. 3657291 within 45 days of the date of this decision.



Jerold Feldman
Administrative Law Judge

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/hs

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 25, 2004

| | | |
|--------------------------|---|-----------------------------|
| RONALD R. COLE, | : | DISCRIMINATION PROCEEDING |
| Complainant | : | |
| v. | : | Docket No. WEST 2004-442-DM |
| | : | WE MD 2004-08 |
| NEWMONT MIDAS OPERATION, | : | Newmont Midas Mine |
| Respondent | : | Mine ID 26-02314 |

ORDER OF DISMISSAL

Before: Judge Barbour

Section 105(c)(2) of the Mine Act (30 U.S.C. §815(c)(2)) requires a miner who believes he or she has been discharged or otherwise discriminated against to file a complaint with the Secretary within 60 days of the alleged discriminatory act. Here, the complainant, Ronald R. Cole, alleges his December 11, 2003, termination contravened the Act. Mr. Cole filed his complaint with the Secretary on April 28, 2004. The time within which he was to have filed expired on February 9, 2004. Mr. Cole's complaint was 79 days late.

The Secretary's Mine Safety and Health Administration (MSHA) investigated the complaint and on July 22, 2004, advised Mr. Cole it believed the facts did not constitute a violation of Section 105(c). On August 19, 2004, Mr. Coles lodged a complaint with the Commission. As part of its answer to the complaint, Newmont noted that it was "untimely" filed with the Secretary and asserted it should be dismissed.

On September 22, 2004, I ordered Mr. Cole to state why his complaint was late-filed and Newmont to state what, if any, prejudice it suffered due to the delay. I noted that although the Commission repeatedly has held the time limit for filing a complaint is not jurisdictional, to withstand dismissal, the miner must establish justifiable circumstances for the late filing, or to be granted the dismissal, the operator must show it has suffered material prejudice (Order 1 (citing Hollis v. Consolidation Coal Co., 6 FMSHRC 21 (January 1984), aff'd mem., 750 F.2d 1093 (D.C. Cir. 1984 (table))).

In responding to the order Mr. Cole stated, "The reason for the delay . . . is due to the fact that I was unaware that MSHA was available to assist. I was recently told by Kevin Hirsch of MSHA about this service to protect miner's rights. I spoke to Kevin approx. April 13"

(Attachment to Letter to Judge (October 5, 2005)).¹ For its part, Newmont maintained the delay was prejudicial because of the negative impact it had on the memories of those who witnessed the events preceding Mr. Cole's termination. Newmont asserted that several persons it would call now work at other Newmont facilities and, "Their recollection about . . . [the events leading to Mr. Cole's discharge] will not be as strong as . . . if Mr. Cole had complied with the time limit to file a complaint" (Newmont's Response 5). In addition, another witness, a former crew member, is no longer employed by Newmont (*Id.*). Finally, Newmont stated that during the delay, Mr. Cole contacted potential witnesses and attempted to get them to change their recollections of an event that directly preceded Mr. Cole's termination (Newmont Response 3-4).

Newmont also expressed its belief that Mr. Cole was very much aware of his section 105(c) rights and of the 60-day time limit for filing a complaint in that he was specifically trained in the topics (Newmont Response 3). Moreover, Newmont stated that it provided Mr. Cole with a copy of the MSHA pamphlet explaining miners' rights under the Act and identifying the 60-day filing deadline (*Id.*). The company further noted that Mr. Cole had over 20 years' experience in underground mining, including both supervisory and non-supervisory positions. For these reasons, the company contended that Mr. Cole either knew, or should have known, about his rights under the Act, including the fact that he was entitled to file a complaint with MSHA, and that he had to do so within 60 days of the company's allegedly discriminatory act (*Id.*).

THE LAW

When ruling on a motion or other request to dismiss a late-filed complaint, the Commission's judges are required to review the facts "on a case-by-case basis, taking into account the unique circumstances of each situation" (*Hollis*, 6 FMSHRC at 24). In the past, several factors that have been considered in determining whether to excuse a delay (see *William T. Sinnott, II v. Jim Walter Resources, Inc.*, 16 FMSHRC 2445 (December 1994) (ALJ) (considering complainant's capacity or ability to pursue a remedy under the Act); *Secretary of Labor on behalf of Franco v. W.A. Morris Sand and Gravel, Inc.*, 18 FMSHRC 278 (February 1996) (ALJ) (considering complainant's awareness of his or her rights under the Act)). It has also been held that whether the delay has caused prejudice to the operator is relevant (*Hollis, supra*).

RULING

Turning first to Newmont's claims of prejudice, I do not find the assertions of faded memories regarding the events leading to Cole's discharge to be persuasive. The complaint was approximately two and one half months late, a delay whose length reasonably would not be

¹ Because Mr. Cole did not indicate he served counsel for Newmont with a copy of the letter and attachment, I have sent counsel the necessary copies.

expected to engender memory lapses. Nor is it prejudicial that two of Newmont's potential witnesses no longer work at the mine site. They still work for Newmont, and their testimony presumably can be obtained. Moreover, although Newmont maintains that another witness no longer works for Newmont – a situation that might make his or her testimony inconvenient to obtain – the company does not assert the testimony is unavailable. As for Newmont's contention that Mr. Cole attempted to intimidate some of those who might testify against him during the time between his termination and the filing of his complaint, even assuming intimidation occurred and was prejudicial to Newmont's case, I cannot conclude the prejudice was caused by the delay since the intimidation might have taken place even if Mr. Cole had filed his complaint in a timely manner.

