JANUARY 2002

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JANUARY 2002

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

RAG Cumberland Resources, LP v. Secretary of Labor, MSHA, Docket Nos. PENN 2000-181-R, etc. (Judge Feldman, November 28, 2001)

Secretary of Labor, MSHA v. Douglas R. Rushford Trucking, Docket No. YORK 99-39-M. (Judge Melick, December 27, 2001)

Review was denied in the following case during the month of January:

Secretary of Labor, MSHA v. Original Sixteen to One Mine, Inc., Docket Nos. WEST 2000-63-M, etc. (Judge Zielinski, October 19, 2001. The original petition filed on November 28, 2001 was granted on a limited basis.)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 4, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. CENT 2002-24-M
	:	A.C. No. 41-04158-05502
KERR ENTERPRISES, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On November 28, 2001, the Commission received from Kerr Enterprises, Inc. ("Kerr") a request 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 has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its request, Kerr, apparently proceeding pro se, asserts that it failed to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor's Mine Safety and Health Administration ("MSHA") "because it has just been brought to our attention that these fines are due." Mot. It also maintains that the employee who "originally signed for the green card no longer works here and in fact worked for Kerr Tractor Co., not Kerr Enterprises Inc." *Id.* Kerr contends that the fines are excessive because the cited violations were corrected, including one that was immediately corrected and did not pose a safety problem. *Id.*

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15

FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *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. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Kerr's position. It is not clear from the record why Kerr did not timely return its green card. Kerr also refers in its request to "[t]he 2 penalties in question." Mot. However, the proposed penalty assessment (A.C. No. 41-04158-05502) included three proposed penalties (Citation Nos. 06202972, 06202973, and 06202974). Proposed Penalty Assessment dated Aug. 7, 2001. Thus, it is not clear which penalties Kerr is referring to in its request. Because of this confusion and in the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Cantera Bravo Inc.*, 23 FMSHRC 809, 809-11 (Aug. 2001) (remanding to judge where pro se operator offered no explanation for failure to timely file request for hearing); *Georges Colliers, Inc.*, 22 FMSHRC 939, 939-41 (Aug. 2000) (remanding to judge where operator misfiled proposed penalty assessment due to changes in office personnel). If the judge determines 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.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

James Kerr, President
Kerr Enterprises, Inc.
5245 North Twin City Highway
Nederland, TX 77627

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 17, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2002-23-M
v.	:	A.C. No. 23-00454-05587
PEA RIDGE IRON ORE COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On November 5, 2001, the Commission received from Pea Ridge Iron Ore Co. ("Pea Ridge") a request 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 has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its request, Dwight A. Miller, Pea Ridge's executive vice president and general counsel, asserts that, due to personnel lay-offs at the time Pea Ridge received the proposed penalty assessment, it failed to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor's Mine Safety and Health Administration ("MSHA"). Mot. A copy of the proposed penalty assessment and the delinquency letter from MSHA were attached to its request. It also attached an unsigned statement by T.D. Gallagher that Pea Ridge ceased mining on August 27, 2001, and has laid off many of its employees. Gallagher Statement

dated Sept. 25, 2001. The statement also requests that the penalties be dropped because Pea Ridge's secured lender has frozen its assets and it cannot pay its outstanding bills. *Id.* There is no indication in the statement or other record documents what connection Gallagher has to Pea Ridge.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *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. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Pea Ridge's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Georges Colliers, Inc.*, 22 FMSHRC 939, 939-41 (Aug. 2000) (remanding to judge where operator misfiled proposed penalty assessment due to changes in office personnel); *E. Ark. Contractors, Inc.*, 21 FMSHRC 981, 981-83 (Sept. 1999) (same). If the judge determines 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.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant Pea Ridge's request for relief. First, I note that the Secretary does not oppose the operator's motion. Nor do I find any other circumstances that would render a grant of relief here problematic. Under these circumstances, I thus fail to see the need or utility for remanding this matter.

Theodore F. Verheggen, Chairman

Distribution

Dwight A. Miller, Vice President
Pea Ridge Iron Ore Company, Inc.
231 South Bemiston Avenue, Suite 1100
St. Louis, MO 63105

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 17, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2002-22-M
v.	:	A.C. No. 36-00251-05541
SOUTHDOWN, INCORPORATED	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On October 25, 2001, the Commission received from Southdown, Inc. ("Southdown") a request 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 has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its request, Southdown, apparently proceeding pro se, asserts that it failed to timely submit a request for a hearing because the Department of Labor's Mine Safety and Health Administration ("MSHA") sent the proposed penalty assessment to the wrong person at Southdown. Mot. It contends that the person who received the proposed penalty assessment is often off site for weeks at a time and is not the person listed on the "MSHA Legal Identity Form." *Id.* Southdown maintains that, since September 1999, it has attempted to update the

"Name of the Person to Receive Official Mail or Service." *Id.* A copy of the proposed penalty assessment was attached to Southdown's request.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *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. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

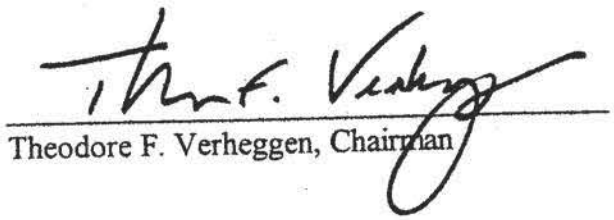
On the basis of the present record, we are unable to evaluate the merits of Southdown's position. In particular, the record is unclear as to the identity of the company official listed on the Notification of Legal Identity form filed with MSHA, and the reasons surrounding Southdown's alleged inability to change that identity. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See generally Concrete Materials of Mont., LLC*, 23 FMSHRC 1209, 1209-11 (Nov. 2001) (vacating default and remanding to judge where operator did not answer Secretary's petition or judge's show cause order because MSHA and judge allegedly sent documents to wrong address); *San Juan Coal Co.*, 23 FMSHRC 800, 800-03 (Aug. 2001) (vacating default and remanding to judge where operator did not answer Secretary's petition or judge's show cause order because MSHA and judge allegedly failed to send documents to designated company official). If the judge determines 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.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant Southdown's request for relief. First, I note that the Secretary does not oppose the operator's motion. I also note that the operator is proceeding pro se, and the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Nor do I find any other circumstances that would render a grant of relief here problematic. Under these circumstances, I thus fail to see the need or utility for remanding this matter.



Theodore F. Verheggen, Chairman

Distribution

Lance W. Griffin, Plant Manager
Southdown Incorporated
P.O. Box 220
Thomasville, PA 17364

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 17, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2002-20-M
v.	:	A.C. No. 45-03220-05517
CASCADE SAND & GRAVEL, INCORPORATED	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On October 1, 2001, the Commission received from Cascade Sand & Gravel, Inc. ("Cascade") a request 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 has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its request, Cascade, apparently proceeding pro se, asserts that it failed to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor's Mine Safety and Health Administration ("MSHA") because it misplaced its copy of the proposed penalty assessment. Mot. Cascade attached a copy of the proposed penalty assessment to its request to reopen and a copy of the certified mail receipt indicating that Cascade received the proposed penalty assessment on August 21, 2001.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *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. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Cascade's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Georges Colliers, Inc.*, 22 FMSHRC 939, 939-41 (Aug. 2000) (remanding to judge where operator misfiled proposed penalty assessment due to changes in office personnel); *E. Ark. Contractors, Inc.*, 21 FMSHRC 981, 981-83 (Sept. 1999) (same). If the judge determines 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.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant Cascade's request for relief. First, I note that the Secretary does not oppose the operator's motion. I also note that the operator is proceeding pro se, and the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Nor do I find any other circumstances that would render a grant of relief here problematic. Under these circumstances, I thus fail to see the need or utility for remanding this matter.

Theodore F. Verheggen, Chairman

Distribution

Joseph B. Clerget, President
Cascase Sand & Gravel, Inc.
6802 196th Avenue, S.W.
Rochester, WA 98579

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

January 17, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2001-585-M
v.	:	A.C. No. 26-02418-05504
PASCO GRAVEL COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On August 27, 2001, the Commission received from Pasco Gravel Company ("Pasco Gravel") a request 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 has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

Pasco Gravel's request to reopen was submitted by Rocco Pasquarello, the company operator. Mot., attachs. He asserts that Pasco Gravel failed to timely submit a request for a hearing on the proposed penalty assessment to the Department of Labor's Mine Safety and Health Administration ("MSHA") because the company was never notified about the proposed assessment until he complained to an MSHA supervisor that an MSHA inspector had gone to his home and told his wife about the violations and upset her. *Id.* Pasquarello contends that he twice requested a hearing by phone with the MSHA supervisor concerning the violations. *Id.* He

further maintains that Pasco Gravel was never in violation and that the MSHA inspector who cited the company had no experience in gravel operations. *Id.* Pasco Gravel is apparently proceeding pro se. Copies of the relevant citations were attached to its request to reopen.

The Secretary does not oppose Pasco Gravel's request to reopen but maintains that the proposed penalty assessment was sent to Pasquarello's home address by certified mail and was returned unclaimed. Sec'y Ltr. dated Sept. 7, 2001. She attached a copy of the certified mail receipt indicating that the proposed assessment was returned unclaimed. *Id.*, attach. The Secretary contends that, because the proposed assessment was returned unclaimed, the inspector called Pasquarello's wife and received her permission to visit her home to discuss the proposed assessment. *Id.* The Secretary maintains that the inspector's behavior was entirely appropriate and was an attempt to ensure that Pasquarello had notice of the assessments. *Id.*

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *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. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Pasco Gravel's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See D.A.S. Sand & Gravel, Inc.*, 23 FMSHRC 1031, 1031-33 (Sept. 2001) (remanding to judge to determine whether relief from final order was appropriate where operator alleged that it never received copy of the proposed penalty assessment); *Carri Scharf Materials, Co.*, 23 FMSHRC 813, 813-16 (Aug. 2001) (same); *Baker Slate, Inc.*, 23 FMSHRC 818, 818-820 (Aug. 2001) (remanding to judge where operator was

apparently confused about Commission procedures and mistakenly thought it had to contact specific MSHA official before making hearing request). If the judge determines 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.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant Pasco Gravel's request for relief. First, I note that the Secretary does not oppose Pasco Gravel's motion. I also note that the company is proceeding pro se, and the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Nor do I find any other circumstances that would render a grant of relief here problematic. Under these circumstances, I thus fail to see the need or utility for remanding this matter.

Theodore F. Verheggen, Chairman

Distribution

Rocco Pasquarello
Pasco Gravel Company
50 W. McMurry Drive
Pahrump, NV 89048

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 23, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. YORK 2002-4-M
v.	:	A.C. No. 43-00396-05538
	:	
U.S. QUARRIED SLATE PRODUCTS, INCORPORATED	: :	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

CORRECTED ORDER[1]

BY: Jordan and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On October 10, 2001, the Commission received from U.S. Quarried Slate Products, Inc. ("Quarried Slate") a request 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 has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its request, Quarried Slate, through its president, Andrew P. Andrushko, asserts that it timely submitted a request for a hearing on the proposed penalty assessment to the Department of

[1] This corrects errata set forth in the Order the Commission issued on January 17, 2002.

Labor's Mine Safety and Health Administration ("MSHA"). Mot. at 1 & attach. Andrushko, apparently proceeding pro se, contends that the sales manager at Quarried Slate "picked up" the proposed penalty assessment on April 20, 2001, but that Andrushko did not open it until April 26, 2001. *Id.* at 1. Quarried Slate's green card, requesting a hearing, was signed by Andrushko and dated May 25, 2001. *Id.*, attach. It was filed on May 31, 2001 by the Civil Penalty Office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). *Id.*, attach. On this basis, Andrushko claims that Quarried Slate timely filed its hearing request within the 30-day deadline. *Id.*; 30 U.S.C. § 815(a). Andrushko also asserts that Quarried Slate is a small operation with limited personnel and that Andrushko suffered a knee injury which severely limited his involvement at the company for over two months. Mot. at 1. However, he does not state when this disability period occurred. Quarried Slate attached a copy of its green card to its request to reopen.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *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. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

On the basis of the present record, we are unable to evaluate the merits of Quarried Slate's position. In particular, the record is not clear on when Quarried Slate received the proposed penalty assessment, when it mailed its green card to MSHA, or how Andrushko's alleged knee injury affected the company's ability to timely return its hearing request. Therefore, in the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Doe Run Co.*, 23 FMSHRC 1012, 1012-15 (Sept. 2001) (remanding to judge where proposed penalty assessment did not reach correct manager in time due to internal mishandling); *Upper Valley Materials*, 23 FMSHRC 130, 130-32 (Feb. 2001) (remanding to judge where operator failed to file hearing request due to lack of familiarity with Commission procedures); *Landon Holbrook, empl. by Island Fork Constr., Ltd.*, 22

FMSHRC 158, 158-60 (Feb. 2001) (remanding to judge where Holbrook failed to timely file hearing request because he was busy caring for ill wife). If the judge determines 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.

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

I would grant U.S. Quarried Slate Product's request for relief. First, I note that the Secretary does not oppose the operator's motion. I also note that the operator is proceeding pro se, and the Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). Nor do I find any other circumstances that would render a grant of relief here problematic. Under these circumstances, I thus fail to see the need or utility for remanding this matter.

Theodore F. Verheggen, Chairman

Distribution

Andrew P. Andrushko, President
U. S. Quarried Slate Products, Inc.
Scotch Hill Road
Fair Haven, VT 05743

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Chief Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
1730 K Street, N.W., Suite 600
Washington, D.C. 20006

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 30, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 2000-63-M
	:	2000-78-M
ORIGINAL SIXTEEN to ONE MINE, INC.	:	2000-195-M

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

ORDER

BY: Jordan and Beatty, Commissioners

On November 26, 2001, the Commission received from Original Sixteen to One Mine, Inc. ("Original Sixteen") a petition for discretionary review challenging the decision issued on October 19, 2001 by Administrative Law Judge Michael Zielinski. On November 28, 2001, a majority of the Commission granted the petition for the limited purpose of affording Original Sixteen an opportunity to amend its petition to comply with the requirements of section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), and Commission Procedural Rule 70(d), 29 C.F.R. § 2700.70(d). On December 17, 2001, Original Sixteen filed an amended petition for discretionary review. On January 2, 2002, the Commission received an opposition from the Secretary of Labor. Having considered the matter, we decline to grant review of the amended petition for discretionary review and vacate the direction for review issued on November 28.[1]

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

[1] The Chairman would have accepted the operator's amended petition for discretionary review.

Distribution

Michael M. Miller, President
Original Sixteen to One Mine, Inc.
P.O. Box 1621
Alleghany, CA 95910

Tina Perruzzi, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge Michael Zielinski
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 31, 2002

DISCIPLINARY PROCEEDING : Docket No. D 2000-1

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

DECISION

BY: Verheggen, Chairman, and Jordan, Commissioner

This disciplinary proceeding arises under Commission Procedural Rule 80, 29 C.F.R. § 2700.80.[1] On May 17, 2000, the Commission received a disciplinary referral pursuant to Rule 80, concerning circumstances related to a discrimination proceeding. In that case, the miner had filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA"), but nineteen months passed before the Solicitor of Labor filed with the Commission an application for temporary reinstatement on the complaining miner's behalf.[2] For the reasons set forth below, we conclude that disciplinary proceedings are not warranted.

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[1] Commission Procedural Rule 80 provides in part:

> (a) Standards of conduct. Individuals practicing before the Commission and Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States. (b) Grounds. Disciplinary proceedings may be instituted against anyone who is practicing or has practiced before the Commission on grounds that such person has engaged in unethical or unprofessional conduct . . . .

29 C.F.R. § 2700.80.

[2] Section 105(c)(2) of the Mine Act provides in pertinent part: "[I]f the Secretary finds that [a discrimination] complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2).

I.

Underlying Discrimination Proceedings and Disciplinary Referral

On July 27, 1998, the miner in question filed a discrimination complaint with MSHA claiming that the operator terminated him in retaliation for his safety complaints. Specifically, the complaint alleged that, on several occasions during late June and early July 1998, the miner, who was employed as the mine's crusher foreman, complained about faulty brakes on a fuel truck, and brought the problems to the attention of the mine's maintenance supervisor. The complaint also alleged that during this period, the truck's faulty brakes were also noted in a "required maintenance form" by the driver of the truck. On July 7, after a coworker told the miner that he heard that the company had no intention of fixing the fuel truck brakes, the miner red tagged the truck, taking it out of service. Eight days later the company terminated the complainant.