However, the complaint still may be dismissed if Mr. Cole has failed to provide a justifiable excuse for the late filing, and I conclude that Mr. Cole's excuse for the delay – essentially that he was unaware of his rights or, as he put it, "that MSHA was unavailable to assist [me]" – does not pass scrutiny. Newmont points out through the affidavit of its Health, Safety and Loss Prevention Manager, Lee Morrison, that Mr. Cole underwent annual refresher training for underground miners in March, 2001 (Newmont Response, Affidavit 2). Mr. Morrison was among those who conducted the training for the then owner of the mine, Dynatec. The training included a discussion of miner's rights and responsibilities (*Id.*). Mr. Morrison states in his affidavit that in addition to discussing miners' rights, the participants in the training, including Mr. Cole, received a copy of a MSHA pamphlet entitled A Guide To Miners' Rights and Responsibilities Under the Federal Mine Safety and Health Act 1977.² Page 3 of the pamphlet contains a section entitled, "Your Rights Under the Mine Act." The section includes a subsection entitled "Protection Against Discrimination: Section 105(c)" and the statement: "It is not legal for you to be fired . . . or otherwise lose job benefits for exercising your rights under the Act." Page 4 of the pamphlet states "A discrimination complaint . . . should be promptly filed with [MSHA]" and cautions, "We [i.e., MSHA] may not be able to pursue a claim unless it is filed *within 60 days* of the act of discrimination" (*Id.*, Attachment B). Page 4 goes onto explain, *inter alia*, that MSHA may ask the Commission to order a complainant's temporary reinstatement and that MSHA may file a complaint on the complainant's behalf (*Id.*). On March 9, 2001, Mr. Morrison and Mr. Cole signed a certificate showing that Mr. Cole attended the training

² To support Mr. Morrison's statement, the company has submitted an outline of the refresher training course. Standing alone, the outline is ambiguous regarding the pamphlet given to the miners. The outline indicates that during the training two topics were discussed between 4:00 p.m. and 4:45 p.m.: "Rights and Responsibilities of Miners" and "Explosive Handling" (Newmont Response, Affidavit 2, Exhibit A at 4). The instruction "Hand out new pamphlet & discuss" is listed under "Explosive Handling", not under "Rights & Responsibilities of Miners" (*Id.*). However, Mr. Morrison's sworn affidavit eliminates the ambiguity. Mr. Morrison states: "Exhibit A [is] the course outline for the training program. As page 4 [of Exhibit A] indicates, one of the items discussed was miner's [sic.] rights. As the outline indicates, we handed out to the miners attending this program what was at the time MSHA's new pamphlet concerning miner's rights" (*Id.*).

(Id., Attachment C).

In a resume submitted on August 21, 2001, to another previous owner of the mine, Normandy Midas Operations, Inc., Mr. Cole stated that he had been employed by various companies in underground mining since 1979 and that he had held both rank and-file and management (shift boss) positions. He also indicated he is a high school graduate (Newmont Response, Affidavit 2, Exhibit D).

Given Mr. Cole's educational background, his long experience in underground mining and the annual refresher training he received in March, 2001, I conclude that Mr. Cole either knew or should have known about the time limit within which to file his complaint. His statement that he missed the deadline because he did not know he was entitled to assistance from MSHA until he spoke with an MSHA representative on April 13 is simply not credible.

Mr. Cole worked for many years in the underground mining industry both for labor and for management. It defies belief that during these years he did not learn that MSHA may represent a miner who claims he or she has been discriminated against for safety-related reasons. In addition, Mr. Cole as the holder of a high school diploma is presumed to understand what he hears and reads.³ He was trained in miners' rights under the Act. He received the MSHA publication explaining both the need to file within 60 days and how MSHA investigates a complaint and otherwise acts on behalf of a complainant. To find that Mr. Cole's had no knowledge of these matters until approximately April 13, 2004, would infer that Mr. Cole was oblivious of the milieu in he which worked and lacked the most elementary comprehension abilities. The record does not support such inferences.

There are times when a person must be accountable for his or her omissions as well as commissions. This is such a time. Letting Mr. Cole's claim proceed in the face of his incredible excuse, would render virtually meaningless the 60-day limit of section 105(c)(2).

The complaint is **DISMISSED**.


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

³ Although Mr. Cole claims ignorance of Mine Act's discrimination provisions, he seems to have been knowledgeable about his rights under other statutes. In an affidavit, Newmont's Human Resources Representative states, inter alia, that after his discharge, Mr. Cole filed for unemployment benefits and filed a Worker's Compensation Claim against Newmont (Newmont Response, Exh. 1 at 2-3).

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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, D.C. 20001

October 7, 2004

| | | |
|-----------------------------|---|-------------------------------|
| JIM WALTER RESOURCES, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| | : | Docket No. SE 2003-150-R |
| v. | : | Order No. 7670455; 06/26/2003 |
| | : | |
| SECRETARY OF LABOR, | : | Docket No. SE 2003-151-R |
| MINE SAFETY AND HEALTH | : | Order No. 7670457; 06/27/2003 |
| ADMINISTRATION (MSHA), | : | |
| Respondent | : | No. 7 Mine |
| | : | Mine ID 01-01322 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. SE 2003-138A |
| Petitioner | : | A. C. No. 01-01322-04260 |
| | : | |
| v. | : | Docket No. SE 2004-45A |
| | : | A. C. No. 01-01322-07603 |
| JIM WALTER RESOURCES, INC. | : | |
| Respondent | : | No. 5 Mine |

ORDER DENYING MOTION IN LIMINE
AND
ORDER DENYING MOTION TO ENFORCE SETTLEMENT

I.

The Consolidated Cases

In Docket No. SE 2003-150-R, Jim Walter Resources, Inc., (JWR), is contesting the validity of Citation No. 7670455, a citation issued pursuant to Section 104(a) of the Mine Act (30 U.S.C. §814(a)) on June 26, 2003. The citation alleged that JWR violated mandatory safety standard 30 C.F.R. §75.334(b)(1), in that the bleeder system for the I-panel longwall was not maintained so as to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine. The citation referenced methane readings that were taken between June 10 and June 25, 2003, at points in the mine's longwall bleeder system. The readings are alleged to have established an upward trend of methane concentrations and "collectively [to have] indicate[d] that the bleeder system [could] no longer handle the current methane liberation" (Citation No. 7670455 at 2). The citation set 6:00 p.m., June 27, 2003, as the time and date for abatement.

In Docket No. SE 2003-151-R, JWR is contesting the validity of Order No. 7670457, which was issued at 7:45 p.m. on June 27, 2003, pursuant to Section 104(b) of the Act (30 U.S.C. §814(b)). The order alleged that JWR failed to timely abate Citation No. 7670455, in that it did not make improvements to enhance the effectiveness of the longwall bleeder system so that the system “continue[d] to liberate high quantities of methane and . . . [could not] continuously dilute the methane to safe operating levels” (Order 7670457).