Approximately nineteen months after the miner filed his discrimination complaint, the Solicitor of Labor filed with the Commission an application for temporary reinstatement on the miner's behalf. The judge hearing the Secretary's application referred to the miner's testimony that his discharge occurred eight days after his complaint to management about the brake problems on the truck, and found that the miner's claims, if found to be credible at a merits proceeding, would constitute protected activity and evidence of a discriminatory motive for the discharge. The judge therefore concluded that the miner's discrimination complaint had not been frivolously brought, and ordered him temporarily reinstated. The company appealed the judge's order to the Commission.

In an interim decision, we concluded that substantial evidence supported the judge's determination that the miner's discrimination claim was not frivolous. We also expressed concern about the Secretary's delay in applying for the miner's temporary reinstatement and her failure to explain why this delay occurred. We retained jurisdiction over the temporary reinstatement case, and ordered the Secretary to explain the circumstances surrounding the protracted delay in applying for the miner's temporary reinstatement.

In response to our order, a staff attorney in the Solicitor of Labor's Arlington, Virginia office submitted a letter stating that factors contributing to the delay included a lengthy investigation of the miner's allegations, requests for additional information by the district and the Solicitor's Office, a delay by MSHA in forwarding the case to the Solicitor's San Francisco regional office, and a delay in reviewing and filing the application for temporary reinstatement by the Solicitor's Office. The attorney also indicated the San Francisco regional office had the case for approximately seven months before filing the application for temporary reinstatement. The attorney stated that, while litigation resources in the San Francisco office were "tight," steps had been taken to ensure that such delays do not occur again.

On May 17, 2000, a disciplinary referral was filed pursuant to Commission Procedural Rule 80(c) by Commissioner Beatty,[3] based on the nineteen months that had passed between the miner filing his discrimination complaint and the Solicitor's application for temporary reinstatement of the miner. The referral suggested that if the Regional Solicitor or any attorney in the Regional Solicitor's Office contributed in any material way to that delay, such conduct would justify bringing disciplinary proceedings against such attorney or attorneys. The referral requested that the Commission conduct an inquiry to determine whether disciplinary proceedings were warranted.

II.

Disposition

Pursuant to Rule 80(c)(2), the Commission conducted an inquiry to determine whether disciplinary proceedings are warranted in this matter. This included, among other efforts, interviews with the miner, a review of the record in the underlying discrimination proceeding,

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[3] Commission Procedural Rule 80(c) provides in pertinent part:

> Disciplinary proceedings shall be subject to the following procedure: (1) Disciplinary referral. . . . [A] Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission shall forward to the Commission for action such information in the form of a written disciplinary referral. . . . (2) Inquiry by the Commission. The Commission shall conduct an inquiry concerning a disciplinary referral and shall determine whether disciplinary proceedings are warranted. The Commission may require persons to submit affidavits setting forth their knowledge of relevant circumstances. If the Commission determines that disciplinary proceedings are not warranted, it shall issue an order terminating the referral. (3) Transmittal and hearing. Whenever, as a result of its inquiry, the Commission, by a majority vote of the full Commission or a majority vote of a duly constituted panel of the Commission, determines that the circumstances warrant a hearing, the Commission's Chief Administrative Law Judge shall assign the matter to a Judge, other than the referring Judge, for hearing and decision. . . .

29 C.F.R. § 2700.80(c).

and a meeting with then Solicitor of Labor, Henry Solano.[4] In the course of our inquiry, we uncovered a substantial amount of information concerning the factors which contributed to delay in processing the miner's complaint. We conclude that the delay was unacceptable, inexcusable, and wholly avoidable. Based on our investigation, we have determined that the lengthy delay which occurred in this case reflects a fundamental misunderstanding of the Mine Act and a systemic failure to properly implement the Act's discrimination provisions on the part of MSHA and the Solicitor's Office.

Complaints of discrimination under section 105(c) of the Mine Act are filed with MSHA, which investigates them and forwards those it believes have merit to the appropriate Regional Solicitor's Office for review, further investigation if necessary, and, when appropriate, the filing of an application for temporary reinstatement with the Commission. Our investigation and the letter we received from a staff attorney in the Solicitor's Office in response to our order establish that approximately twelve months elapsed between the filing of the miner's complaint with MSHA on July 27, 1998 and MSHA's forwarding of the case file to the San Francisco Regional Solicitor's Office in June or July 1999. An additional seven months passed between the San Francisco office's receipt of the miner's file and that office's application for temporary reinstatement on January 21, 2000.

Regarding MSHA's twelve-month delay, we have determined that, at some point in the processing of the miner's discrimination claim, MSHA initiated a section 110(c) investigation into whether the complainant miner, in his capacity as a crusher foreman, played any role in the continued use of the allegedly defective truck. Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). During our investigation, we were informed by the Solicitor of Labor that MSHA and the Solicitor's Office refuse to pursue statutorily mandated section 105(c) discrimination actions on behalf of miners against whom section 110(c) allegations have been raised, until the section 110(c) investigation is completed, and a determination is made that section 110(c) charges will not be brought. They have adopted this policy to avoid a conflict of interest between the Solicitor's prosecutorial role as the Secretary of Labor's counsel, and the Solicitor's role in representing miners under the anti-discrimination provision of the Mine Act. Thus, a very large part of the delay in MSHA's investigation of the underlying discrimination complaint here is attributable to its investigation of the miner under section 110(c).

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[4] We take general exception to our dissenting colleague's characterization of the Commission's investigation and deliberations concerning this matter. However, we will not respond to the dissent's various assertions concerning the manner in which this case has proceeded. But we do feel it necessary to specifically refute the dissent's suggestion that Commissioners or staff either initiated or received phone calls of questionable propriety. *See* slip op. at 13 n.4.

While we appreciate the conflict faced by the Solicitor's Office in such situations, we strongly disagree with the way that office has chosen to resolve it. We believe that prioritizing section 110(c) investigations over section 105(c) complaints represents a fundamental misinterpretation of the Mine Act.

Neither the text nor the legislative history of the Mine Act supports the hierarchy of priorities that MSHA and the Solicitor have chosen to follow. Indeed, such an approach contravenes both the letter and the spirit of that statute. Section 105(c)(2) of the Mine Act mandates expeditious time limits governing the processing of discrimination cases by the Secretary and the Commission. For instance, under section 105(c)(2) the Secretary must initiate an investigation into the allegations in a miner's discrimination complaint within 15 days of receiving the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending a final order on the complaint. 30 U.S.C. § 815(c)(2). Section 105(c)(2) also provides that "[i]f upon such investigation, the Secretary determines that the provisions of this [subsection] have been violated, he shall immediately file a complaint with the Commission . . . alleging such discrimination . . . ." *Id.* Section 105(c)(3) provides that "[w]ithin 90 days of the receipt of a complaint . . . , the Secretary shall notify the miner . . . of his determination whether a violation has occurred." 30 U.S.C. § 815(c)(3). Congress' inclusion of these time limits evidences the importance it has placed on the speedy processing of discrimination cases.

Moreover, the Mine Act's legislative history clearly reflects Congress' considered judgment that discrimination complaints must be accorded the utmost priority. S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) ("*Legis. Hist.*") ("The bill requires the Secretary to rigorously enforce these rights with discrimination complaints receiving high priority."). In enacting the temporary reinstatement provision in section 105(c), Congress was clearly concerned about miners who are out of work while their discrimination complaints are being processed. *See* S. Rep. No. 95-181, at 37 (1977), *reprinted in Legis. Hist.*, at 625 ("[T]emporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment . . . pending the resolution of the discrimination complaint."). Miners are statutorily precluded from applying for temporary reinstatement themselves. *See* 30 U.S.C. § 815. Rather, they must rely on the Secretary of Labor in her best judgment to do so on their behalf. Because the policy of subordinating section 105(c) claims to section 110(c) investigations thwarts the statutory purpose of expediting relief for victims of discrimination, it is unsupportable.

In a practical sense, the policy of MSHA and the Solicitor invites delay of the magnitude which occurred in the underlying discrimination matter here. Such delay has serious implications for effective enforcement of the Act's protections. Under this policy, miners whose temporary reinstatement applications are delayed could conceivably go for months without a paycheck until the section 110(c) matter is resolved. In this matter, according to an affidavit submitted by an

attorney in the Solicitor's Office who worked on the miner's discrimination case, the miner, after months without a paycheck, suffered severe economic hardship. The natural effect of delaying both a miner's vindication of his rights to be free from discrimination and to obtain temporary reinstatement is that all miners will be discouraged in the future from asserting their rights under the Mine Act. It is our firm belief that the delays caused by MSHA and the Solicitor's Office mishandling of this case could discourage miners from asserting rights under the Act as much as anything a mine operator could do. Yet miner participation in securing the Act's promise of a safe and healthy workplace is a foundation of the statutory enforcement scheme. *See* S. Rep. No. 95-181, at 35, *reprinted in Legis. Hist.*, at 623 ("If our national mine safety and health program is to be truly effective, miners will have to play an active part in the enforcement of the Act.").

Equally or more troubling than this specter of delay are the consequences in a case in which the Solicitor's office decides to proceed with a section 110(c) charge against a miner. In such a case, it is our understanding that the Solicitor will never agree to represent that miner in the temporary reinstatement or discrimination proceeding, because of the perceived conflict of interest. This policy in effect permits section 110(c) allegations to completely trump the miner's right to immediate temporary reinstatement and relief from discrimination. This is troubling because under the Mine Act, only the Secretary can apply for temporary reinstatement on a miner's behalf — the application cannot be filed by private counsel. Consequently, the Solicitor's policy could have the effect of severely limiting the temporary reinstatement provision of the Mine Act.

Because this policy eviscerates the protections of section 105(c) of the Mine Act, causing significant hardship to miners bringing discrimination claims, we urge the Solicitor to review this conflict of interest issue again and attempt to devise solutions that will permit the Secretary to carry out her responsibilities under both sections 105(c) and 110(c) of the Act.[5]

In addition to the troubling MSHA policy which clearly impeded progress in the initial investigation of the 105(c) case, we are concerned about the subsequent delay which occurred after the discrimination complaint finally arrived at the Regional Solicitor's Office.[6] Our investigation revealed that decisional paralysis on the part of the Solicitor's Office contributed substantially to the delay in processing the miner's case. While we are not certain when MSHA decided not to pursue section 110(c) charges against the miner, we can nevertheless conclude, based on the Solicitor's policy of refusing to pursue a miner's discrimination complaint before MSHA has decided whether to pursue section 110(c) charges against that miner, that the agency

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[5] Our dissenting colleague dismisses the Solicitor's conflict of interest explanation as "nothing more than a post hoc cover story." Slip op. at 15. We are mindful, however of the privacy and ethical considerations that would have been implicated had the Solicitor referred to the section 110(c) investigation in his written response to our earlier order.

[6] Attorneys employed by the Solicitor's Office, because they practice before the Commission, are, of course, subject to rules of professional responsibility pursuant to Rule 80.

had decided not to pursue section 110(c) charges by July 1999 when an attorney from the Regional Solicitor's Office finally contacted the miner. Consequently, by this time, the potential conflict between the Solicitor acting in his capacity as the Department of Labor's attorney and as an attorney acting on behalf of a complaining miner no longer existed, and thus cannot explain the complaint processing delay which followed.

While we acknowledge the assertion of the Solicitor's Office that additional investigatory work was necessary after it received the case materials from MSHA, we nevertheless conclude that its 7-month delay in filing an application for temporary reinstatement can only be characterized as a "bureaucratic meltdown." Indeed, the attorney responding to our order for an explanation of the delay stated that the filing of an application for temporary reinstatement on the miner's behalf was unnecessarily delayed in the Regional Solicitor's Office, essentially admitting that some portion of that office's 7-month delay was avoidable. Whether the delay is attributable to a dilatory initial assignment of the miner's discrimination case to an attorney in the Regional Office or inefficient processing of the case by various attorneys at agency headquarters or in several field offices later assigned to handle the matter, such mismanagement is unacceptable, particularly in situations where a miner is out of work pending action by the Solicitor's Office.[7]

Finally, during the course of our investigation into this matter we have become aware that the Solicitor of Labor believes that no attorney-client relationship exists between the Solicitor and a miner on whose behalf the Solicitor brings a section 105(c) complaint or temporary reinstatement proceeding. Rather, the Solicitor considers the Department of Labor to be its client, with complaining miners having only a derivative interest in a discrimination complaint the Secretary brings on a miner's behalf.

However, we find nothing in the manner in which the Solicitor of Labor handles section 105(c)(2) discrimination cases that indicates to miners that counsel in the Solicitor's Office are not their attorneys. Miners file discrimination complaints with MSHA. The first stage at which attorneys from the Solicitor's Office publicly represent the interests of such a complainant is in temporary reinstatement proceedings, for which *only* the Secretary may apply. If the Secretary subsequently concludes that the anti-discrimination provisions of the Act have been violated, she must prosecute a discrimination complaint, "suing on behalf of the complainant." *Eastern Assoc. Coal v. FMSHRC*, 813 F.2d 639, 644 (4th Cir. 1987); 30 U.S.C. § 815(c)(2).[8] The caption in

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[7] Solicitor Solano informed the Commission that management improvements involving personnel and resource enhancements were subsequently implemented in the regional office to ensure that temporary reinstatement cases would in the future be handled efficiently and accorded the high priority they deserve.

[8] If the Secretary determines that the Act was not violated, the complainant, with or without private counsel, may file a complaint on his or her own behalf. 30 U.S.C. § 815(c)(3). However, this section 105(c)(3) complaint may not be filed until the Secretary has made her determination of non-discrimination, which she is supposed to do within 90 days. *Id.*; Commission Procedural Rule 41(b), 29 C.F.R. § 2700.41(b).

these cases always reads "Secretary of Labor on behalf of" the miner. In addition, attorneys in the Solicitor's Office during the course of litigation of a temporary reinstatement or discrimination claim perform many of the same tasks that an attorney in such a case would perform on behalf of a client (such as acting on behalf of the miner in settlement negotiations, etc.).

In our investigation of this matter we have found nothing that would have led the miner to believe that attorneys in the Solicitor's Office litigating his case were anything other than *his* attorneys. But as stated above, we have learned that the Solicitor does not hold such a view. Insofar as the views of the Solicitor might tend to confuse complaining miners, the Solicitor of Labor is, we believe, duty bound to disabuse miners of any notion that attorneys in the Solicitor's Office handling miners' discrimination cases consider themselves to be those miners' attorneys.

In sum, we emphasize that delays of the sort that happened in this matter are unacceptable. Such delays are harmful to the very interests of miners that the Secretary of Labor is charged under the Mine Act with protecting and have a significant chilling effect on miners' willingness to lodge safety complaints. Here, however, we find no basis for referring this matter to one of our judges under Rule 80. Instead, we have discovered a significant misapplication of section 105(c), compounded by inexcusable administrative delays in the handling of the miner's case, all of which reveals not an ethical lapse by any individual attorney, but rather a failure of the *system*.

Accordingly, we do not find it appropriate to sanction individual lawyers for what is fundamentally an institutional problem, and thus conclude that assignment of this matter to an administrative law judge for further proceedings is unwarranted. This disciplinary referral is therefore terminated.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Commissioner Beatty, dissenting:

The legislative history of the Mine Act clearly reflects Congress' considered judgement that discrimination complaints *must* be accorded the utmost priority. S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) ("*Legis. Hist.*"). By the plain terms of the Mine Act, miners are *precluded* from applying for temporary reinstatement and therefore must rely on the Secretary of Labor to do so on their behalf. 30 U.S.C. § 815(c)(2). In enacting the temporary reinstatement provision in section 105(c), Congress was clearly concerned about miners who are out of work while their discrimination complaints are being processed. "[T]emporary reinstatement is an *essential protection* for complaining miners who may not be in the financial position to suffer even a short period of unemployment pending the resolution of the discrimination complaint." S. Rep. No. 95-181 at 37; *Legis. Hist.* at 625. Consequently, the Secretary is required by the Mine Act to commence her investigation of a discrimination complaint with 15 days of receiving it, and, upon the mere determination that the complaint is not frivolous, to seek a Commission order temporarily reinstating the complaining miner to his job. 30 U.S.C. § 815(c)(2); S. Rep. No. 95-181 at 36-37; *Legis. Hist.* at 624-25.

"We conclude that the delay [in processing the complainant's case] was unacceptable, inexcusable, and wholly avoidable." Slip op. at 4. "[W]e have determined that the lengthy delay which occurred in this case reflects . . . a systematic *failure* to properly implement the [Mine] Act's discrimination provisions on the part of . . . the Solicitors's Office." Slip op. at 4 (emphasis added). "Our investigation revealed that decisional paralysis on the part of the Solicitor's office *contributed substantially* to the delay in processing the miner's case." Slip op. at 6 (emphasis added). "[W]e . . . conclude that [the Solicitor's] 7-month delay in filing an application for temporary reinstatement can only be characterized as a 'bureaucratic meltdown.'" Slip op. at 7. The Solicitor's Office "essentially *admitt[ed]* that some portion of [the] . . . delay was avoidable." Slip op. at 7 (emphasis added). "Whether the delay [was] attributable to . . . an attorney in the Regional Office or . . . attorneys at agency headquarters . . . , such management is unacceptable, particularly . . . where a miner is out of work pending action by the Solicitor's Office." Slip op. at 7.

The foregoing language has been excerpted from the majority's opinion. It clearly reflects my colleagues' understanding of the temporary reinstatement provision of the Mine Act and its importance to the health and safety of our nation's miners. It further acknowledges the majority's complete understanding of the Secretary's statutory duty as the sole enforcer of this important provision. The language also lays out my colleagues' findings relating to the failure of the Solicitor's Office and MSHA to exercise their statutory obligations in this temporary reinstatement case. Given the harshness of these excerpts, one would expect the majority to fully investigate the circumstances surrounding the19-month delay in the filing of the miner's temporary reinstatement application, a delay which the majority predicts will "have a *significant chilling effect* on miners' willingness to lodge safety complaints [under the Mine Act]." Slip op. at 8 (emphasis added). The majority position, however, demonstrates that, at least in matters

involving the Secretary's obligation to obtain temporary reinstatement orders, the Commission's enforcement of its disciplinary process is all bark and no bite.

As this opinion will make clear, I believe my colleagues' decision to dismiss this case without a complete investigation will seriously erode the foundation upon which the protective purposes of section 105(c) of the Mine Act were founded. I can think of no single decision issued by this body, either past or future, that will cast a darker cloud over the protection of miners' health and safety then the one issued by the majority today. What makes today's decision troubling is that this case is not one in which we must decide between the positions espoused by Secretary and an operator, as we do in nearly all our decisions. What we are faced with here is not deciding which party is correctly interpreting a statue or regulation, or the appropriateness of a civil penalty. The instant case, instead, removes us from our normal roles and requires us to serve as investigators charged with conducting a thorough and impartial inquiry into facts that resulted in the filing of a disciplinary referral, and to serve as impartial evaluators of the evidence gathered. Then, if necessary, to make a reasoned decision as to whether the case should be referred to an administrative law judge. In my opinion, the majority's handling of this case falls far short of completing these important tasks.

To gain a complete understanding of this case, it is helpful to closely examine the facts regarding the 19 months that elapsed from the filing of the miner's section 105(c)(2) complaint with MSHA to the Secretary's filing of a temporary reinstatement application. All of these facts are either contained in the public record of the temporary reinstatement case or were obtained by Commission personnel conducting the Commission's limited investigation into this matter. On July 27, 1998, the miner in question, a supervisor,[1] filed a discrimination case against his employer alleging he was terminated earlier that month in retaliation for "safety" complaints he raised relating to his operation of a 1948 model fuel truck (hereinafter "truck 627"). According to the miner, truck 627 had a lengthy history of numerous safety problems including, but not limited to, faulty brakes. The miner had raised many maintenance requests concerning truck 627 with the operator, which, according to the miner, did not want to be bothered about the truck's problems.

In addition to raising complaints about truck 627's maintenance problems, the miner also had an argument with the operator's safety manager when the miner refused to complete MSHA training certificates indicating that he had certified new drivers. The miner's complaints about truck 627, and the operator's subsequent failure to correct the problems, culminated in the miner "red tagging" the truck and taking it out of service. According to the miner, from the day he red tagged truck 627, he faced a tense and hostile work environment. Following his discharge, MSHA inspected truck 627 and issued an unwarrantable failure citation for various defects.

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[1] As recently as the Commission's decision in *Capitol Cement Corp.*, 21 FMSHRC 883, 894 n.17 (Aug. 1999), we affirmed that the health and safety of all miners, including supervisors, "is a preeminent statutory concern" under the Mine Act.

Soon after the miner filed his discrimination complaint with MSHA, he was contacted by Steve Cain, an MSHA special investigator assigned to investigate the case. In the months that followed the miner attempted on numerous occasions to contact Mr. Cain to check on the status of his discrimination case. In November 1998, after first being told that his case file had been lost, the miner was informed that his case file had been transferred to an individual named Ethel Horton in MSHA's Arlington, Virginia headquarters.

Apparently, the miner had several conversations with Horton and also sent her letters. He indicated that during this time period he was in constant contact with MSHA, but no one ever called him back. According to our investigation, at some point in July 1999, *12 months following the filing of his discrimination complaint,* the miner was finally contacted by an attorney representing the Solicitor's Office. The attorney apparently told the miner that one of the "major hurdles" in his case was MSHA's investigation under section 110(c) of the Mine Act of the miner's alleged responsibility for the violations involving truck 627. Then, it was not until *7 more months had elapsed* that the Solicitor's Office saw fit to file an application for temporary reinstatement with the Commission in February 2000. The reinstatement case was heard that month by a Commission administrative law judge, who within 3 days ordered the miner reinstated to his job at the same rate of pay and benefits he was receiving prior to his discharge. The judge's decision was appealed by the operator and was unanimously affirmed by the Commission.

On May 17, 2000, after a lengthy review of the case, I filed a disciplinary referral pursuant to Rule 80(c), requesting that the Commission investigate whether attorneys subject to the Commission's disciplinary rules were involved in, what had been up until that time, an unheard of delay in the filing of the miner's temporary reinstatement application. The language used by the majority today vindicates that referral. Upon receipt of the disciplinary referral, Commission Procedural Rule 80(c) mandated that the Commission conduct an inquiry into the allegations raised in the referral to determine whether disciplinary proceedings were warranted. 29 C.F.R. § 2700.80(c).

The majority analyzes the Secretary's delay in filing for temporary reinstatement of the miner as composed of two separate and distinct delays. That is, a 12-month delay from the filing of the discrimination complaint until the time the Solicitor's Office claims it became involved, and an additional 7-month delay after the Solicitor's Office took the case. The majority feels that the initial delay can be attributed solely to MSHA, with the Solicitor's Office only responsible for the latter delay. Based on the Solicitor's Office own admissions, I completely disagree with the majority's conclusion that the Solicitor's Office was not involved in this case during the first 12 months of the delay. For purposes of clarity in discussing the matter, however, I will discuss the delays separately.

A. The Initial 12-Month Investigatory Delay

According to the majority, further disciplinary proceedings are not warranted here because it found

> no basis for referring this matter to one of our judges under Rule 80. Instead, we have discovered a significant misapplication of section 105(c), compounded by inexcusable administrative delays in the handling of the miner's case, all of which reveals not an ethical lapse by any individual attorney, but rather a failure of the *system*.

Slip op. at 8 (emphasis in original). In essence, the majority is arguing that the Commission's investigation failed to uncover evidence that the 12-month delay could be attributed to any individual attorney.[2] In so doing, the majority sees fit to then place the blame for the delay in bringing the miner's case for reinstatement on the *system*. Apparently, they believe that placing the blame on the system adequately explains their decision to dismiss this case without conducting a complete inquiry into the roles of the individuals involved. With all due respect to the majority, its finding of a "system failure" [3] does not withstand even superficial scrutiny once the background of the Commission's "investigation" is examined.

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[2] Interestingly, the disciplinary referral filed in this case makes reference to circumstances that may warrant disciplinary action against "individuals" practicing before the Commission. In fact, the referral names at least two of the "individuals" who had some involvement in the case. To the extent that the majority has limited its inquiry to a search for information regarding a particular individual, they have failed to investigate the disciplinary referral properly.

[3] The majority's conclusion of a system failure is indeed curious. A system, as I understand its meaning, is defined as "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose." *Webster's Third New Int'l Dictionary* 2322 (1986). The system here is the Solicitor's Office, which is composed of various attorneys who provide legal representation to both MSHA and miners in 105(c) cases. Indeed, these individual attorneys within the Solicitor's Office are the "parts" that form the system the majority has examined. What puzzles me is how the majority can justify placing the blame for this delay on the system without first investigating the conduct of the *individual* attorneys who make up the system. These individuals make up part of the system the majority has chosen to admonish. By failing to investigate these individuals, the majority chastises the whole for what was clearly the fault of a few. In my view, the majority's "system failure" argument directly contravenes the "individual" responsibility envisioned by the ethical rules and regulations that govern the practice of law.

Much can be learned about the Commission's inquiry into the matter simply by considering the amount of time devoted to the investigation. The Commission's complete inquiry into the facts surrounding the entire 19-month delay encompassed a grand total of about 9 hours. With the exception of six meetings held by the Commission on this matter, the entire investigation consisted of an interview with the miner, and a meeting with former Solicitor of Labor Henry Solano and several representatives from the Solicitor's Office. Conversely, the Secretary claims that MSHA and the Solicitor's Office spent a total of 19 months investigating the matter. This gross disparity in investigation time is alarming, and in my opinion speaks volumes not only about the inquiry, but also the majority's decision to dismiss the case because of a lack of evidence.

In addition, the majority's conclusion that it could not find an ethical lapse by an individual attorney is highly questionable because the Commission never even asked the Solicitor's Office to account for, on the record, its attorneys' involvement in the case. At the outset of this proceeding, the Commission's Office of General Counsel (OGC) suggested that, because the Commission did not have sufficient facts to reach a determination whether formal disciplinary proceedings were warranted, we could order affidavits from attorneys in the Solicitor's Office. Such affidavits are contemplated by the Commission's disciplinary rules, and the Commission has, in the past, received affidavits during an inquiry into an alleged violation of the Commission's rule against ex parte communications. *See* 29 C.F.R. § 2700.80(c)(2); *Sec'y of Labor on behalf of Beavers v. Kitt Energy Corp.*, 8 FMSHRC 15, 16 (Jan. 1986)); *see also UMWA on behalf of Rowe v. Peabody Coal Co.*, 7 FMSHRC 1136, 1140 (Aug. 1985).[4]

I subsequently urged my colleagues to follow past Commission practice and submit a series of questions to certain individuals in the Solicitor's Office in an attempt to gather more information about who was involved in this case and what their respective roles were during the 19-month delay. The pertinent part of the draft order containing the questions that I proposed is Appendix A to this opinion. Unfortunately, the majority did not agree that such a request of officials in the Solicitor's Office was necessary, even though it may well have exposed the very evidence they now claim is lacking that any *individual attorney* was responsible for the delay in processing the miner's temporary reinstatement. I continue to believe that to even begin to understand how the Secretary could delay filing a temporary reinstatement application for 19 months, the Commission should have submitted via order a series of questions to the Solicitor's Office.

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[4] OGC also informed the entire Commission that Associate Solicitor of Labor Edward Clair had contacted the Commission by phone, apparently through then-Chairman Mary Lu Jordan's office, to suggest a meeting with the Solicitor to discuss the referral. At the time of the phone call I voiced very strong opposition to the receipt of any off-the-record information from Mr. Clair's office, because both he and his staff were within the scope of the Commission's investigation into the delay.

As part of our investigation my colleagues did agree to an interview of the miner, and from that interview we discovered a number of interesting facts. For example, we learned that during the 19-month delay the miner had interacted with at least eight different individuals employed by either MSHA or the Solicitor's Office. The miner provided the names of these individuals, along with multiple pages of typed notes that he stated were created contemporaneous to the phone conversations. This information was an excellent opportunity for us to direct particular questions to those individuals, particularly with regard to an issue the miner could not help with, which was whether anyone from the Solicitor's Office was involved with the case during the 12 months that MSHA was allegedly investigating the case. In spite of repeated efforts, however, I was unable to garner the support of the majority to submit questions to the Secretary's responsible representatives.

Further adding to the curiousness of the majority's decision to dismiss this case was the Solicitor's ever-changing explanation of how and why it took 19 months to investigate the miner's complaint and file a temporary reinstatement application. In affirming the administrative law judge's temporary reinstatement order, we requested a full explanation for the delay from the Secretary. In response, we received a letter from a staff attorney in the Solicitor's Office that provided a rather lengthy list of reasons for the 19-month delay, including: a lengthy investigation of the miner's allegations, requests for additional information by the district and the Solicitor's Office, a delay in forwarding the case to the Solicitor's Office in San Francisco, and a 7-month delay in reviewing and filing the temporary reinstatement application by the Solicitors's regional office. A majority of the Commission felt at that time that the information provided fell woefully short of what was expected, given the gravity of the situation.

The Solicitor then took another stab at curtailing the Commission's inquiry into the disciplinary referral by submitting to the Commission a letter where he took the position that, regardless how dilatory his office was in filing a temporary reinstatement application, it was an exercise of prosecutorial discretion and therefore not subject to the Commission's disciplinary rules. After that argument, not surprisingly, failed to persuade us,[5] the Solicitor and several representatives from his office eventually met with the Commission to discuss the disciplinary referrals. It was there for the first time that the Solicitor unveiled his latest explanation for the initial 12-month delay: the conflict of interest that he claimed precluded his office from pursuing temporary reinstatement for the miner during that time. According to the Solicitor, his office

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[5] As the majority recognizes (slip op. at 1 n.1), the Commission's disciplinary rules mandate that "[i]ndividuals practicing before the Commission and Commission Judges shall conform to the standards of ethical conduct required of practitioners in the courts of the United States." 29 C.F.R. § 2700.80(a). A common feature of the standards of conduct expected of a practicing attorney is that he or she will act with reasonable diligence and promptness in representing a client. *See, e.g.*, ABA, Model Rule of Professional Conduct 1.3 (2001). There is nothing in the concept of prosecutorial discretion which excuses attorneys from compliance with this requirement, least of all in a case where it took 19 months to file an application under a statute which contemplates that the decision to proceed will be made on an expedited basis.

made a decision to indefinitely forego pursuing temporary reinstatement for the miner because of an ongoing investigation by MSHA for possible 110(c) charges against the miner. He opined that while MSHA was investigating the miner for a potential 110(c) charge, the case presented a potential "conflict of interest" between the Solicitor's obligation to represent its client, MSHA, and their statutory obligation to pursue temporary reinstatement for the miner. Accordingly, the Solicitor's Office supposedly had a "hands-off" attitude toward the case during those 12 months, at the end of which it claims a decision was made not to file section 110(c) charges against the miner.[6]

When viewed in isolation, the Solicitor's latest explanation is more credible than the previous explanations his office provided for the delay. After all, few people would take issue with the Labor Department's top attorney ensuring that representatives of the Secretary do not have conflicts of interest in enforcing the various provisions of the Mine Act. Unlike my colleagues in the majority I am not willing to accept the Solicitor's newest explanation for the delay because I believe an objective review of several key points undermines the Solicitor's position that his office was not at all involved in the case during the first 12 months of the delay.

First, there is no getting around the fact that the conflict of interest explanation is simply the latest attempt by the Solicitor's Office to provide a reason to the Commission for the delay. It is indeed curious that the conflict of interest excuse was not offered until nearly 10 months had passed from the time the Commission first requested the Secretary to explain the delay, 5 months had elapsed after the settlement of the miner's case, and only after it had become apparent that the explanations offered in the staff attorney letter, the claim that the Commission was interfering with prosecutorial discretion, and phone calls to the Commission's headquarters failed to produce the desired result — a dismissal of the disciplinary referral.

In addition, the Solicitor did not point to a single document, public or private, which set forth the policy he advocated. MSHA makes available thousands of pages setting forth its policies under the Mine Act, yet neglects to inform the public regarding its "policy" of avoiding "conflicts" between section 110(c) cases and section 105(c) discrimination cases? As far as I am aware, the Solicitor's Office has never to this date alerted miners that even the mere investigation of a discrimination complaint by the Solicitor's Office must await the resolution of any potential section 110(c) charge. Given the circumstances, the Solicitor's tardy oral explanation to the Commission appears to be nothing more than a post hoc cover story.[7]

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[6] In spite of MSHA's claim that it determined that the miner was not liable under section 110(c), our investigation revealed that a representative of the Solicitor's Office, inexplicably, continued to cite the section 110(c) investigation to the miner as a reason why the miner should settle the case.

[7] While the Solicitor was silent on why this explanation was not initially provided to the Commission, the majority opines that the reticence was based on privacy and ethical considerations. Slip op. at 6 n.5. This does not explain, however, the failure of MSHA and the

Finally, and most importantly for future cases, to the extent the Solicitor's position regarding the subject temporary reinstatement application is the actual policy of his office, it creates an extremely troubling situation whereby *any* miner's right to temporary reinstatement can be trumped by the Solicitor's obligation to represent MSHA in section 110(c) actions. This hierarchical scheme, advanced by the Solicitor, creates an absurd result that certainly has no bases in the law.[8] On this important point, I could not agree more with my colleagues in the majority who state "the Solicitor's policy could have the effect of *severely limiting* the temporary reinstatement provisions from the Mine Act." Slip op. at 6 (emphasis added).[9] The Solicitor could not be more mistaken in his claim that the conflict in this case will be rare because it can only arise where an agent of an operator is involved. The Solicitor's position on this issue is a threat to *all* miners, and not just supervisory personnel who often become targets of MSHA's section 110(c) investigations, because the Secretary has repeatedly attempted before this Commission to expand the definition of "agency" under the Mine Act. Therefore, under the Solicitor's supposed approach, *any* miner the Secretary believes could be held to be an "agent" of

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Solicitor's Office to inform the miner why the Secretary was taking so long to act on his discrimination complaint or a temporary reinstatement application. Moreover, as the majority itself recognizes, the Solicitor's Office refuses to acknowledge that it had an attorney-client relationship with the miner in this case. Without the attorney-client relationship, the ethical obligations that govern that relationship do not attach, so the majority is not only speculating when it attempts to excuse the Solicitor's actions by reference to ethical and privacy considerations, but contradicting the Solicitor as well.