In Docket No. SE 2004-045-A, the Secretary is petitioning for the assessment of a civil penalty of \$1,550 for the alleged violation of section 75.334(b)(1) contained in Citation No. 7670455. Also, she seeks the assessment of a civil penalty of \$164 for an alleged violation of mandatory safety standard 30 C.F.R. §75.323(e). The alleged violation is contained in Citation No. 7669872, issued on June 19, 2003.

In Docket No. SE 2003-138-A, the Secretary is petitioning for the assessment of a civil penalty of \$317 for an alleged violation of section 75.334(b)(1) contained in Citation No. 7670075. The violation allegedly occurred on August 14, 2002.

II.

The Motion in Limine

In the part of the consolidated case that involves Citation No. 7670455 and Order No. 7670457, JWR moves to exclude from evidence the following items and testimony: certain specified exhibits that relate to a June 28, 2003 through July 1, 2003 ventilation survey conducted at JWR’s No. 5 Mine by MSHA technical support expert, John Urosek; an MSHA memorandum dated August 4, 2003, titled “Results of an Underground Mine Air Pressure Quantity Investigation at . . . [JWR’s] No. 5 Mine;” notes of MSHA Inspector William R. Spens from his investigation of the mine’s ventilation system from June 27, 2003 through July 2, 2003; all testimony of John Urosek; all testimony of William Spens; and all testimony relating to any investigations or inspection of the ventilation system at the mine conducted after the issuance of the June 27, 2003 order (Order No. 7670457).

The company argues that the written material and the testimony is excludable because an inspector must believe that the operator has violated a mandatory health or safety standard before he or she issues a citation or order. Therefore, the pertinent question is “whether the inspector reasonably believed that a violation of section 75.334(b)(1) existed, not whether the inspect[or] (or MSHA) can later justify an unjustifiable citation and order. . . .” (Mot. 2). According to JWR, an investigation or inspection occurring after the issuance of the citation and order is not relevant and has “no bearing on whether the [i]nspector believed the operator had violations of any mandatory health or safety standards” (Id.). Moreover, the testimony of Messrs. Urosek and Spens would bring forth no firsthand knowledge of the facts underlying the citation and the order since they were not part of the decisional process to issue the two enforcement actions (Id. 3-4).

III.

Ruling on Motion in Limine

I decline to exclude the written materials and testimony because I cannot conclude they are in fact irrelevant to the issues at hand. The primary issue concerning Citation No. 7670455 and the subsequent order is whether or not a violation of section 75.334(b)(1) occurred on June 26, 2003, at 7:00 p.m., and secondary issues involve the alleged significant and substantial (S&S) nature of the alleged violation, the degree of negligence of JWR (assuming a violation is found), and whether on June 27 it was reasonable for the inspector to decline to extend the time for abatement of the citation. It is conceivable that each item of evidence JWR seeks to exclude could have a bearing on these issues.

In declining to exclude the evidence, I note my disagreement with JWR's contention that investigations occurring after issuance of a citation or order cannot be used to establish a violation cited prior to the investigation. Evidence discovered post-citation may be used – and not infrequently is used – to prove that prior alleged conditions existed. As counsel for the Secretary points out, the question is what the facts were at the time the violation was cited, and proof used to find the answer is not restricted to those facts that were in the inspector's mind when he or she issued the citation (Sec's Statement in Opp. to Mot. in Limine 3).

IV.

The Motion to Enforce Settlement and Ruling

JWR also moves to enforce a settlement agreement it contends it reached with counsel for the Secretary. In its motion, JWR states that the parties began earnestly to discuss a settlement of these cases around September 10, 2004, and that counsel for the Secretary forwarded to counsel for JWR a draft settlement agreement on or around September 14. The proposed agreement concerned all issues in these cases except the alleged violations of section 75. 232(e) contained in Citation No. 7669872 (Docket No. SE 2003-45-A), which the parties believed could be appropriately submitted for decision on the basis of motions for summary judgment. Discussions continued between counsel and, on September 21 or 22, counsel for JWR proposed adding seven additional words to the draft agreement. According for JWR, the proposed additional words were discussed on the morning of September 22, and the parties agreed to the September 15 settlement proposal, leaving out the proposed seven words. At this point, counsel for JWR understood the case was settled. However, on the afternoon of September 22, counsel for the Secretary began to state that there was no settlement and that terms of the September 15 proposed settlement were not agreeable to the Secretary. In other words, in JWR's view, counsel for the Secretary refuses to settle the matter on terms he proposed on September 15, terms JWR accepted on September 22.

Counsel for the Secretary has yet to reply to this motion, but there is no need for him to do so because it is clear to me that the motion cannot be granted. The settlement of contested

issues is an integral part of dispute resolution under the Mine Act (Pontiki Coal Corp., 8 FMSHRC 668, 674 (May 1986)), and the Act requires settlements to be subject to the approval of the Commission and its judges (see 30 U.S.C. §820(k)). For there to be an enforceable settlement, there must be a genuine agreement between the parties; that is to say, there must be a true meeting of the minds as to the settlement agreement's provisions (Peabody Coal Co., 8 FMSHRC 1265, 1266 (September 1986)).

Settlements of contested civil penalty and associated review cases are submitted for approval in the form of motions made orally on the record or motions made in writing. It is worth noting that no motion to approve a settlement has been submitted to the undersigned in these cases. Nor has there been any oral on-the-record representation as to a settlement and its terms. JWR's own motion establishes that there has been no meeting of the minds as to the terms of a settlement. Had there been an agreement, it would have been formalized and submitted in writing or it would have been entered orally on the record and documented in transcript form. The "back and forth" which counsel for the company describes is part of the settlement process, a process that has yet to reach fruition. Controversies as to who agreed to what and when are why the Commission's judges require fully-documented agreements before they recognize a case as settled. The lesson is clear; the parties must formally document their agreements if they want them to be enforced.

ORDER

For the above stated reasons, the motions are **DENIED**.



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

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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

October 14, 2004

RAG CUMBERLAND RESOURCES, LP, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. PENN 2000-181-R
: Citation No. 3657290; 7/6/2000
SECRETARY OF LABOR, : Docket No. PENN 2000-182-R
MINE SAFETY AND HEALTH : Citation No. 3657291; 7/6/2000
ADMINISTRATION (MSHA), :
Respondent : Cumberland Mine
: Mine ID 36-05018
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 2001-63-A
Petitioner : A.C. No. 36-05018-04200
v. :
:
RAG CUMBERLAND RESOURCES LP, : Cumberland Mine
Respondent :

ORDER DENYING MOTION TO INTERVENE1

On August 10, 2004, the Commission directed reassessment of the civil penalty for Citation No. 3657291 in view of its determination that RAG Cumberland Resources LP's (Cumberland's) failure to immediately correct hazardous bleeder conditions as required by the mandatory safety standard in section 75.363(a) was not attributable to an unwarrantable failure. 26 FMSHRC 639. On October 8, 2004, the United Mine Workers of America (the Union) filed a Motion to Intervene in the above captioned proceedings. The Union relies on Commission Rule 2700.4(b)(1) that provides, in pertinent part, that "[a]fter the start of the hearing, . . . [the Union] may intervene upon just terms and for good cause shown." (Emphasis added). Neither the Secretary nor Cumberland opposes the Union's motion. As discussed below, despite the lack of opposition, the Union has failed to demonstrate the requisite good cause to permit intervention at the late stage of these proceedings.

The hearing in these matters was conducted in two sessions from April 3 through April 6, 2001, and from July 24 through July 25, 2001. Timothy W. Hroblak, a Union safety committeeman, was a principal witness at the hearing. The Union did not move to intervene in

1 This Order supercedes the previous order issued October 12, 2004. The previous order reflected docket numbers that were not on remand. A correction has been made to the case caption and is reflected in this Order.

the hearing proceeding. After the hearing, the Secretary and Cumberland filed post-hearing briefs. An initial decision in these matters was issued on November 28, 2001. 23 FMSHRC 1241 (ALJ). A copy of the initial decision was sent to the Union because the Union had filed a related compensation case in Docket No. PENN 2000-204-C that was ultimately dismissed on April 26, 2002. The Union did not move to intervene following its receipt of the initial decision.

The Commission granted Cumberland's petition for review of the initial decision on January 7, 2002. On August 10, 2004, the Commission issued its appellate decision affirming the fact of the cited violations in Citation Nos. 3657290 and 3657291, and reversing the initial finding that the violation in Citation No. 3657291 was caused by Cumberland's unwarrantable failure. The Commission's remand for reassessment of the civil penalty for Citation No. 3657291 is currently before me. 26 FMSHRC 639.

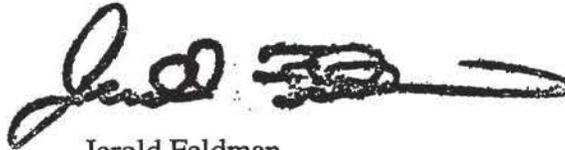
In support of its motion, the Union notes the Secretary has informed it that she may not appeal the Commission's decision. Consequently, the Union argues that it can no longer rely on the Secretary to represent the Union's interests. The Union asserts that the Commission's reversal of the unwarrantable failure "is an important aspect of this litigation that will likely have repercussions beyond this matter." (*Union mot.* at p.2). However, the Union does not seek to file a brief before the Commission. (*Union mot.* at p.3). Rather, the Union seeks to intervene for the purpose of participating in judicial review. (*Union mot.* at p.2).

Under the Commission's Rules, a person who is permitted to intervene is a party. 29 C.F.R. 2700.4(a). Thus, the purpose of conferring intervenor status is to permit the intervenor to play an active role by participating in the hearing and/or by filing briefs in support of its position. Here, however, the Union seeks party status at this late stage after briefs have been filed, oral argument has been presented before the Commission, and the initial decisions on the merits have been issued by the judge and the Commission. Granting the Union party status as an intervenor may confer the Union with appeal rights even if the Secretary and Cumberland do not seek judicial review.

I am cognizant of the unopposed nature of the Union's motion. However a lack of opposition cannot overcome the lack of propriety of the Union's motion. Here the Union seeks to accomplish indirectly what it should seek directly. If the Union wishes to intervene in order to participate in judicial review it must file a motion to intervene with the Court of Appeals if an appeal is docketed. It is inappropriate for me to confer intervenor status solely for an anticipated appellate court proceeding.

Finally, the Union relies on *Smoke v. Norton*, 252 F.3d 468 (D.C. Cir. 2001) to support its intervention request. The Union's reliance is misplaced. In *Smoke* the Government represented the interests of a Native American tribal government. The tribal entity sought to intervene after a summary judgment was granted against the Government, before the Government decided whether to appeal, to ensure an appeal of the summary decision. The Court noted that the tribal government had no occasion to intervene in order to protect its interests until after the judgment was entered. Here, the Union has failed to avail itself of the intervenor provisions in the Commission's Rules. See 29 C.F.R. §§ 2700.4(b), 2700.73. Moreover, although their interests may coincide, the Secretary does not represent the Union in these matters.

Accordingly, the Union's motion to intervene before the undersigned Administrative Law Judge lacks the requisite showing of good cause. Consequently, the Motion to Intervene **IS DENIED** as untimely.

A handwritten signature in black ink, appearing to read 'Jerold Feldman', with a long horizontal flourish extending to the right.

Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 14, 2004

| | | |
|-----------------------------|---|---------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. SE 2003-160 |
| Petitioner | : | A.C. No. 01-01322-00004 |
| v. | : | |
| | : | Docket No. SE 2003-161 |
| JIM WALTER RESOURCES, INC., | : | A.C. No. 01-01322-00005 |
| Respondent | : | |
| | : | No. 5 Mine |
| UNITED MINE WORKERS | : | |
| OF AMERICA, | : | |
| Intervenor | : | |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. SE 2003-174 |
| Petitioner | : | A.C. No. 01-01322-04271 |
| v. | : | |
| | : | |
| JIM WALTER RESOURCES, INC., | : | No. 5 Mine |
| Respondent | : | |

RULINGS ON PENDING MOTIONS IN LIMINE
AND
MOTION FOR SUMMARY DECISION

Jim Walter Resources (JWR) has filed several pre-trial motions in limine and one motion for summary decision, which are addressed herein.