[8] The section 105(c) discrimination provisions are replete with time limits, in most cases quite severe. *See, e.g.,* 30 U.S.C. § 815(c)(2) (requiring miners to file discrimination complaints within 60 days of the alleged discrimination, the Secretary to commence investigation of the complaint within 15 days and to apply for temporary reinstatement on an expedited basis, and the Commission to order immediate reinstatement if the complaint is not frivolous); 30 U.S.C. § 815(c)(3) (requiring Secretary to notify miner within 90 days of miner's complaint whether Secretary has found the miner to have been discriminated against, and giving miner 30 days from that to file his own complaint with the Commission if the Secretary did not so find). In light of this clear Congressional intent, one simply cannot take seriously the Solicitor's position that the Secretary can sit on a discrimination complaint indefinitely while a section 110(c) investigation is conducted.

[9] The irony in the majority's observation, however, is that their decision to dismiss this case without further inquiry to determine the real cause for the delay in reinstating the miner will have the same practical impact on miners. After its decision, how many miners will be willing to raise safety complaints when their right to prompt temporary reinstatement under the Mine Act has proven to be illusory?

the operator, such as rank and file mine examiners,[10] is subject to investigation and potential charges under section 110(c). The net effect of the Solicitor's position on this issue would be, at worst, elimination of the miner's right to temporary reinstatement, and at best a financially crippling delay in the processing of temporary reinstatement cases.

I say "would be" because I hope that once the majority's decision is issued miners nationwide, and their representatives, will be alerted to the consequences the Solicitor's policy will ultimately have on the right to temporary reinstatement. Hopefully, this will force the Solicitor's Office to rethink its position (if indeed it spent any time initially thinking about the issue). If that occurs, perhaps there will be a limit to the damage inflicted on the temporary reinstatement provisions of the Mine Act by the Solicitor's imprudent attempt to mask in a cloak of ethical conduct his office's failure to properly handle a case.[11]

B. The Additional 7-Month Delay in Filing the Application

My colleagues in the majority do not feel that the points I have raised concerning the validity of the Solicitor's various explanations are serious enough to warrant additional inquiry into the individual attorneys' real role in this case during the first 12 months of the delay. Regardless of the position they take on that portion of the delay, they admit that the Solicitor's Office was fully engaged in a representative capacity for the miner during the last 7 months of his ordeal.

In fact, various admissions made by representatives of the Solicitor's Office suggest that it was actively involved in the case at least as early as July 1999.[12] For example, in the letter

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[10] Miners, either rank and file or supervisory, can also become entangled in this trap in situations arising out of sections 110(e), 110(f), 110(g), and 110(h) of the Mine Act. For example, we have held that even rank-and-file miners qualify as "agents" under the Mine Act when they perform examinations mandated by law. *See Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-96 (Feb. 1991); *Mettiki Coal Corp.*, 13 FMSHRC 760, 772 (May 1991).

[11] Unfortunately, the temporary reinstatement case here is not all that unique. Existence of delays in other MSHA Western District cases, discrimination and otherwise, are evident from the Commission's reported decisions both before and after the 19-month delay in filing the miner's temporary reinstatement application. *See, e.g., Sec'y of Labor on behalf of Bussanich v. Centralia Mining Co.*, 22 FMSHRC 153, 153-54 (Feb. 2000) (miner had filed three discrimination complaints in previous 3 years, none of which Secretary had acted upon); *United Metro Materials*, 23 FMSHRC 1085 (Sept. 2001) (ALJ) (dismissal of civil penalty proceeding in fatality case because Secretary did not issue proposed penalty assessment until December, 2000, which was 14 months after citations had issued), *rev. directed*, Oct. 26, 2001.

[12] Of course, there is no way for the majority to determine with any degree of certainty how early in the process the Solicitor's Office became involved in the case. As the majority

from the Solicitor's Office staff attorney in response to the Commission's initial request for information, the agency readily admitted that the case was in the San Francisco Regional Solicitor's Office for *7 months* prior to the filing of the temporary reinstatement, and that this caused the case to be "unnecessarily delayed." Moreover, the Solicitor himself admitted it during his January 2001 presentation to the Commission, and Commission staff verified this in their interview with the miner.

Of course, the Solicitor had an explanation for the seven month delay also — that his office needed to conduct a further investigation into the miner's claim. He claimed that during those 7 months, his office wrestled with the strength of the case, as it was a difficult case to determine whether or not to seek temporary reinstatement.

I find the majority's wholesale acceptance of the Solicitor's explanation (slip op. at 7) puzzling for several reasons. To begin with, the majority fully recognizes that when the Solicitor's Office allegedly received this case in July 1999, MSHA had just completed a *12-month* investigation into the matter to determine whether charges would be brought against the miner under section 110(c). After a year-long investigation, what on earth could possibly have been left for the Solicitor's Office to investigate? Even if we were to assume that an additional investigation was needed, how can the majority justify the Solicitor's Office taking 7 months to complete it, particularly when, as Commission staff who interviewed the miner reported, no more that four employees of the operator where involved, *including* the discriminatee himself?

Moreover, the majority must recognize the transparency of the Solicitor's claim that his office wrestled with the strength of the temporary reinstatement case. After all, they understand the Solicitor's burden in terms of bringing a case for temporary reinstatement. In fact, they recently commented on this very issue in *Bussanich*:

> "[t]he scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738 (11th Cir. 1990). . . . The Mine Act's legislative history defines the "not frivolously brought" standard as indicating that a miner's "complaint appears to have merit." S. Rep. 95-181, at 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624.

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admits, "we are not certain when MSHA decided not to pursue section 110(c) charges against the miner." Slip op. at 6. Again, this lack of information is a direct result of the majority's refusal to pursue the investigation.

22 FMSHRC at 157.

Furthermore, before the meeting with the Solicitor the Commission was informed of facts involving this case that were exactly the opposite of what the Solicitor argued. There was no dispute regarding the existence of adverse action, as the miner was terminated. The miner had red tagged a truck and refused to certify new miners as trained because he was not qualified to do so, textbook examples of protected activity. Evidence also supported the miner's assertion that he repeatedly complained about the truck, but was met with inaction on the company's part, if not outright hostility. Based on the closeness in time between the most apparent protected act, red tagging the truck, and the miner's firing, motivation could be presumed for purposes of temporary reinstatement. The miner's complaint was therefore anything but frivolous, and I can see no reason why MSHA and the Solicitor's Office delayed moving quickly to get the miner temporarily reinstated. In addition, even if the Secretary were to later determine that the miner had not been discriminated against, the Commission's rules require a judge to dissolve a temporary reinstatement order at the Secretary's request. *See* 29 C.F.R. § 2700.45(g).

Finally, the Solicitor himself undercut his claim that closeness of the case merited a 7-month investigation by his office. He reported in his presentation to the Commission that he was not pleased with the length of time it took to seek reinstatement, and that, according to his review, there were periods of time during the 7-month "investigation" for which there was no appropriate accounting.

Against the backdrop of a previous 12-month investigation by MSHA, admissions of a failure to timely act by the Solicitor's and his staff attorneys, independent evidence regarding the strength of the miner's case, and a recognition of the minimal burden placed on the Solicitor in temporary reinstatement matters, I simply do not understand the majority's decision to dismiss this case without conducting further inquiry into the conduct of the Solicitor's Office. Perhaps my colleagues misunderstand their role under Rule 80. Our undertaking here is not to sit as a trier of fact to determine *if* there was misconduct on the part of an attorney in the Solicitor's Office. Instead, as stated earlier, our sole responsibility it is to conduct an *complete* and *impartial* inquiry into these disciplinary referrals. And, we must also complete an objective evaluation of the evidence we discover during the inquiry. Only then, if the evidence warranted, would we submit the matter to a judge to determine *if* misconduct occurred.

Do my colleagues in the majority believe that 7 months is an acceptable period of time for a miner to sit at home without income after being discharged for seeking to exercise his rights under the Mine Act? If not, they owe it to the nation's miners, whether they be rank-and-file or not, to conduct a complete investigation in this proceeding, instead of simply accepting the unsupported assertions of the Solicitor's Office.

In essence, my colleagues have elected to end this important investigation under Rule 80 and then dismiss this case because the cursory investigation did not bear fruit. In other words, the majority ran into a dead end of its own making. This decision, in my opinion, should be

viewed as a disappointment to both industry and labor. In addition to the chilling effect the majority opinion will have on miners exercising their rights under section 105(c), the decision also provides a basis upon which individuals in the private sector, who have been investigated and disciplined under Rule 80, can question our ability to objectively review the conduct of the Department of Labor's attorneys.

For the foregoing reasons, I respectfully dissent.

Robert H. Beatty, Jr., Commissioner

APPENDIX A

Commission Procedural Rule 80(c)(2) expressly authorizes the Commission to require persons to submit affidavits setting forth their knowledge of circumstances relevant to its inquiry into whether disciplinary proceedings are warranted. *See* 29 C.F.R. § 2700.80(c)(2). Pursuant to Commission Procedural Rule 80(c)(2), we direct Associate Solicitor of Labor Edward P. Clair, San Francisco Regional Solicitor Daniel W. Teehan, and San Francisco Regional Solicitor's Office attorney Christopher B. Wilkinson, each to supply a sworn affidavit fully addressing each of the items that follow.

1. Provide a detailed chronology of the facts relating to the processing of [the miner's] discrimination complaint from the time that [he] initially filed a complaint with MSHA until the application for temporary reinstatement was filed.

2. Provide a complete, detailed description of your personal involvement in connection with the processing of [the miner's] discrimination complaint in the case within the time frames you have identified in response to question 1.

3. Provide a detailed description of any and all personal contact that you had with [the miner] within the time frames you have identified in response to question 1.

4. Identify any attorney, or staff personnel to whom [the miner's] case has been assigned at any time, or who were involved in any way and for any length of time in work related to [his] discrimination complaint.

5. Identify any individuals who were in custody of materials in [the miner's] case file, or any other materials related to or stemming from [his] discrimination complaint. Describe the length of time each person possessed such materials, and the reason these materials were in the custody of each person. If these materials were not in any person's custody during certain time periods, please describe where these materials were located during such periods, how long they were in each location, the reasons why these materials were in each location, and any other circumstances surrounding their presence in each location. Provide the earliest date where communication between MSHA and members of the Solicitor of Labor's staff occurred relating to [the miner's] discrimination complaint and/or the decision to file a petition for temporary reinstatement. Please identify the individuals involved in this contact, and the substance of any discussions which occurred.

6. Describe and provide information regarding each communication between MSHA and attorneys or other members of the Solicitor of Labor's staff which in any way relates to the processing of [the miner's] discrimination complaint and/or petition for temporary reinstatement. Include the substance and outcome of any such discussions.

7. Did the investigation into [the miner's] discrimination case and/or relating to the application for temporary reinstatement differ substantially from other Mine Act discrimination cases investigated and presented to the Solicitor's Office? If so, please provide facts to support your conclusion.

8. Did the procedure involved in the processing of [the miner's] discrimination case and/or temporary reinstatement application, following the investigation, differ substantially from the procedures normally followed by the Solicitor's Office in other Mine Act discrimination cases? If so, please provide facts to support your assertion.

10. To the best of your knowledge, describe any other circumstances which contributed to the delay in the filing of a temporary reinstatement application on [the miner's] behalf.

Distribution

Edward P. Clair, Associate Solicitor
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., Room 6003
WASHINGTON, D. C. 20006-3867
Telephone No.: 202-653-5454
Telecopier No.: 202-653-5030

January 3, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 2000-157 A. C. No. 34-01707-03532
v.	:	
GEORGES COLLIERS INCORPORATED, Respondent.	:	Mine: Pollyanna No. 6

DECISION

Appearances: Christopher V. Grier, Esquire, and Brian Duncan, Esquire, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Secretary;
Elizabeth M. Christian, Esquire, San Antonio, Texas, for the Respondent.

Before: Judge Barbour

The captioned proceeding was severed from the cases with which it was consolidated and was stayed pending the filing of an associated section 110(c) proceeding (*see Georges Colliers, Inc.*, 23 FMSHRC _____, Docket No. CENT 1999-178, etc., (December 26, 2001), Slip op. 5 n. 1 (CALJ Barbour)). While the case was stayed the parties agreed to settle the section 110(c) proceeding. Thus, when the section 110 (c) proceeding was filed, a motion to approve the settlement also was filed. I granted the motion, approved the settlement, and dismissed the section 110 (c) proceeding (*Alva D. Lawley, employed by Georges Colliers, Inc.*, Docket No. CENT 2001-157 (August 30, 2001)). The parties also filed stipulations with regard to the captioned case. The stipulations, together with stipulations entered before the case was stayed, effectively limit the case to a single issue -- the effect of any civil penalty assessed on the Respondent's ability to continue in business.

In *Georges Colliers, Inc.*, 23 FMSHRC ____ Docket No. CENT 1999-178, etc., (December 26, 2001) (Slip op. 45), I concluded that the imposition of proposed civil penalties would adversely affect the company's ability to continue in business and that a substantial reduction in what I otherwise would assess was warranted. The evidence upon which the conclusion was based is applicable to the captioned proceeding (Slip. op. 43-44). Given the evidence, I reiterate my conclusion and find that the size of the penalty assessed herein will adversely affect the company's ability to continue in business.

In light of the parties stipulations, which are incorporated herein by reference, and in light of my conclusion regarding the ability to continue in business penalty criteria, I make the following assessment:

Citation/ Order No.	Date	30 C.F.R.	Proposed Penalty	Assessed Penalty
7599496	8/18/99	72.620	$1,250.00	$250.00

The violation was very serious and the Respondent's negligence was high. The violation was abated in a timely fashion. Given the large history of previous violations; the small size of the operator; and the effect of the penalty on the Respondent's ability to continue in business, I assess a penalty of $250.00 for the violation.

ORDER

The Respondent **IS ORDERED** to pay a civil penalty of $250.00 within 30 days of the date of this decision and upon full payment this proceeding is **DISMISSED**.[1]

David F. Barbour
Chief Administrative Law Judge

Distribution:

Christopher V. Grier, Esquire, Office of the Solicitor, U.S. Department of Labor, 525 South Griffin St., Suite 501, Dallas, TX 75202

Brian A. Duncan, Esquire, Office of the Solicitor, U.S. Department of Labor, 525 South Griffin St., Suite 501, Dallas, TX 75202

Elizabeth M. Christian, Esquire, 7940 Pipers Creek Road, Suite 1812, San Antonio, TX 78251

[1] Payment may be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 360250M, PITTSBURGH, PA 15251.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 3, 2002

TILDEN MINING COMPANY L.C., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. LAKE-2001-94-RM
v.	:	Citation No. 7841254;1/31/2001
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA Respondent	:	Docket No. LAKE 2001-95-RM Citation No. 7841255;1/31/2001
	:	Docket No. LAKE 2001-96-RM Citation No. 7841256;1/31/2001
	:	Docket No. LAKE 2001-97-RM Citation No. 7841257;1/31/2001
	:	Docket No. LAKE 2001-98-RM Citation No. 7841258;1/31/2001
	:	Docket No. LAKE 2001-99-RM Citation No. 7842159;1/31/2001
	:	Docket No. LAKE 2001-100-RM Citation No. 7842160; 1/31/2001
	:	Docket No. LAKE 2001-101-RM Citation No. 7842161; 1/31/2001
	:	Docket No. LAKE 2001-102-RM Citation No. 7842162; 1/31/2001
	:	Docket No. LAKE 2001-103-RM Citation No. 7841263; 1/31/2001
	:	Docket No. LAKE 2001-104-RM Citation No. 7841264; 1/31/2001
	:	Docket No. LAKE 2001-105-RM Citation No. 7841265; 1/31/2001
	:	Docket No. LAKE 2001-106-RM Citation No. 7841266; 1/31/2001
	:	Docket No. LAKE 2001-107-RM Citation No. 7841267; 1/31/2001

: Docket No. LAKE 2001-108-RM
: Citation No. 7841268; 1/31/2001
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: Docket No. LAKE 2001-109-RM
: Citation No. 7841269; 1/31/2001
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: Docket No. LAKE 2001-110-RM
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: Docket No. LAKE 2001-121-RM
: Citation No. 7841281; 1/31/2001
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: Docket No. LAKE 2001-122-RM
: Citation No. 7841282; 1/31/2001
:
: Tilden Mine
: Mine ID 20-00422

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for the Contestant;
Christine Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Secretary.

Before: Judge Weisberger

Statement of the Case

These consolidated cases are before me based on Notices of Contest filed by Tilden Mining Company, L.C., (Tilden), challenging the issuance by the Secretary of Labor of various citations alleging violations of 30 C.F.R. § 14107(a). Pursuant the notice, the cases were heard in Marquette Michigan on June 12 and 13, 2001. Subsequent to the hearing, the parties each filed Proposed Findings of Fact and a Brief. The parties also filed replies to their adversary's initial filings.

Findings of Fact and Discussion

I. Background

1. Tilden mines and processes ore bearing iron into iron ore pellets.

2. These cases involve guarding conditions at the tail pulley on 14 No. 22 conveyors, the head pulleys on four of the No. 26 conveyors, the take-up and wrap-over pulleys on 13 of the No. 26 conveyors, and the tail pulley on the 26-A conveyor, all located in the balling area of the Pellet Plant at Tilden. Balling attendant, maintenance workers, and lube technicians work in this area.

3. Concentrate containing 65% iron, a fluxing agent, and a binder is fed into balling drums by each of the No. 22 conveyors — Nos. 22-1 through 22-14. There is one such conveyor for each balling drum. The drums form the concentrate into "green balls" or "unfired" pellets for further processing.

4. These balls exit the drums and proceed through a "scalper" or sizing mechanism onto one of the No. 26 conveyor belts — Nos. 26-1 through 26-14. There is one such conveyor for each balling drum.

5. These belts deposit the balls onto either the Nos. 26-A, 26-B, 26-C or 26-D conveyor belts.

6. The Nos. 26-1 through 26-14 conveyor belts, and the No. 26-A conveyor belt are at an intermediate level in the plant below the level where the No. 22 conveyors and the balling drums are located.

7. The washdown level of the Pellet Plant is located below the intermediate level where the No. 26 conveyors are located. There is a bin area on a level above the main balling drum floor.

8. There are two areas of balling lines. One is called "Tilden 1" and the other is called "Tilden 2". Tilden 1 contains balling line Nos. 1 thru 7 and Tilden 2 contains balling line Nos. 8 thru 14. These lines are located on opposite sides of the same level of the plant. The area immediately between them is open to the washdown floor.

9. These balling mill lines, with their associated conveyors, were installed in the 1970s.

10. The guarding on the various pulleys that was in place at the time of the inspections at issue had been inspected by MSHA on numerous occasions. The guarding on the No. 22 tail pulleys was raised to its current height in 1980 as a result of an MSHA inspection and had been approved by MSHA inspectors at the time. Based on the uncontradicted and unimpeached testimony of Bradley Nelson, Tilden's plant repairman, I find that approximately seven years ago these guards were reduced in height to lighten them to make them easier to move.

11. The conveyors and the guarding at issue were routinely inspected twice a year by MSHA inspectors, and no citations for the No. 22 conveyor tail pulleys, the No. 26 head pulleys, the No. 26 take-up and wrap-over pulleys, and the No. 26-A tail pulley had been issued since 1980.

12. During his September, 2000 inspection, MSHA inspector Steve Field gave a verbal advisory to Douglas Brazeau, an agent of Tilden, that guards along the No. 22 line of conveyor belts were inadequate.

13. However, Field did not give specific advice as to each numbered conveyor. However, he advised Brazeau to extend the guards on any conveyor on the No. 22 line of conveyors that was "... similar to... the No. 22 conveyor we looked at.". (Tr. Vol. I, 29)

14. Brazeau asked Field how long Tilden had to get the extension of the guard done, and Field told him, if they were not extended they would be cited in a follow-up inspection.

15. Brazeau did not start to change these guards because he had not completed the job of modifying other guards cited before Field returned to further inspect the plant.

16. It take one or two days to make a set of guards for a tail pulley.

17. In December, 2000, MSHA inspector Dan Hongisto reminded Jim Paquette, another agent of Tilden, regarding Field's earlier advisory, in September 2000, pertaining to improving some guarding that he had found to be inadequate. Hongisto told Paquette that he expected that Field would issue citations if these conditions were not corrected. However, Hongisto did not identify the specific conveyors at issue.

18. In late December, 2000, Paquette told Leonard Parker, Tilden's manager of safety and environment about the conversation he had with Hongisto regarding the latter's concerns about guarding at the Tilden Mine.

19. Parker and Paquette then made a general inspection of the Tilden pellet plant balling area, the area of the subject citations, of the adequacy of the guards to prevent accidental or inadvertent contact, and determined that the existing guards were adequate.

20. In late January 2001, Field inspected the Pellet Plant.

21. On February 2, 2001, Field issued the 29 citations which are at issue in these proceedings and which involve alleged violations of 30 C.F.R. Section 56.14107(a). He based his determination on his belief that Section 56.14107(a) required guarding that would prevent all contact with the moving parts of the cited No. 22, and No. 26 conveyor belts in the general area of the cited belts.

22. The areas that were cited along the No. 22 conveyor line in January, 2000, were the same as those that had been identified by Field in his September, 2000 advisory to Brazeau.

II. The validity of the Citations at Issue

At issue in these consolidated cases is the validity of 29 citations alleging violations by Tilden of 30 C.F.R. Section 56.14107(a) which provides that "[m]oving machine parts shall be guarded to protect persons from contacting ... drive, head, tail, and take-up pulleys ... and other similar moving parts that can cause injury". (Emphasis added.) The cited violative conditions relate to the tail pulleys on the No. 22 conveyors, the head pulley on a No. 26 conveyor, the head, take-up and wrap-over pulleys on the No. 26 conveyors, and the tail pulley on the left side of the 26-A conveyor belt. In essence, the weight of the evidence establishes, with regard to all cited conditions, that, either due to the existence of guards in place, including mesh guards, rails, and other structures, or the location of the moving machine parts in relation to miners accessing the area, contact with the moving machine parts was unlikely. Indeed, it was stipulated to by the parties, prior to the hearing, that all the citations allege that the likelihood of injury is "unlikely". (Jt. Ex.. 1, par. 9).

A. The Secretary's Position

It is the Secretary's position, as set forth in her Post-Trial Brief, that regarding all the cited conditions, although contact with moving parts may have been "unlikely", they were not in compliance with Section 14107(a), supra, because the conditions were such that a person could have made contact with the moving machine parts. In support of its position, the Secretary argues that, (1) its enforcement action is consistent with the language of the standard and the protective purposes of the Act; (2) that legislative history demonstrates congressional intention to prevent, not merely to minimize violative conditions; (3) that the Secretary's interpretation best promotes the protection of Tilden's miners, as excluding the cited guards would thwart the protective purposes of the Act; (4) that, accordingly, the Secretary's interpretation deserves deference; and (5) that the Mine Act provides for liability without fault[1].

For the reasons that follow, I do not find much merit in the Secretary's arguments and find that it has not been established that the cited conditions were in violation of Section 14107(a) supra.[2]

1. The Preamble to Section 56.14107(a), supra, and MSHA's Program Policy Manual

In support of its position that, in essence, the Section 56.14107(a), supra, requirement for guarding is not limited to situations of protection against inadvertent or accidental contact, but encompasses conditions where contact can be made, the Secretary strongly relies on the preamble to the Federal Register ("preamble") which contains a discussion and summary of the final promulgated version of Section 56.14107(a) (56 Fed. Reg. 32509, Aug. 25, 1988). The preamble notes that some commenters suggested that "... the standard also permit an exception for situations where the exposed moving parts are 'located out of reach' " (id.). The next sentence of the preamble states as follows: "[h]owever, this phrase would create uncertainty as to the standard's application." In not accepting the exception urged by the commenters, the preamble states as follows: "[u]nder the final rule, the standard applies where the moving machine parts can be contacted and cause injury." (Id.)

The preamble further notes that some commenters believed "... that guards should provide protection against inadvertent, careless, or accidental contact, but not against deliberate

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[1]The Secretary also argues that because estoppel does not operate in enforcement proceedings, this doctrine can not be applied to defeat the validity of the citations at issue. Inasmuch as I did not take estoppel into account in reaching a decision in these cases, it is not necessary to further discuss this argument.

[2]In light of this conclusion it is not necessary to make a decision regarding the Secretary's argument that the inspector appropriately deemed Tilden's negligence to be high regarding the cited conditions at the No. 22 belts.

or purposeful actions. ...[and that] guards which totally enclose moving parts [are] counterproductive to other safety considerations ... ." (Id.) After noting this opinion, the preamble sets forth the following language:

> [i]n reviewing the statistics in which persons working in mines have lost hands, arms, legs, and their lives to moving machine parts, MSHA notes that in most of those instances the persons were performing deliberate or purposeful work-related actions with the machinery. The installation of a guard to enclose the moving machine parts would have prevented most of those injuries." (Id.) (Emphasis added.)

Thus, it would appear that it was recognized in the preamble that guarding is required not to prevent all contact but would be limited to preventing either deliberate work-related actions or purposeful work-related actions. In the instant proceeding no evidence has been adduced as to any scenario wherein contact with moving parts could result from situations where a miner is engaged in the performance of either deliberate or purposeful work-related actions. While contact can physically be made with the moving parts at issue, there is no evidence relating such contact with the performance of either deliberate actions or purposeful work-related actions.

I am cognizant of the second sentence of the preamble regarding the objective of Section 56.14107(a) supra, as follows: "The Standard clarifies that the objective is to prevent contact with these [moving] machine parts." (Id.) However, it is clear that the expressed objective was not to prevent all contact as this word was omitted from this sentence. Further, the scope of contact to be guarded against appears, as noted above, to be based on statistics concerning injuries resulting from moving machine parts, and thus appears to be limited to those contacts resulting from either deliberate or purposeful work-related actions.

In addition, the Secretary relies upon MSHA's Program Policy Manual ("PPM") which contains the following language pertaining to Section 56.14107(a), supra: "[a]ll moving parts identified under this standard are to be guarded with adequately constructed, installed and maintained guards to provide the required protection" (Jt. Ex. 1, par. 26). However, it is most instructive, that, regarding when Section 56.140107(a) supra, should be cited at conveyor locations the PPM provides as follows: "[t]his standard is to be cited when a guard at conveyor locations does not extend a distance sufficient to prevent any part of a person from accidentally getting behind the guard and becoming caught, or in those instances when there is no guard at the conveyor-drive, conveyor-head, conveyor-tail, or conveyor take-up pulleys" (Emphasis added.) (Jt. Ex.1, par. 26). Thus the PPM does not provide, as argued by the Secretary, that Section 14107(a), supra, is to be cited in all situations where persons can contact moving parts that cause injury. Rather it indicates that Section 14107(a), supra, is to be cited where an existing guard is not sufficient to prevent accidental conduct, or where there is not any guard present.

Thus, the preamble and the PPM relied on by the Secretary do not unequivocally establish that Section 14107(a), supra, was intended to require guarding to prevent all contact.

2. Deference

In essence, it is the Secretary's argument that the Metal Non-Metal Division of MSHA interprets Section 56.14107(a) supra, as encompassing guarding against any contact not just merely accidental contact, and that this interpretation must be deferred to. In this connection, the Secretary cites case law that established that an adjudicatory body should give great deference to an agency's interpretation of a regulation promulgated by the agency, and that this interpretation must be accepted as long as it is not plainly erroneous or inconsistent with the language or purpose of the regulation (see, Martin v. OSHRC, 499 US 144, 148-149 (1991), and other Court of Appeals and Commission cases cited on pages 31 and 32 of the Secretary's Brief). However, the Secretary has not set forth with any precision or particularity, the specific citation and embodiment of its authoritative interpretation of the scope of Section 56.14107(a) supra. In this connection, the Secretary cites the PPM and Preamble to Section 56.14107(a) supra, and argues, that "policy issuances, and the regulation's background," support her interpretation. It does not appear that these two documents are unequivocally supportive of the Secretary's interpretation (I(A)(1), infra). Nor is it asserted by the Secretary that the PPM and/or Preamble specially embody her interpretation and constitute her authoritative interpretation. Hence, the Secretary has not convincingly set forth the authoritative source of its interpretation, i.e., precisely where it is set forth, and what specific language does it contain. Further, the PPM and the preamble are not unambiguously consistent with each other, and consistent with the Secretary's argument set forth in its brief. (See, I(A)(1), infra.)

I take cognizance of the deference cases set forth on pages 31 and 32 of the Secretary's Brief. However, it is significant to note that the more recent cases, do not set forth a general rule that the adjudicatory body is mandated to defer to the Secretary's interpretation of the regulation, as long as that interpretation is reasonable and consistent with the Act. Instead these cases discuss various factors that must be considered in evaluating the weight to be accorded the Secretary's interpretation. In United States v. Mead 533 U.S. 218, 150 L. Ed. 2nd 292 [No. 99-1434], (June 18, 2001), the Court analyzed the degree of deference to be accorded an agency's construction of its statutory scheme under the doctrines enunciated in Chevron, U.S.A. Inc. v. Natural Resources Defense Council 467 U.S. 837 (1984). The Court, in Mead, 150 L. Ed. 2nd, supra, at 304, referring to Skidmore v. Swift & Co. 323 U.S. 134 (1944), stated as follows: "The fair measure of deference to an agency administering its own statute as been understood to vary with circumstances, and Courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position ... ." (Emphasis added.)

I note that Mead, supra, involved the issue of the degree of deference to be accorded an agency's interpretation of a statute, whereas the case at bar involves the degree of deference to be accorded an agency's interpretation of its own regulation. However, it would appear that the rationale in Mead, supra, setting forth that the degree of deference varies with the circumstances of the case, would seem to apply to equal force to the case at bar. Indeed, in Akzo Nobel Salt v. FMSHRC 212 F. 3rd 1301 (D.C. Cir. 2000), the Court of Appeals noted, in a split decision, that

the Commission's interpretation of 30 C.F.R. § 57.11050 was the same as that espoused by the Secretary before the Court of Appeals. The Court of Appeals in Akzo, supra, stated that generally it defers to an agency's interpretation of its own regulations, unless that interpretation is erroneous or inconsistent with the regulation. However, the Court of Appeals, in vacating the Commission's decision and remanding the matter to obtain from the Secretary her authoritative interpretation, qualified the general applicability of deference to the Secretary's interpretation as follows: "... we recognize that Courts defer to agency interpretations of ambiguous regulations first put forward in the course of litigation, but only where they 'reflect the agency's fair and considered judgement on the matter in question' Auer v. Robbins 519 U.S. 452, 462, 117 S. Ct. 905, 137 L. Ed. 2nd 79 (1997), Church of Scientology of California v. IRS, 792 F. 2nd 153, 165 (D.C. Cir. 1986) (Silberman, J., concurring);" (Akzo, supra, at 1304). Significantly, the Court in Akzo, supra, went on to reason as follows:

> In assessing the likely of such 'considered judgement' we have noted, for example, whether the agency had previously 'adopted a different interpretation of the regulation or contradicted its position on appeal,' National Wildlife Federation v. Browner, 127 F. 3rd 1126, 1129 (D.C. Cir. 1997), as, of course, the Secretary has here. Compare Association of Bituminous Contractors, Inc, v. Apfel, 156 F. 3rd 1246, 1252 (D.C. Cir. 1998), deferring to an agency's litigation position where it appeared simply to articulate an explanation of long standing agency practice. (Id.)

(See also, Nolichuckey Sand Co., Inc., 22 FMSHRC 1057, at 1062, (2000), citing Auer, supra, and Akzo, supra).

In the case at bar, if it is the Secretary's implicit argument that either its litigation position and/or the opinion of the inspector who issued the citation being contested, constitute the Secretary's interpretation that must be deferred to, this argument fails as it has not been established that these interpretations reflect MSHA's "considered judgment". The Court of Appeals in Akzo supra, in its analysis of an agency's considered judgement focused on whether the agency had previously adopted a different interpretation or whether it was articulating an explanation "... of long standing agency practice ... .". (Akzo, supra, at 1304.) In contrast, in the case at bar, the Secretary's litigation position and the interpretation of the issuing inspector, is not in harmony with MSHA's long standing agency practice. I note that the conditions cited have been in existence for several years and had not been cited in past inspections. Although an agency may change its policy (see, Thomas Jefferson University v. Shalala, 512 U.S. 504, 515-18 (1994), the Secretary herein has not articulated any rationale for her having changed her enforcement policy regarding citation of the conditions at issue. Such a change appears to be as a result of the thought processes of one individual, i.e., the issuing inspector, and that the Secretary's litigation position is a "*post hoc* rationalization", to which the Court of Appeals in Akzo, supra, indicated that it would not defer to. (Akzo, supra, at 1304-1305 citing Martin, supra, at 156.)