I.
MOTION IN LIMINE TO EXCLUDE REPORT

First, the company has moved to exclude from evidence the report of the investigation (the "Report") MSHA conducted into two explosions that occurred at JWR's No. 5 Mine on September 23, 2001. The report, which is titled Report of Investigation Fatal Underground Coal Mine Explosions September 23, 2002, was issued on December 11, 2002. The Secretary opposes the motion. For the reasons that follow, I conclude that the report should not be excluded.

When ruling on any motion, a judge must keep in mind the basic principles governing the subject litigation, foremost of these are the nature of the particular proceeding and the nature

of the motion. This proceeding is administrative in nature and the motion requests exclusion of potential evidence prior to being offered. The Commission long ago made clear that, when rendering a decision, a judge must base his or her findings and conclusions on substantial evidence^[1] (Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1135-36 (May 1984)). The principal issues in these cases concern alleged violations of the Secretary's mine safety and health regulations for underground mines found during the investigation. The Report contains much information regarding the Secretary's view of the events leading to the accident, her description of the accident, and her narrative description of some, but not all, of the enforcement actions MSHA took and the violations it alleged as a result of the investigation. In addition, the Report contains narrative descriptions of the investigation, as well as narrative discussions of the mine's organization, the mine's physical layout, and mine procedures and systems that, in the Secretary's view, relate to the explosion. Several mine maps also are included.

To be relevant, evidence must be both material and probative. To be material, it must be offered to prove a proposition or event that is at issue or to provide background for understanding the proposition or event. To be probative, it must tend to establish the proposition or event. Joining these concepts, the Federal Rules of Evidence defines "relevant evidence" as "evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (Fed. R. Evid. 401). The system of proof presupposes that all relevant evidence is admissible (Fed. R. Evid. 402). While there are exceptions to keep otherwise relevant evidence from the record ^[2], the judge is granted much discretion in ruling on admissibility. If evidence is relevant, fairness to the parties and the judge's duty to facilitate full development of the record, warrant great restraint in excluding the evidence from the record.³

RULING

Given these underlying principles, the first issue before me is whether the Report is relevant, and I conclude that it is. The Report not only concerns the investigation that lead MSHA to issue the subject citations, in some instances it directly involves the specific citations at issue. At one end of the spectrum, the Report may only provide background for understanding

¹ Substantial evidence is "such evidence as a reasonable mind might find adequate to support [the judge's] conclusion" (Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

² See e.g., Fed. R. Evid. 403 (providing for exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues . . . or considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

³ The weight the judge gives to the evidence once admitted is another matter entirely.

the events at issue. At the other end, it may corroborate and supplement testimony establishing alleged violations. Either way it is relevant. However, like any relevant evidence admitted into evidence, it will be subject to rebuttal, and the weight that is ultimately attributed to the Report, or to the parts of the Report used by the Secretary and/or the UMWA, can be impacted fundamentally by that rebuttal.

As noted, while all admitted evidence must be relevant, not all relevant evidence must be admitted. Relevant evidence may be excluded if it is only minimally relevant that is if the judge finds it is too tangential to the questions at issue. At law, otherwise relevant hearsay evidence is routinely barred. In arguing for the Report's exclusion, JWR notes that it is hearsay and argues that its admission would be fundamentally unfair (Mot.3). It asserts that hearsay evidence, such as the Report, is only admissible if it meets a high standard of reliability and truthfulness, and it points to Rule 803(8)(c) of the Federal Rules (Fed. R. Evid. 803(8)(c)), which permits admission of results and reports of investigations "made pursuant to law, unless the sources of information or other circumstances indicate lack of trustworthiness" (Mot. 4-5). In JWR's view, the Report's lack of trustworthiness is established by its "impermissible legal conclusions and unreliable factual findings" (Id. 5). JWR argues that Rule 803(8)(c) bars legal conclusions within a report, and since the Report inextricably mixes legal conclusions with purported factual findings, the entire report must be excluded (Id. 6). JWR goes on to detail many circumstances which, it asserts, attest to the unreliability of the Report and to the inherent bias of MSHA in presiding over the formulation of the Report (Mot. 11-31).

In my view, JWR's objections and concerns do not on their face set forth adequate reasons to bar the Report from the record. If the Report is admitted, it will not speak for itself. For it to bear on the outcome of the case, it will have to be supplemented by testimony. Once the testimony has been offered, JWR will have an opportunity to impeach the testimony and on cross-examination to otherwise question the Report's reliability. In short, it will have the opportunity to use its concerns to diminish the weight attributed to the Report or to its pertinent parts. The essential point is that the Report will be of probative value only to the extent it supports my ultimate findings, and that value will be measured by weighing the Report against various factors, a crucial one being whether those whose statements and opinions are reported are available for in-court cross-examination and whether JWR persuasively attacks the reliability and accuracy of the witnesses. Moreover, even if the Report were inherently prejudicial to the company, which I do not find, the in-court right to impeach the Report as actually used at trial before the judge, fully protects JWR from invidious conclusions based on the Report's contents.

Because I conclude the Report is relevant to the issues before me and because I conclude the company's concerns of fairness and prejudice, inter alia, can be met at trial, the motion will not be granted.

II.
MOTION IN LIMINE TO EXCLUDE EVIDENCE OF PRIOR VIOLATIONS

Second, JWR has moved to exclude evidence of prior violations of 30 C.F.R. § 75.400 for any purpose and to limit consideration of evidence of prior violations of 30 C.F.R. § 75.403.⁴ As grounds for its motion, JWR speculates that “MSHA may intend to introduce evidence of past violations of § 75.400 and § 75.403 in an attempt to show that: (1) because it violated these standards in the past, it must have been in violation of them on September 23, 2001; (2) . . . it knew or should have recognized inadequate rock dust levels and addressed them during pre- and on-shift examinations on September 22 and 23, 2001; and (3) . . . it was on notice of the need to be more attentive to ensuring compliance with them and, therefore, its actions on September 22 and 23, 2001 were negligent and the result of an unwarrantable failure to comply with the law” (Mot. 2). The company argues that the requirements of section 75.400 are independent of the requirements of section 75.403, and, as such, have no factual or legal bearing on whether violations of section 75.403 or violations of the pre- and on-shift examination standards occurred, or on whether JWR was negligent or unwarrantably failed to maintain adequate levels of rock dust on the date of the explosion, or failed to identify allegedly inadequate rock dust levels during pre- and on-shift examinations (Id. 2-3). JWR also argues that prior violations of section 75.403 are not at issue because JWR was not advised it was out of compliance with the

⁴ Section 75.400 prohibits the accumulation of combustible materials in underground coal mines. The regulation states:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

Section 75.403 states:

Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be not less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 centum for each 0.1 per centum of methane where 65 to 80 per centum, respectively, of incombustibles are required.

incombustible content levels of dust alleged in almost all of the prior violations until after September 23, 2001. In the company's view, for penalty assessment purposes, the only relevant prior violations to consider are repeat violations of the standards the company is found to have violated (Mot. 11 at n.7).

RULING

As stated above, when ruling on any motion, a judge must keep in mind the basic principles governing the subject litigation, the foremost of which are the nature of the particular proceeding and the nature of the motion. The motion relates only to Docket No. SE 2003-160, which, of course, is a civil penalty proceeding. The primary issues in the proceeding are whether the alleged violations in fact occurred, and, if so, whether the violations were the result of JWR's negligence and unwarrantable failure to comply with the standards. If JWR violated a standard, a civil penalty must be assessed for the violation, and the assessment must take account of the civil penalty criteria of section 110(i) of the Act (30 U.S.C. § 820(i)).

In Docket No. SE 2003-160, eight violations are alleged to have occurred. They are set forth in the following citations and orders:

1. Citation No. 7328081 alleges a violation of section 75.403 and charges that the vast majority of dust samples collected during the investigation of the explosion did not meet the regulation's requirements for incombustible content of combined coal dust, rock and other dust;

2. Order No. 7328082 alleges a violation of section 75.1101-23(a) and charges that JWR's adopted and approved program of instruction in the location and use of fire fighting equipment, etc., was not followed as required⁵;

3. Citation No. 7328083 alleges a violation of section 75.202(a) and charges that the roof in the No. 2 Entry of the No. 4 Section at the intersection of survey station No. 13333 was not supported or otherwise controlled to protect persons from hazards

⁵ Section 75. 1101-23(a) states in part:

Each operator . . . shall adopt a program for instruction of all miners in the location and use of fire fighting equipment, routes of travel to the surface, and proper evacuation procedures to be followed in the event of an emergency. . . .”

related to a roof fall ⁶;

4. Order No. 7328085 alleges a violation of section 75.1101-23(c) and charges that JWR failed to conduct fire and emergency drills at intervals of not more than 90 days, in that interviews and miner records indicated that no drills had been conducted since March, 2001⁷;

5. Order No. 7328088 alleges a violation of section 75.360(b)(3) and charges that an adequate pre-shift examination was not conducted in the No. 4 Section of the mine for the oncoming afternoon shift on September 22, 2001, in that the rock dust which had been applied was inadequate, obvious and widespread, but was not identified as a hazard by the pre-shift examiner⁸;

6. Order No. 7328104 alleges a violation of section 75.362(a)(1) and charges that JWR did not perform an adequate on-shift examination in the No. 4 Section of the mine where two mechanics were assigned to work on September 22, 2001, in that the rock dust which had been applied was inadequate, obvious and widespread, but was not identified as a hazard by the on-shift

⁶ Section 75.202(a) states:

The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

⁷ Section 75.1101-23(c) states:

Each operator of an underground coal mine shall require miners to participate in fire drills, which shall be held at periods of time so as to ensure that all miners participate in a drill no later than January 31, 1974, and at intervals of not more than 90 days thereafter.

⁸ Section 75.360(b)(3) requires the person conducting the pre-shift examination to examine for hazardous conditions at “[w]orking sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift.”

examiner⁹;

7. Order No. 7328105 alleges a violation of section 76.360(b)(3) and charges that JWR did not conduct an adequate pre-shift examination in the No. 4 Section where miners were scheduled to perform maintenance work and to install roof bolts during the oncoming shift on September 23, 2001, in that the examination did not include working places where miners were scheduled to install roof bolts, did not include the cross-cuts between the No. 2 and No. 3 entries, and the rock dust which had been applied was inadequate, obvious and widespread, but was not identified as a hazard by the pre-shift examiner;

8. Order No. 7328106 alleges a violation of section 75.360(b)(3) and charges that JWR did not conduct an adequate pre-shift examination in the No. 4 Section where miners were scheduled to install cribs during the oncoming shift on September 23, 2001, in that rock dust which had been applied was inadequate, obvious and widespread, but was not identified as a hazard by the pre-shift examiner.

The operator's history of previous violations is the first of the civil penalty assessment criteria listed in the Act (30 U.S.C. § 820(i)). In assessing civil penalties, the Act and the Commission require that a judge take account not only of the operator's prior history of violations of the specific standards that have been violated, but of its general history as well. As the Commission has repeatedly noted, the language of section 110(i) does not limit the scope of the applicable history to violations that are similar to the violations that are proven at trial (see e.g., Jim Walter Resources, Inc., 18 FMSHRC 552, 557 (April 1996)).¹⁰ It long has been the

⁹ Section 75.362(a)(1) states in part:

At least once each shift, or more often if necessary for safety, a certified person designated by the operator [i.e., the on-shift examiner] shall conduct an on-shift examination of each section where anyone is assigned to work during the shift and any area where mechanized equipment is being installed or removed during the shift. The . . . [on-shift examiner] shall check for hazardous conditions

¹⁰ For this reason, JWR's suggestion that "unrelated violations" (presumably violations of standards other than those found to have existed) should not be considered as part of JWR's relevant history of prior violations, is contrary to Commission precedent and is

practice in civil penalty cases for a judge to consider as relevant all paid violations that occurred within 24 months of a found violation. To the extent previous violations of sections 75.400 and 75.403 come within this parameter, they are relevant and will not be excluded.