Therefore, although the Secretary's interpretative position has been considered, I find that it has not been established to be either a considered judgement of the agency, or unequivocally set forth in any authoritative interpretation. Thus, its position need not be deferred to.

B. The Commission's Decision in Thompson Brothers Coal Co., 6 FMSHRC, 2094 (1984)

Further, in evaluating the Secretary's position regarding the scope of Section 56.14107(a) supra, and its applicability to the conditions at issue, I am guided by the Commission's decision in Thompson Brothers Coal, Inc. 6 FMSHRC 2094 (1984), which involved the Commission's review of a decision by a Commission Judge (4 FMSHRC 1763 (September 1982)), who had found that the lack of guarding at certain fan-blades and air-compressor belts and pulleys located in front of a truck's engine, violated 30 C.F.R. Section 77.400(a) which, in essence, requires the guarding of moving machine parts "... which may be contacted by persons, and which may cause injury to persons ... .".[3] The Judge's conclusion was based upon the testimony of the inspector who issued the citations at issue, that a miner checking or repairing the engine while the truck was stationary and the engine was idle, could contact unguarded cooling fan and air compressor belts, and sustain an injury. 4 FMSHRC at 1763. In affirming the Judge, the Commission concluded that the guarding standard at issue (Section 77.400(a), supra.) "... contemplates guarding of machine parts subject to the standard where there is a reasonable possibility of contact and injury." (6 FMSHRC supra at 2096.) The Commission, in reaching its conclusion, reasoned that use of the word may in the key phrases in the standard at issue, i.e., "may be contacted" and "may cause injury", (Emphasis added.) "... introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended." (6 FMSHRC supra at 2097.) Significantly, the Commission went on to find as follows: "[W]e find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." (Emphasis added.) (Id.) The Commission further set forth that the application of this test, "cannot ignore vagaries of human conduct", and "... requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duty, and as noted, the vagaries of human

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[3]The Secretary, in a reply brief, argues that Thompson, supra, should not be relied upon in determining the scope of Section 56.14107(a), supra, since Thompson was decided under Section 77.400, supra, which introduces the element of probability of contact in its use of language requiring the guarding of moving parts "which may be contacted by persons", whereas Section 56.14017(a) supra does not have such language limiting its protection to parts which may be contacted but instead requires guarding to protect persons from contacting moving parts. Although the Secretary is correct in its comparison of the literal wording of Section 77.400, supra, and Section 56.14107(a), supra, I note that significantly, the preamble, relied on by the Secretary in its interpretation of the scope of Section 56.14107(a) supra, states that "... the Standard [Section 56.14107(a), supra,] applies where the moving machine parts can be contacted and cause injury." (Emphasis added.) The common meaning of can is "to have the possibility' (Random House Unabridged Dictionary, 2nd Edition (1998) at 302). Similarly, in common usage, the word may is "used to express possibility" (Random House, supra,at 1189). Significantly, Random House, supra, notes that can and may "... are frequently but not always interchangeable in senses indicating possibility ... .". (Random House, supra at 302). I thus find that although Thompson may not be conclusively relied upon as binding Commission precedent regarding its interpretation of the scope of Section 56.14107(a) supra, the guidelines it sets down for determining the applicability of a guarding standard apply with equal force as an analytical framework in evaluating the applicability of Section 14107(a), supra, to the conditions at issue.

conduct." (Emphasis added.) (Id.) In Thompson, supra, in concluding that the evidence established a reasonable possibility of contact and injury, and hence a violation under the cited guarding standard, the Commission noted following facts: (1) that on occasion mechanics could be called on the examine or work on the engines while the engines were idling; (2) that a miner checking or working on the engine while the engine was running could come in contact with any of the cited machine products; (3) that the operator's witnesses all agreed that contact was possible even though they regarded it as unlikely, and that "[a]t a minimum, contact could result from such causes as a sudden movement, stumbling, or momentary distraction or inattention". (Id). The Commission then summarized the facts presented which led to its conclusion as follows: "[G]iven the physical accessibility of the engine compartment, the fact that mechanics check and work on running engines, and that contact with the cited machine parts could occur, we conclude that a reasonable possibility of contact existed." (Id. at 2097.)

In the case at bar, all of the parts cited, were in area where, at times, miners were present. However, there is no evidence of any work duties of any miners that would require them to be in a situation where there was a reasonable possibility of contact with exposed moving parts. Specifically, there is no evidence in the record, in contrast to Thompson, supra, that miners are required to check and work on running equipment in areas of close proximity to the exposed parts.

1. The No. 22 Tail Pulleys (Citation Nos. 7841254 through 7841267, Docket Nos. LAKE 2001-94 through LAKE 2001-107)

Essentially, the record is clear that a miner could contact the tail pulleys at the twenty-two conveyor in spite of existing guarding and railing. However, in order to contact any moving parts, a miner would have had to approach the guard at approximately chest level and reach over and down in order to deliberately contact the moving parts. The top of the tail pulley itself was 10 inches below the top of the guard (not including the rail) and the pinch point where the belt went around the pulley was 24 inches below the top of the guard (not including the rail) and 13 inches horizontally away from the guard. Although persons have access to the floor grating, which is somewhat adjacent to the tail pulleys, there is no evidence in the record relating such awkward contact to any purposeful or deliberate work-related activity. The belts and pulleys are not in operation when maintenance is performed on the pulleys. Also, regular lubrication of the pulleys is performed by way of grease-lines that extend beyond the guards so that the guards fully protect a person performing this operation from contact with the pulleys.

On the other hand, Bradley G. Nelson, one of Tilden's plant repairmen who performs maintenance, testified that the belts are adjusted when the belt is in operation, by applying a wrench to bolts located on the tail pulleys. However, on cross-examination, he indicated that this maintenance is performed while the guards are still in place, inasmuch as the bolts protrude through holes in the guards and extend beyond the guards. Thus, protection is still provided to prevent contact with the pulleys.

Field opined that, despite the awkwardness of making contact with the pulley which could be physically accessed only by a miner reaching down 24 inches in a vertical distance then reaching out 13 inches in a horizontal distance, there could be inadvertent or accidental contact or contact through inattentiveness. Upon continuing cross-examination, he agreed that accidental conduct would have to be by somebody "walking by very close to the guard". (Tr. Vol II, 136), and that the normal walkway is on the right side of the conveyor. When asked whether miners would walk "right up against the conveyor" (id.), he said they could. However, significantly, he added in response to additional questioning, as follows: "I don't know that anybody would." (Tr. Vol I, 137). Thus, I find Field's testimony to be of insufficient probative value to establish that there was a reasonable possibility of accidental or inadvertent contact.

I note the testimony of Field that, regarding the No. 22-13 conveyor belt, that one "could stumble against the guard and fall into the pulley." (Tr. Vol I, 31) [4] Aside from this conclusionary, statement he did not explain the basis for his opinion. In the absence of any explanation for his opinion, it is difficult to understand how a person stumbling would have any part of his body go over an existing guard that was 50 inches high, extend a further 13 inches in a horizontal distance, and then extend downward approximately 10 inches to contact the top of the tail pulley.

In this vein, I note, the testimony of Leonard R. Parker, Tilden's manager of safety and environment, who worked on the installation of the conveyors at issue, that there would not be any potential for a person walking to the right of the conveyor, or behind the conveyor, and stumbling, to contact the conveyor tail pulley. I accord more probative value to Parker's opinion, rather than Field's opinion, as the former provided a clear basis for his opinion as follows: "I guess, put in simple terms, it's simple physics, a body in motion tends to stay in motion. If you are going parallel to the guard, you would fall forward going down and forward parallel to the guard, not into the guard." (Tr. Vol II, 39).

Taking into account all the above, I conclude that as a consequence of a lack of entire guarding of the tail pulleys at issue, injury from contact was unlikely, contact was unlikely, and that it has not been established that there was a reasonable possibility of contact with any of the moving parts of the No. 22 tail pulleys. Accordingly, I find that it has not been established that conditions at these areas violated Section 14107(a) supra. Hence, the Notice of Contest filed regarding Citation No. 7841266 is sustained. Since the parties agreed that the disposition of this citation should apply to the following citations: 7841254 through 7841267, the Notices of Contest filed regarding these citations are sustained.

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[4]However, Field conceded that the presence of a rail in the area would prevent somebody strumbling due to coming to contact with the tail pulley.

2. Head pulleys on the No. 26 Conveyors (Citation Nos. 7841268 thru 7841271, Docket Nos. 2001-108 thru 111)

Essentially, it is the Secretary's position that the head pulley, which is the subject of Citation No. 7841268,[5] was not sufficiently guarded because a person could contact the pulley or its pinch-point. This assertion is based upon (1) Field's testimony by that balling area attendants, lube technicians, and maintenance personnel could contact that head pulley, and (2) Nelson's testimony that he could contact the pulley. Specifically, he indicated that as he is 68 inches tall, he could reach upward approximately eight feet. However, the Secretary did not adduce any evidence relating any contact to any purposeful, deliberate or work-related activities. Further, even Field conceded that it was unlikely that a person could contact the pulley. Indeed, as explained by Tilden's witnesses, Parker, and James Paquette, whose testimony in these regards has not been contradicted, impeached, or rebutted, in order to contact the moving head pulley, a person would have to overcome the trip-cord, a conveyor belt, a pulley or an idler. I also find persuasive Paquette's testimony that due to the height of the pulley, being approximately 80 inches above the ground, it is doubtful that a person could contact the pulley if one were to fall down in the area.

Also, vertical and horizontal access to the head pulley was limited somewhat due to the presence of two vertical steel structures that left an opening between them of only eight to 10 inches measured on a horizontal plane. Moreover, since the pulley at issue is above another conveyor belt, and extends more than one foot beyond it, the emergency stop-cord on the lower belt would be between a miner and the head pulley at issue. Hence, the possibility of contact would be further limited.

For these reasons I find that although the head pulleys were unguarded, it has not been established that there was reasonable possibility of contact with these moving parts (see, Thompson, supra). Thus, I find that it has not been established that the conditions at the cited head pulleys violated Section 10407(a) supra, and the Notices of Contest regarding Citation Nos. 7841268 through 7841271 are sustained.

3. Take-Up and Wrap-Over Pulleys on the No. 26 Conveyor Belt (Citation Nos. 7841269 thru 7841281, Docket Nos. LAKE 2001-109 thru LAKE 2001-121)

Essentially, it is the Secretary's position that contact could be made with the take-up and wrap-over pulleys of the No. 26 conveyor line, and thus the citations issued for these violations should be affirmed.

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[5]Citation Nos. 7841270, and 7841271 also involve such a head pulley. The parties agreed that the decision regarding Citation No. 7841268 should also apply to Citation Nos. 7841269, 7841270 and 7841271.

Thirteen citations[6] involve the adequacy of guarding at sets of two wrap-over pulleys and one take-up pulley, which, in combination, act the keep tension on the conveyor belt located above these pulleys. The take-up and wrap-over pulley units were protected by railings or expanded metal guards on three sides. The bottom area of the take-up wrap-over pulley units located above a grating where a person might stand, are separated from the floor grating area by a double-rail (Citation Nos. 7841269, 7841271, 7841272, 7841275, 7841279, 7841280, and 7841281). In another cited unit there was a single-rail between the deck area and the take-up wrap-over pulley unit. (Citation No. 7841274.). A triple-rail was between the deck area and the take-up wrap-over pulley unit cited in Citation No. 7841277. Regarding the last four units cited (Citation Nos. 7841270, 7841276, 7841273, 7841278), a metal screen was between the deck area and the take-up wrap-over pulley unit.

a. The Wrap-over Pulleys

The grating or deck area was separated from the take-up wrap-over pulley unit by a steel I-beam 19 inches high. The front wrap-over pulley of each unit was 80 inches above the deck grating, and recessed back from the edge of a rail or screen by approximately one foot. The second wrap-over pulley was located behind the front wrap-over pulley and the take-up pulley. There was a limited amount of traffic in the area under the conveyor belt where the take-up wrap-over pulleys were located. However there is insufficient evidence in the record to establish a relation between purposeful or work-related activities in the area and contact with these pulleys. The areas were accessed by miners to perform lubrication. However, this operation was performed by way of extended grease-lines which permitted lubrication from the walkway parallel to the belt. Although there was a possibility of contact with the wrap-over pulleys, the evidence fails to establish that such contact would have been reasonably possible. (See Thompson, supra) Due to the height of the wrap-over pulley, being approximately 80 inches above the floor grating where a person would stand, even allowing for the vagaries of human conduct, the record does not establish any basis for a conclusion that these pulleys could have been contacted by a person stumbling or being careless or inattentive. The only way for a person standing next the mesh guard to contact the wrap-over pulley, would have been to reach around or under the railing or over the top of the railing one foot to make contact. There is nothing in the record relating the possibility of this type of contact to any purposeful or work-related activity.

b. The Take-up Pulleys

Each take-up pulley, located between two wrap-over pulleys, was only 36 inches above the level of the grating. However, for the most part, the tail pulleys were covered by a conveyor belt, and recessed two feet behind either railings or expanded metal screen guards. Further, contact with the take-up pulleys from below, i.e., from the deck were a person might stand, was limited due to the presence of either rails, or a metal screen. Moreover, the fact that the take-up pulleys were recessed two feet horizontally behind either railings or metal screen guards, would further

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[6]Citation Nos. 7841269 through 7841281.

limit the possibility of contact. Also, as set forth above, (III(C)(1)), there is no evidence relating the possibility of contact with the take-up pulleys through either purposeful or work-related activities. For all the above reasons I conclude that the record has failed to establish that there was any reasonable possibility of contact with either the wrap-over or the take-up pulleys that were cited.

4. The No. 26-A Conveyor Tail Pulley (Citation No. 7841282, Docket No. LAKE 2001-122)

The No. 26-A tail pulley that was cited was equipped with a guard that extended eight inches beyond the edge of the pulley. The pulley was located 64 inches above the floor grating, and approximately 12 inches from the edge of the floor grating. To contact the pulley, a person would have to lean forward or against the moving conveyor belt, reach around the existing guard and then reach toward the back of the pulley. Further, wheels on the conveyor belt would prevent a miner from positioning his body against the conveyor belt to reach the pulley. The record does not establish that such an awkward contact would have had any relation to the performance of purposeful or work-related activities. Indeed, extended grease-lines are provided. Also, the issuing inspector set forth in the citation at issue that foot traffic in the area was "slight". (Gx. 18.) It is also significant to note that the inspector, in the citation, indicated that contact was "unlikely". (Id.)

Taking into account all the above, I conclude that it has not been established that the conditions at the tail pulley of the No. 26-A conveyor belt were such that there was a reasonable possibility of contact with the tail pulley. Accordingly, I find that it has not been established that the cited conditions violated Section 56.14107(a), supra.

CONCLUSION

Based on all the above reasons, I conclude that the Secretary has failed to establish that any of the citations issued in these proceedings constituted violations of Section 56.14107(a) supra,[7]

[7]The parties stipulated that if it is found that there is no violation with respect to Citation No. 7841266, then Citation No. 7841254 thru 7841267 should be dismissed. Similarly, the parties stipulated, in essence, that should a finding be made of no violation regarding Citation Nos. 7841268, 7841270, and 7841272,a similar finding should be made regarding the following Citation Nos.: 7841269, 7841270, 7841271, 7841273 7841275, 7841276, 7841278, 7841279, 7841280, and 7841281.

ORDER

It is **Ordered** that the Notices of Contest regarding the following Citations are sustained: Citation Nos. 7841254, 7841255, 7841256, 7841257, 7821258, 7841259, 7841260, 7841261, 7841262, 7841263, 7841264, 7841265, 7841266, 7841267, 7841268, 7841269, 7841270, 7841271, 7841272, 7841273, 7841274, 7841275, 7841276, 7841277, 7841278, 7841279, 7841280, 7841281, and 7841282. It is also **Ordered** that the following Docket Nos. are **Dismissed**: Docket No. LAKE 2001-94 thru and including Docket No. LAKE 2001-122.

Avram Weisberger
Administrative Law Judge

Distribution: Certified Mail

Henry Moore, Esq., Buchanan Ingersoll, One Oxford Centre, 301 Grant Street, 20th Fl. Pittsburgh, Pennsylvania

Christine Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn Street, 8th Floor, Chicago, Illinois

/sc

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

January 4, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-297
Petitioner	:	A. C. No. 15-16470-03503 YIF
v.	:	
	:	Burke Branch Tipple
SIMP-A-LEX,	:	
Respondent	:	

DEFAULT DECISION

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On November 30, 2001, I issued an Order to Show Cause to the Respondent ordering it to show cause within 21 days of that order why a default decision should not be issued in this case. For the reasons set forth below, I find that the Respondent is in default and order the payment of the civil penalty proposed by the Secretary.