Nor am I persuaded that evidence of any prior violations of section 75.400 or section 75.403 offered as proof that JWR violated section 75.403 (as alleged in Citation No. 7328083) or section 75.360(b)(3) (as alleged in Orders No. 7328088, 7328105 and 7328106) and section 75.362(a)(1) (as alleged in Order No. 7328104) should be excluded. It is obviously true, as the company points out, that section 75.400 and section 75.403 have different requirements and, at this point, it seems a “reach” to imagine how prior violations of section 75.400 and section 75.403 might in part establish the alleged violations of section 75.403 and the pre-shift and on-shift examination standards, but, without the testimony of those who assert a connection between the past violations and an alleged violation, I cannot entirely rule out such a connection and, hence, I cannot rule out the relevancy of the past violations for this purpose. As previously noted, any testimony offered by MSHA in this regard will be subject to cross-examination, and the efficacy of the Secretary’s position will be best judged on the basis of the fully developed record. Although the company asserts that allowing evidence of prior violations of section 75.400 and section 75.403 to show that JWR violated section 75.403 and the cited pre-shift and on-shift examination standards would be prejudicial to its interests (Mot. 10), this is an administrative proceeding where the judge can weigh the totality of the evidence, not a case in which evidence needs to be excluded to shield a jury from the taint of bias.

Moreover, contrary to JWR’s assertion, past violations of section 75.400 and section 75.403 may be relevant to determine whether the company was negligent and/or unwarrantably failed to comply with section 75.403, section 75.360(b)(3) and section 75.362(b)(1). Negligence is the failure to exercise the care reasonably required under the circumstances and unwarrantable failure is “aggravated conduct, constituting more than ordinary negligence by a mine operator in relation to a violation” (Emery Mining Corp., 9 FMSHRC 1995, 2004 (December 1987)). In determining if conduct is unwarrantable, the Commission has recognized a number of non-exclusive factors that are relevant (see e.g., Mullins and Sons Coal Co., 16 FMSHRC 192, 195 (February 1994); Peabody Coal Co., 14 FMSHRC 1258, 1261 (August 1992)) and has stated that it is the totality of the operator’s conduct in relation to the violation that must be considered (The Helen Mining Co., 10 FMSHRC 1672, 1676 n. 4 (December 1988), citing Emery Mining Corp., 9 FMSHRC 1997 (December 1987); see also FMC Wyoming Corp., 11 FMSHRC 1622, 1627-28 (September 1989)). (Logically, the same analysis applies when making a negligence finding.) Thus, where an operator has been placed on notice about a condition that constitutes a violation, the level of priority placed on abatement of the problem is a factor properly considered in a negligence and unwarrantable failure analysis (see, e.g., Enlow Fork Mining Co., 19 FMSHRC 5 (January 1997)). If, as JWR maintains, in many instances it was not placed on notice of alleged violations until after the explosions occurred, it may offer testimony to this effect at trial. Certainly, such testimony would be relevant in assessing the priority the company gave to

rejected.

maintaining the required incombustible content of dust in the area and to the totality of the company's conduct.

For these reasons, the motion in limine to exclude evidence of prior violations will not be granted.

III.
MOTION FOR SUMMARY DECISION
OR
MOTION IN LIMINE TO EXCLUDE DUST SAMPLE RESULTS

Third, JWR has moved for a summary decision finding Citation No. 7328081, and Orders No. 7328088, 7328104, 7328105, and 7328106 invalid; or, in the alternative, for an order in limine, excluding from evidence the results of mine dust samples taken by MSHA after the explosions on September 23, 2001.

As noted above, Citation No. 7328081 charges, *inter alia*, that JWR failed to maintain the incombustible content of the mine dust at a required level throughout specified parts of the mine and that the condition "contributed to the severity and extent of the second explosion." The orders charge that JWR failed to properly pre-shift and on-shift pertinent parts of the No. 4 Section on the last several shifts prior to the explosions because the company failed to recognize and address the inadequacy of the rock dust applications in the area.

To support the allegations relating to incombustible content, MSHA collected and analyzed dust samples. The samples were collected from mid-October until mid-December 2001. The samples were analyzed at the agency's Mt. Hope, West Virginia laboratory. The results of the samples purportedly showed that of 123 band samples taken, 121 (over 98%) had incombustible levels below the regulatory requirements – that is, the incombustible content of the combined coal dust, rock dust and other dust was less than 65% in the intake air courses and less than 80% in the return air courses.

JWR, however, points out that coal extracted from the mine comes from the Blue Creek Coal Seam, a soft and unusually friable seam that readily crumbles into dust (Mot. 7) and that the sample results should "come as no surprise" since they were taken: after two explosions, significant flooding, and the passage of 7 to 11 weeks (Mot. 8-9). In the company's view, "common sense" indicates that, given these factors, the samples could not possibly accurately depict pre-explosion conditions at the mine (Mot. 9). Therefore, the samples are not evidence of what they purport to prove and, because the citation and orders are premised on the samples, the enforcement actions are invalid (Mot. 9-10).¹¹ In other words, the samples should be excluded

¹¹ The company cites to cases upholding the principle that a test result used as evidence of a past event must reflect conditions sufficiently comparable to the conditions that existed at the time of the past event (see, e.g., Hall v. General Motors Corp., 647 F.2d 178, 180

as irrelevant because they are not representative of pre-explosion conditions (Mot. 29).

JWR also attacks the samples as unreliable and, hence, inadmissible because they are not identified as to their source and because they are not representative of the whole substance they purport to represent (Mot. 38). The company asserts all of the purported band samples are not in fact band samples; some are “grab” samples and, therefore, are inherently unrepresentative (Id.). It also asserts, in several instances, MSHA relied on two different sampling results from the same location (Mot. 39), and that some of the samples were contaminated by dust blown from other areas during the explosion (Mot. 39).

For these reasons, summary decision should be granted, vacating the citation and three of the four orders, and the fourth order (Order No. 7328105) should be modified to eliminate any reference to inadequate rock dust and the failure of the examiners to detect (Mot. 40).

Finally, although the citation and orders on their face indicate the alleged violations are based on the collected dust samples, JWR notes that Inspector Murray, who issued the citations and orders, stated in deposition testimony that the even if the dust samples do not represent conditions as they existed prior to the explosion, the enforcement actions are nonetheless valid because of “the fact of the explosion” itself (Mot. 42, quoting Murray dep. 391-392). JWR points out that Clete Stephan, who it describes as MSHA’s “principal expert on the issue” (Mot. 42), stated that an explosion could be propagated even with 92 or 93 percent incombustible content or with “a little sprinkling of float coal dust on top surfaces” (Mot. 42, quoting Stephan dep. 416). For these reasons, JWR maintains the fact of the explosion cannot in itself support the citation and orders (Mot. 42).

If summary decision is denied, JWR, nonetheless, wants the samples barred from admission to the record.

RULING

Commission Rule 67 provides:

A motion for summary decision shall be granted only if the entire record including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, 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).

The material facts involved in establishing the violation of section 75.403 as set forth in Citation No. 7328081 turn on the question of whether rock dust in the cited areas was maintained

(D.C. Cir. 1980); Mattis v. Carlon Electrical Products, 295 F.3d 856, 863 (8th Cir. 2002)).

in such quantities that the incombustible content of the combined coal dust, rock dust and other dust was not less than 65%. It is clear from the citation that the Secretary's allegation of a violation is premised on the results of the samples. If the samples do not support the alleged violation, it cannot be sustained, unless the Secretary can prove an alternative plausible theory. The material facts involved in establishing a violation of section 75.360(b)(3) as set forth in Orders No. 7328088, 7328105 (in part), and 7328106 and section 75.362 (a)(1) as set forth in Order No. 7328104 are whether the pre-shift examiner conducted a detective examination on the oncoming afternoon shift on September 22, 2001, in failing to identify inadequate rock dust applications which then existed in the areas the examiner traveled (Order 7328088); whether the on-shift examiner conducted a detective examination in the No. 4 Section on the afternoon shift on September 22, 2001, in failing to identify inadequate rock dust applications which then existed (Order No. 7328104); whether the pre-shift examiner conducted a detective examination on the No. 4 Section, where persons were scheduled to perform maintenance work and install roof bolts, in failing to identify inadequate rock dust applications which then existed (Order No. 7328105); and whether the pre-shift examiner conducted a detective examination on the No. 4 Section, where persons were scheduled to work installing cribs, in failing to identify inadequate rock dust applications which then existed (Order No. 7328106). It is clear the allegations of violations largely are premised on the assertion that the inadequate rock dust applications were "obvious and widespread" and "should have been recognized by a prudent examiner" (e.g., Order 7328106).

While JWR has raised fundamental questions concerning the relevance of the sample test results as indicative of the conditions existing at the time the examinations were conducted, the Secretary has responded by asserting that the sample results are relevant and that they establish a prima facie case JWR was not in compliance with section 75.403. She asserts that, if anything, the test results were altered in JWR's favor by the explosion and its aftermath (Sec.'s Resp. 3), in that the explosion actually increased the percentage of incombustible content, "because coal dust is consumed and incombustible content settles out as the forces dissipate in the area the dust originally was located" (Id. 9). Indeed, according to the Secretary, the incombustible content ration may have reached a level 5% to 7% higher than that which existed before the explosion (Id. 10). Moreover, flooding that followed the explosion would have had a neutral effect, if any, on the samples, in that coal and rock particles "would have been drained out of the flooded area in equal proportion to their presence in the area" (Id. 10). Finally, the Secretary argues that rib sloughage caused by the unusually friable coal did not materially affect the sample results and that the samples were properly collected and analyzed (Id. 12-13). Thus, in the Secretary's view, the question of the reliability of the sample results is a factual dispute that forecloses summary decision (Id. 6-7).

With regard to the alleged violations of section 75.360(b)(3) and section 75.362(a)(1), the Secretary maintains that the pre-shift and on-shift examiners violated that standards by failing to detect the inadequate rock dust conditions that existed and by failing to detect the "float coal dust explosion hazard" (Sec.'s Resp. 14). The Secretary adds that, "The operator appears to have failed to inform its examiners when MSHA inspectors found hazardous conditions in areas that

had been examined . . . [and] that over time a degree of laxness in the detection and correction of hazardous conditions occurred at the . . . [mine]" (*Id.*). She asserts her case in this regard rests on more than sample results.

JWR's motion for summary decision must fail, in that material facts – namely, those concerning the relevance of the dust samples – very much are in dispute. Do the samples establish the incombustible content of the dust as it existed prior to the explosion? The issue appears to be critical to establishing the alleged violation of section 75.403 and has a bearing also on proving the alleged violations of section 75.360(b)(3) and section 75.362(a)(1). Although JWR has raised significant questions concerning the effects of the explosion and its aftermath upon the incombustible content of the samples, the Secretary has responded that she can answer the questions with facts that prove the sample results accurately reflect pre-explosion conditions. The answer will lie in the proof the parties offer at trial. Moreover, while the results of dust samples may be indicative of the evident nature of the allegedly inadequate applications of rock dust, they are not the only evidence that can conceivably support finding violations of the pre-shift and on-shift examination standards. Credible evidence of the visual appearance of the areas and credible evidence of the significance of the appearance also may be offered. Again, the answer will lie in the proof the parties offer at trial.

The motion in limine also must fail. I cannot conclude based on the record as it now stands that the sample results are irrelevant to establishing the alleged violations. Indeed, depending on the evidence offered at trial, they may be highly relevant. Nor is failing to exclude them prejudicial to JWR when, at trial, the company will have the opportunity to raise questions regarding the effects of the explosions on the sample results and to offer evidence as to those effects. It is not implausible that the company will be able to establish that no significant weight should be attributed to any of the sample results, in which case the Secretary's attempts to prove a violation of section 75.403 may be severely impaired, and her attempts to prove violations of section 75.360(b)(3) and section 75.362(a)(1) also will be compromised, but, the issues must be tried to find out.

ORDER

For the reasons stated above, JWR's motions are **DENIED**.



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