On October 1, 2001, I issued a Prehearing order to the parties directing a response not later than November 2, 2001. The order was sent to the parties by Certified Mail-Return Receipt Requested. The Respondent's return receipt card shows that the order was signed for by "Betsy Bentley" on October 4, 2001.

The Secretary, by counsel, filed a Motion for Default Judgment on November 7, 2001. In the motion, counsel stated that he had contacted Jerry Bentley, the former manager of Simp-A-Lex, and the person who responded to the Petition for Assessment of Civil Penalty. Mr. Bentley reiterated to counsel what he had stated in the Answer to the petition, that the company was no longer in business and the principal owner of the company was deceased. Mr. Bentley indicated that neither he nor anyone else was in a position to pursue litigation on behalf of the company. Counsel advised him that if that were the case, he should inform the judge that the company wanted to withdraw the contest of the citations in this case. Mr. Bentley stated that he would do so.

When he had not received anything from the company, counsel for the Secretary filed the motion for default. The judge has not received either a request to withdraw from the proceeding, a response to the Secretary's motion or any other communication from the Respondent.

Commission Rule 66(a), 29 C.F.R. § 2700.66(a), requires that "[w]hen a party fails to comply with an order of a Judge . . . an order to show cause shall be directed to the party before the entry of any order of default or dismissal." Rule 66(c), 29 C.F.R. § 2700.66(c), provides that "[w]hen the Judge finds a party in default in a civil penalty proceeding, the Judge shall also enter an order assessing appropriate penalties and directing that such penalties be paid."

The show cause order was sent to the Respondent by Certified-Mail, Return Receipt Requested and by regular mail. The green return receipt card shows that it was received on December 3, 2001, and was signed for by "Amanda Blackburn." The order stated in bold faced print that: "Failure to respond within the time provided will result in the issuance of a Default Decision affirming the citations and assessing a penalty of $50,113.00." To date no response has been received.

ORDER

Accordingly, it is **ORDERED** that the Respondent, Simp-A-Lex, is found to be in **DEFAULT** in this matter, that Citation Nos. 7368306, 7368307 and 7368308, alleging violations of sections 48.25, 48.31 and 77.1605(b) of the Secretary's Regulations, 30 C.F.R. §§ 48.25, 48.31 and 77.1605(b), respectively, are **AFFIRMED** and that the company is **ORDERED TO PAY** a civil penalty of **$50,113.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215

Jerry Bentley, P.O. Box 688, Allen, KY 41601

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041
January 8, 2002

NATHAN B. HARVEY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 2001-38-D
v.	:	HOPE CD 2000-01
	:	
MINGO LOGAN COAL COMPANY,	:	Mountaineer Mine
Respondent	:	Mine ID 46-06958

DECISION

Appearances: Nathan B. Harvey, Complainant, Man, West Virginia, *pro se*;
Mark E. Heath, Esq., Heenan, Althen & Roles, LLP, Charleston, West Virginia, and Anne Wathen O'Donnell, Assistant General Counsel, ARCH COAL, Inc., St. Louis, Missouri, for Respondent.

Before: Judge Hodgdon

This case is before me on a Complaint of Discrimination brought by Nathan B. Harvey against Mingo Logan Coal Company under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). A hearing was held in Logan, West Virginia. For the reasons set forth below, I find that the Complainant was not discharged by Mingo Logan because he engaged in activities protected under the Act.

Harvey filed a discrimination complaint with the Secretary of Labor's Mine Safety and Health Administration (MSHA), pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on November 17, 2000.[1] On January 30, 2001, MSHA informed him that, on the basis of its investigation, it had determined that "a violation of Section 105(c) of the Act has not occurred." Harvey then instituted this proceeding with the Commission, under section 105(c)(3), 30 U.S.C. § 815(c)(3), on February 6, 2001.[2]

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[1] Section 105(c)(2) provides, in pertinent part, that: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

[2] Section 105(c)(3) provides, in pertinent part, that: "If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his

(continued...)

Background

Mingo Logan operates the Mountaineer Mine complex in Mingo County, West Virginia. The complex is made up of two underground coal mines, one in the upper seam, known as the Lower Cedar Grove, and the other in the bottom seam, known as the Alma A. There is a 50 foot buffer between the two seams, but the mines are entered by a common portal. Mining is by continuous mining, room and pillaring and longwall methods.

Nathan Harvey began working at the mine on March 31, 1993. He was hired because he had electrical training and because he was certified, by the state of West Virginia, as a foreman. During his time with the company he also became a certified electrician. For the most part, he performed duties as an electrician, although on occasion he was asked to act as a foreman. Harvey was fired on September 28, 2001.

As a result of his termination, Harvey filed a discrimination complaint against the company. In it, he stated: "I feel I was discriminated against because I complained to management about being rock dusted, illegal equipment move practices and being forced to participate in them by management, which was a safety hazard." He later asserted at the hearing that he had also expressed concern "about how much dynamite they were shooting at the Alma Mines (*sic*)." (TrI. 178.)[3]

Findings of Fact and Conclusions of Law

In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (November 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983); *Secretary on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (August 1984).

The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it

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[2](...continued)
own behalf before the Commission . . . ."

[3] A separate transcript, beginning with page 1, was prepared for each day of the hearing. The transcript for September 5 will be referred to as "TrI." and the transcript for September 6 will be referred to as "TrII."

nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

I find that Harvey has failed to demonstrate that he engaged in protected activity. I further find that, even if he did engage in protected activity, he did not show that his discharge was motivated in any part by that activity, while the Respondent has convincingly established that the discharge was in no part motivated by such activity.

Did Not Engage in Protected Activity

Rock Dusting Complaint

The Complainant testified that sometime in 1998, he was sent by his foreman, John Morgan, to move some equipment and then to clean power distribution boxes for the belt heads in the two and three mains. He stated that during the time he was performing these tasks, the area he was working in was rock dusted. As he described it, "while I was cleaning in the boxes and stuff, when I got through, I looked out and I couldn't see because of the dust. I couldn't breathe, so I had to finally get over to fresh air." (TrI. 92.) Harvey believed that this was done to him intentionally.

The evidence, however, is to the contrary. In the first place, almost all of the witnesses testified that at least once in their career they had been rock dusted. None believed that it had been done to them intentionally; all felt that it had been accidental. Furthermore, everyone knew, including Harvey, that if they found themselves being rock dusted, they were to go to fresh air.

With regard to the specific incident involving the Complainant, Benny Lee Blankenship, Harvey's brother-in-law, testified that he was the one doing the rock dusting that night and that he did not intentionally rock dust the Complainant. Morgan, who had nothing to do with the rock dusting, stated that he tried to find Harvey during the shift and could not. He denied that he deliberately sent Harvey to work in an area that was being rock dusted.[4]

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[4] Morgan testified that:

> I was trying to find him because it had been quite a while since I'd heard from him and I couldn't locate him, and I guess about 6:00 he came out and I asked him where [he]'d been. He said, "You know where I've been." I said, "No, I don't or I wouldn't be asking." He said "I've been up working in the rock dust where you

(continued...)

Carlos Porter, the shift foreman, testified that rock dusting was normally done on the weekend, but that this was "an isolated incident. We had a dusty condition that needed to get some rock dust on." (TrII. 55.) He further stated that he was surprised that Harvey had been rock dusted because Harvey was "a certified foreman, and everybody knows it's a standard policy that if you get in rock dust, to get in the intake and get out of the rock dust . . . ." (TrII. 53.)

The Complainant has not cited any rules or regulations that prohibit rock dusting while miners are working in the mine.[5] Nor am I aware of any. Harvey has taken what was plainly an unfortunate accident and attempted to turn it in to a personal vendetta. While complaining to management about rock dusting when others are in the mine could be construed to be a safety complaint, even though it is not prohibited, it is apparent in this instance that what Harvey was complaining about was not that it was unsafe, but that it was done to him on purpose.

There is no evidence to support that claim. Indeed, the evidence is overwhelming that it was not intentional. Thus, it is apparent that Harvey was not making a safety complaint at the time of the incident, but has decided since his termination that that was what he was doing. I conclude that he was not engaging in protected activity at the time. Further, it is obvious that this incident, which occurred at least three years earlier, is much too remote to be connected to his discharge even if it were protected activity.

Equipment Move Practices

Harvey testified that he conducted equipment moves in the mine and thought he was doing a good job. However, he claimed that he later started getting concerned because people in the mine were saying that the moves were not being performed legally. To make sure he was doing it correctly, he stated that he asked Porter to talk him through a move. Even though Porter informed him, after having Harvey relate to him how he conducted a move, that he was doing it correctly, he began refusing to act as a foreman on moves. Although Harvey asserted at the hearing that he did this because he still thought the move procedure was unsafe, he admitted that he told his supervisors that it was because he did not get paid for it. (TrI. 101, 139.)

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[4](...continued)

> sent me." And I told him, I said, "No, Nathan, I didn't send you to work in the rock dust. You could have come outby. You could have went to fresh air intake. I did not intend for you to work in no rock dust."

(TrI. 223-24.)

[5] He requested that I take judicial notice of section 75.321, 30 C.F.R. § 75.321, which deals with "Air Quality." (TrII. 55-56.) That regulation clearly has no application to rock dusting.

There is nothing in the record to support Harvey's allegations on this issue. Indeed, the evidence is compelling that, contrary to his assertion, he refused to perform equipment moves because he felt that he was not being paid for being certified both as an electrician and a foreman. For instance, on April 23, 1999, foreman Malcolm Walls put the following in a memorandum:

> On 4-23-99 we had 3 scoops to move. The outby hourly certified foreman was off. Informed Nathan Harvey that Jim Davidson would be the new electrician & you would be the move foreman. He stated he would not be the move foreman. I ask why not and he replied that he didn't want to use his foreman papers.
>
> I told him that we paid him to use all his certificates. He said they didn't pay him for being a certified foreman & he said he still didn't want to use his certificate.

(Resp. Ex. 4.) When Walls reported this to Porter, Porter called Harvey in and asked him about it. In the Incident Report that Porter wrote up after the discussion, he noted that Harvey "said we should pay him an hour more to use his certification." (Resp. Ex. 5.)

Porter had a follow-up meeting with Harvey on April 27. Porter then wrote the following in an Incident Report:

> I called Mr. Harvey in to discuss the problem about him not wanting to be the foreman on equipment moves.
>
> I asked Nathan why he didn't want to move equipment[.] I got the same reply as I did on 4-23-99, I don't want to use my foreman's certification, I don't get paid enough and I don't like the responsibility of being the foreman[.] I then said well that's the way you feel about the matter and he said yes it is.

(Resp. Ex. 6.) Porter then had Harvey moved to another section where he worked only as an electrician and did not have to use his foreman papers.[6]

These memoranda are particularly significant because they were written at the time of the incident when no one at the company had a knowledge that Harvey would be making a discrimination complaint. No where is there any mention that Harvey believed the moves were being conducted unsafely.

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[6] Interestingly, as a result of Harvey's complaint, electricians with foreman papers were given a 10 cents an hour raise beginning in August 1999.

If Harvey really believed that the moves were unsafe, after Porter informed him he was performing them correctly, there is no evidence that he ever told that to management. Porter, who no longer worked for Mingo Logan at the time of the hearing, testified that Harvey never claimed that the moves were unsafe. (TrII. 48.) Perhaps even more significantly, Harvey surreptitiously made three tape recordings of conversations he had with four supervisors. These conversations occurred with Porter in August 1998, (Comp. Ex. 7, Resp. Ex. 16.),[7] with Gary Griffith, maintenance supervisor, in March 2000, (Comp. Ex. 8, side A, Resp. Ex. 17), and with Griffith and David Runyon, Mine Manager, in March 2000, (Comp. Ex. 8, side B, Resp. Ex. 18). In all three of the tapes Harvey's aversion to using his foreman papers to conduct moves was discussed. In none of them does he claim, or even intimate, that he believes that the moves are not safe and that is why he refuses to make them.

The evidence supports the company's position that Harvey refused to use his foreman's papers for monetary, not safety, reasons. Accordingly, I conclude that Harvey did not engage in protected activity concerning equipment moves. Furthermore, even if Harvey's actions did qualify as protected activity, since the alleged complaints occurred in 1998 and 1999, there is not a coincidence in time between the protected activity and the adverse action.

Mingo Logan's Blasting Practices

Harvey testified that "I had made some complaints because of the shots that were going on at Alma, and there was a lot of talk between the men that they were shooting way too hard and way too much and that somebody was going to get hurt." (TrI. 106.) He admitted, however, that he was not involved in the shooting. (TrI. 176.)

Harvey claimed he informed an MSHA inspector about the blasting and that the inspector later came to the mine and issued some citations concerning blasting violations. He also stated in his opening statement, (TrI. 7), although not when he testified under oath, that he complained to a mine foreman about the blasting.

If Harvey, in fact, made such complaints, they would clearly be protected activity. Inasmuch as he did not mention this activity when he filed his discrimination complaint, however, it is doubtful that, if he had any concerns at all about the company's blasting policies, he never did more than voice them to other miners. There is no evidence that he ever complained to management about it or that management was in any way made aware of his concern.

Although Harvey admitted that he did not tell management that he believed the company was blasting unsafely and that he was not aware that the MSHA inspector had told management that he was the miner who had complained, (TrI. 171-72), he hypothesized that two foreman may have seen him talking to the inspector and "that Mingo Logan assumed I had called" the

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[7] The Complainant's exhibit is the tape of the conversation, the Respondent's exhibit is a transcript of the tape.

inspector. (TrI. 109.) However, one of the two foremen that he named testified credibly that he recalled that the inspector in question inspected the mine on several occasions but that he did not recall seeing Harvey talking with him. (TrII. 7-9.)

Thus, even if Harvey did complain to MSHA about blasting safety, there is no evidence that the company management was aware of his complaints. Accordingly, I find that Harvey did not engage in protected activity with regard to his alleged blasting complaints.

Discharge Not the Result of Protected Activity

The evidence does not support the Complainant's claim that he engaged in protected activity. However, even if Harvey's unsupported claims are accepted at face value, he has offered no evidence to connect his activity with his discharge. As nearly as can be discerned, none of the activity occurred in proximity to his dismissal. On the other hand, the record conclusively substantiates Mingo Logan's claim that it fired Harvey because of his "bad attitude" and not because of any safety complaints made by him.

It appears that initially Harvey was viewed as a good employee, but that about three years prior to his termination, his attitude began going downhill. As Porter, who worked with him the entire time he was at the mine, testified:

> It got really bad. You couldn't do anything to help him. It was like he had a grudge against the world, a chip on the shoulder type attitude.
>
> He showed it by anything you tried to do to help him, he didn't get along with employees anymore, his co-workers, he didn't get along with them. He didn't get along with his foremen, and like I said, I talked to him several times about it, and there was no helping him. He didn't want any help.

(TrII. 37-38.) Griffith testified:

> His attitude just changed. He went from having an acceptable attitude and trying to do what I considered a decent job to one of just not caring, not wanting to do what he was assigned to do, and just didn't care whether he done anything or not. He just appeared to be irate all the time. So it went from acceptable to very poor.

(TrI. 259.)

The record is replete with evidence of miners telling their supervisor that they did not want to work with Harvey, of Harvey refusing to speak to supervisors, even going so far as not acknowledging receipt of work assignments, of his failing to check back with supervisors to find out his next assignment after completing one, of supervisors having to check up on him to make sure he was doing his job and of his otherwise uncooperative attitude.

Harvey's actions on his final day of work, which precipitated his discharge, provide a good example of the reasons for his termination. On the morning of September 27, he was assigned to go to the Alma mine with another electrician to work on some belts that were down. When he got to the Alma entrance he delayed getting into the mantrip to go into the mine. Harvey admitted that he caused a delay, but claimed that he was just "clowning around." (TrI. 116-17.) Evidently, he was the only one who thought it was funny, because the foreman at the Alma mine reported the incident to Harvey's supervisor, Bob Tilley.

Later that day in the electricians' shop, Tilley instructed Harvey to get his gear together to go underground to work on another belt. According to Tilley, Harvey reacted to these instructions by taking small, slow steps toward his locker, while looking at the ceiling. As a result, Tilley, who, had been receiving complaints about Harvey for three or four weeks, "was upset with the way [Harvey] walked to the back room" and "already had one foreman complaining to me that morning about him," called Harvey into his office for a meeting. (TrI. 318.)

Tilley, who even the Respondent admitted was one of the easiest-going foreman at the mine, began by asking Harvey "why he wouldn't talk to [him] or the other men and why he wasn't doing his job like he should." (Resp. Ex.. 9, TrI. 318.) Harvey responded by complaining that he was always assigned the worst jobs and that Tilley did not consider him as good as an electrician as the other men. Harvey concluded by stating that "he would start doing his job when he was treated like everyone else." (Resp. Ex. 9.)

Tilley, still aggravated by Harvey's attitude, reported the matter to Griffith, his supervisor. When Griffith heard the story, he "couldn't believe it" since he considered Harvey's response to be insubordination. (TrI. 274.) As a result, Griffith went to Runyon and recommended that Harvey be discharged. Runyon did not want to do that because the company had a shortage of electricians. Instead, he decided to have a meeting with Harvey to give him a chance to agree to change his attitude, straighten up and try to be a better employee.

Runyon, Griffith and Buddy Johnston, Mingo Logan's Human Resources Manager, met with Harvey on September 28. Runyon testified that he began the meeting by going through the three year history of the company's problems with Harvey's attitude, noting that his attitude had gotten progressively worse to the point that no one wanted to work with him. Runyon then told Harvey that the problem had become so serious that something had to be done, that his attitude had to change. Harvey responded: "I don't have a bad attitude; you-all got a bad attitude." (TrII.

106-7.) When Runyon asked Harvey if he understood how serious the situation had become, Harvey said: "You're telling me I'm fired. Are you telling me I'm fired?" (TrII. 105.)

In response to this, Runyon reiterated that the purpose of the meeting was not to fire Harvey, but to get him to commit to changing his attitude. Again Harvey asked: "Are you telling me I'm fired?" At that point, Johnston, who thought that Harvey was being very combative and antagonistic, said: "Is that what you want, Nathan? Do you want us to fire you?" (TrI. 197, TrII. 106.) As this type of dialogue continued, it became apparent that no progress was being made, so the three men asked Harvey to step out of the room.

The three supervisors then discussed what had occurred. Johnston and Griffith were of the opinion that Harvey had to be discharged. Runyon wanted to give him one more chance to say that he would try to improve. They called Harvey back in. Runyon testified that:

> I moved my chair from around the desk. I got real close to him where I could see him, you know, eyeball to eyeball, and I said, "Nathan," I said, "Buddy, do you understand how serious this is today? I'm telling you your problems, what you got. I went through this whole conversation and I've explained everything to you." I said, "We're at the crossroads here. We've got to have change today." I said, "It can't go on like this." I said, "We have to have something change today." I said, "We can't have your attitude like this no more. You're going to have to commit to me you're going to change."

(TrII. 110.)

Harvey's response was, "Are you firing me?" (TrII. 110.) Runyon then asked Harvey if he wanted to resign and when he said he would not, told him that he was fired. Harvey got up and said, "Fine. You'll hear from my lawyer," and left. (TrII. 110-11.)

Johnston and Griffith corroborated Runyon's testimony. They agreed that Harvey never acknowledged that he had an attitude problem or agreed to make any changes. Harvey's testimony does not differ in any major respects from the company's testimony on this meeting. (TrI. 118-20.) Nevertheless, if it did, I would credit the testimony of Runyon, Johnston and Griffith.

The Company has established that about three years before his termination, Harvey began displaying what can only be characterized as a bad attitude. He refused to serve as a foreman on equipment moves, not because he thought they were unsafe, but because he felt he should be paid extra for doing them. When his request to trade shifts with another electrician was turned down, he even went so far as to go to the personnel office and request that the additional pay that he was receiving for acting as a foreman on equipment moves be stopped since he was no longer going

to perform that function. When questioned by management about this, he responded: "You scratch my back, I'll scratch yours." (Comp. Ex. 8, Resp. Ex. 18 at 1.)

Supervisors frequently had to check up on Harvey to find out what was taking him so long to do a job or to make sure he had completed a job. On at least one occasion, he refused to go back to the surface to find out what additional work needed to be done, after completing an assigned task, and when the electrician he was working with insisted on doing so, he called the electrician "a big suck." (TrII. 14.) By the time he was fired, he had trouble with every supervisor he had worked for and even his fellow electricians told their foremen that they would rather work alone than work with him.

The company's evidence in this case that Harvey was fired for his bad attitude and not because of any protected activity he may have engaged in is both considerable and credible. Perhaps the best indication of the veracity of Mingo Logan's evidence is that the tapes which Harvey secretly made of three conversations with company management personnel all corroborate the testimony of the company witnesses, rather than Harvey.

Conclusion

Harvey has failed to show either that he engaged in protected activity or that he was discharged for engaging in that activity. Harvey's being accidentally rock dusted, while unfortunate, was not engaging in protected activity. His concern with equipment moves was primarily monetary, but even if he also really had safety concerns, those concerns were either not conveyed to management or were adequately responded to by management. His problem with blasting seems to have arisen after his discharge, and to be based mainly on hearsay and supposition. Nonetheless, if he really did have such concerns, there is no evidence that they were ever communicated to anyone in management. In addition, there is no concurrence in time between any of this activity, most of which occurred several years earlier, and the discharge. In contrast, the Respondent has amply demonstrated that Harvey was fired because of his longstanding bad attitude and not because of any protected activity in which he may have engaged.

Order

Accordingly, since the Complainant has not established that he was discharged for engaging in activity protected under the Act, it is **ORDERED** that the complaint of Nathan B. Harvey against Mingo Logan Coal Company is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Nathan B. Harvey, P.O. Box 14, Main WV 25635

Mark E. Heath, Esq., Heenan, Althen & Roles, 1380 One Valley Square, P.O. Box 2549, Charleston, WV 25329

Anne Wathen O'Donnell, Assistant General Counsel, Arch Coal, Inc., CityPlace One, Suite 300, St. Louis, MO 63141

/nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 15, 2002

PRONGHORN DRILLING COMPANY, Applicant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
v.	:	DOCKET NO. EAJ 2001-4
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent:	:	Formerly WEST 2000-537-M / 538-M A. C. Nos. 48-00837-05501 N5Y 48-00837-05502 N5Y
	:	Smith Ranch Project

DECISION

Before: Judge Melick

This proceeding is before me upon the application of the Pronghorn Drilling Company (Pronghorn) for an award of fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, the "EAJ Act." Pronghorn prevailed over the Department of Labor's Mine Safety and Health Administration (MSHA) before trial by summary decision in the underlying penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (1994) the "Mine Act." The EAJ Act provides that a prevailing party may be awarded attorney's fees unless the position of the United States is substantially justified or that special circumstances make an award unjust. *Secretary v. Black Diamond Construction Inc.*, 21 FMSHRC 1188 (November 1999). The Supreme Court has defined substantially justified as "justified in substance or in the main," or a position that has a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1998). In *Pierce*, the Supreme Court set forth the test for substantial justification as follows:

> "A position can be justified even though it is not correct and we believe it can be substantially, "*i.e.,* for the most part" "justified if a reasonable person could think it correct, if it has a reasonable basis in law and fact." *Id.* at 566n.2. The Court also noted that certain "objective indicia" such as the terms of a settlement agreement, the stage of the proceedings at which the merits were decided and the views of other Courts on the merits can be relevant to the inquiry of whether the government's position was substantially justified. *Id.* at 568. In proceedings under the Act, the agency bears the burden of establishing that its position was substantially justified. *Lundin v. Mecham,* 980 F.2d 1450, 1459 (D.C. Cir. 1992).

In the underlying proceeding under the Mine Act, the Secretary charged independent contractor, Pronghorn, with Mine Act violations at the Smith Ranch Project, owned and operated by Rio Algom Mining Corporation (Rio Algom) and arising out of an accident which killed truck driver Philip Robideoux. Pronghorn and Rio Algom filed motions for summary decision in the underlying proceedings based on the claim that the Secretary was without jurisdiction under the Mine Act. The motions for summary decision were granted by decision dated September 7, 2001, and the Secretary did not seek review.

The rationale for the decision is set forth below:

> Whether the "Smith Ranch Project" is a "mine" depends on whether it meets the definition set forth in Section 3(h)(1) of the [Mine] Act. Section 3(h)(1) provides as follows:
>
> > "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

In connection with their motions for summary decision the parties have reached joint stipulations on the jurisdictional issue and more particularly regarding the processes and activities involved in uranium recovery at the Smith Ranch Project. The process utilized at the Smith Ranch Project is described in an article entitled, "The Smith Ranch Uranium Project" published in the Uranium Institute Twenty Second Annual International Symposium 1997, and authored by R. Mark Stout and Ennis E. Stover (SJ Exhibit No. 2). For purposes of this decision however, it is sufficient to note, and it is undisputed, that the mineral here at issue, *i.e.*, uranium, is extracted in liquid form without any workers underground.

As previously noted, Section 3(h)(1)(A) of the Act defines "coal or other mine" as "[a]n area of land from which minerals are extracted in nonliquid form or, *if in liquid form, are extracted with workers underground.*" (emphasis added). It is therefore beyond dispute that the Smith Ranch Project at issue herein is not a "mine" within the meaning of Section 3(h)(1)(A) of the Act.

The Secretary nevertheless argues that Rio Algom's processing of this mineral, which has been extracted in liquid form without workers underground, is covered under Section 3(h)(1)(C) of the Act as "the milling of such minerals." "Coals or other mine" is there defined to also include ". . . structures, facilities, equipments, machines, tools, or other property, . . . used in, or be used in, or resulting from, with workers underground, *or used in, or to be used in, the milling of such minerals . . .*" (*emphasis added*).

It is well established that "[w]hen the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails." *W. Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989). If it is plain on its face, effect should be given to its clear meaning. *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990).

Under the clear and plain language of Section 3(h)(1)(C) those milling operations covered under the Act are only those involving the milling of "such minerals," *i.e.,* "minerals extracted from their natural deposits in nonliquid form, or if in liquid form, with workers underground." Clearly when the adjective "such" is used to modify the noun "minerals" it qualifies the word "minerals" limiting it to only those minerals previously qualified in the statute, *i.e.,* only those minerals extracted from their natural deposits in nonliquid form, or if in liquid form, with workers underground.

The adjective "such" sometimes serves a useful purpose, as where it saves having to repeat a concept that cannot be referred to in a word or two. In statutes and regulations, for example, it may be necessary to make clearly that the second reference is exactly the same concept mentioned previously. The word "such" is the simplest way to do so. *See People v. Jones*, 46 Cal 3d 585, 250 Cal Rptr 635, 759 P2d 1165 (1988). The legislative history is also consistent with this construction. As that history reflects, the definition of mining was intended to encompass the milling process, but only those operations "related" to minerals defined by and incorporated into the Act's provisions.

Within this framework of law it is clear that the operations here at issue, whether or not they constitute "milling" within the meaning of the Act, are excluded from coverage under the Act and the Secretary has no jurisdiction in

these proceedings. Accordingly all citations herein must be vacated and these civil penalty proceedings dismissed.

23 FMSHRC at 1042-1044.

Pronghorn asserts that it is entitled to the requested award because the position of the Secretary was not "substantially justified in law or fact," and that its assertion is fully supported by the summary decision. I agree. The clear and plain language of the Mine Act as applied herein limits jurisdiction to only operations involving the milling of minerals extracted from their natural deposits in nonliquid form, or, if in liquid form, with workers underground. When it has never been disputed that the mineral at issue herein is extracted in liquid form with no workers underground there is no ambiguity and no room for debate. Indeed, the Secretary had no reasonable basis in law or fact to assert jurisdiction in the underlying proceedings. Accordingly the Secretary's position was not "substantially justified." In light of the plain and clear language of the jurisdictional statute, I cannot find that "reasonable people could genuinely differ" over this issue.

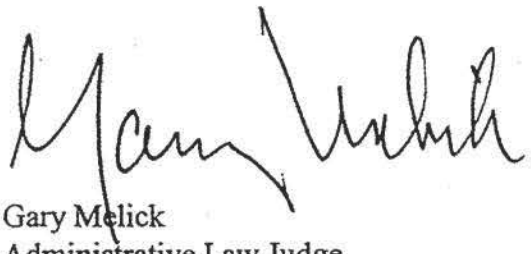
In reaching these conclusions I have not disregarded the Secretary's argument that she had a reasonable basis to proceed herein because neither the owner of the Smith Ranch Project, Rio Algom, nor the Applicant herein, independent contractor Pronghorn, had claimed at the time of the accident that the Secretary did not have jurisdiction and that they challenged her lack of jurisdiction only after litigation had commenced. The Secretary has also argued that MSHA had been conducting inspections at the Smith Ranch Project for years, apparently without being challenged for lack of jurisdiction by either Rio Algom or Pronghorn. I give such arguments but little weight, however, since following an unreasonable interpretation over several years or the acquiescence by lay persons who may be ignorant of the law in the Secretary's enforcement actions, does not transform an unreasonable interpretation into a reasonable one. See *F.J. Vollmer Company, Inc. v. Magaw (BATF)*, 102 F.3d 591 (D.C. Cir. 1996).

The Secretary also argues, however, that even assuming, *arguendo*, that her position in the underlying cases was not substantially justified, an award under the Act should nevertheless be denied because special circumstances make an award unjust. See 5 U.S.C. § 504(a)(1). She argues that such an award would be unjust because Pronghorn has been relieved of civil penalties only because the Secretary mistakenly believed that MSHA, not OSHA (Occupational Safety and Health Administration) had jurisdiction over the accident. She notes that she is now statutorily time-barred from bringing action under OSHA jurisdiction. See 29 U.S.C. § 658(c). This argument presumes, however, that Pronghorn was in fact guilty of violating some unidentified OSHA standards. Because of the early dismissal of the underlying penalty proceedings by summary decision no evidence was heard on the merits concerning any violations and accordingly the argument is indeed presumptuous.

The Secretary's argument is also patently absurd. According to her argument, an award would be unjust where she has wrongly and unreasonably asserted jurisdiction in the underlying case, thereby depriving herself of the opportunity to litigate. The Secretary also cites the case of

Mester Mfg. Company v. INS, 900 F.2d 201, 204 (9th Cir. 1990) in support of her argument that an award would be unjust. *Mester* did not, however, address this particular issue and it is therefore inapposite.

In summation I conclude that the Secretary has failed to sustain her burden of proving that her position in the underlying case was substantially justified or that an award in this case would be unjust. Accordingly, Pronghorn is entitled to an award under the EAJ Act. The Secretary does not challenge the Applicant's requested fees, costs and expenses of $50,942.45, through September 2001. I have reviewed the application and find that the listed fees, costs and expenses are allowable. Since those fees, costs and expenses apply only to the period through September 2001, however, a final order will not be issued in this case until a final application has been submitted by stipulation or otherwise and ruled upon by the undersigned. Such application must be submitted to this judge on or before January 31, 2002.



Gary Melick
Administrative Law Judge

Distribution: (By Certified Mail)

Sean P. Durrant, P.C., Palmerlee & Durrant, LLC, 11 North Main Street, Buffalo, WY 82834

Edward Falkowski, Esq., Office of the Solicitor, U.S. Dept. of Labor, P.O. Box 46550, Denver, CO 80201-6550

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

January 17, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-208-M
Petitioner	:	A.C. No. 13-00691-05514
	:	
v.	:	Docket No. CENT 2001-140-M
	:	A.C. No. 39-01439-05502
HIGMAN SAND & GRAVEL, INC.,	:	
Respondent	:	IA Portable #1 & Bergdale Pit

DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Higman Sand and Gravel, Inc. ("Higman Gravel"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). A hearing was held in Sioux City, Iowa. At my request, the parties filed post-hearing briefs on the issues raised by the Commission's decision in *Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 995 (Sept. 2001) ("*Good Construction*").

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background and Discussion of General Issues Raised by Higman Gravel

Higman Gravel operates the Bergdale Pit and IA Portable #1. The Bergdale Pit is a small pit and screening plant which opened less that a year prior to the subject MSHA inspection. This pit had not been inspected by MSHA prior to this inspection. MSHA Inspector Joe Steichen inspected the Bergdale Pit on August 16, 2000, and issued one citation. The IA Portable #1 is near Akron, Iowa, in Plymouth County. Higman Gravel refers to this facility as the "Akron Plant." It is a gravel-processing facility that includes a pit and a plant where the excavated rock is crushed and screened. It was opened in the 1960s. The equipment is permanent and, despite the name given it by MSHA, it is not a portable operation. MSHA Inspector Kevin LeGrand

inspected the Akron Plant on December 2, 1999. Higman Gravel contested 16 of the citations issued by Inspector LeGrand in these proceedings.

Higman Gravel raised a number of general issues in these cases. First, it argues that the Secretary failed to demonstrate that accidents could result from the cited conditions. It contends that an injury could only result from an employee's intentional misconduct and that no employee has ever been injured by the cited conditions. It maintains that the Secretary failed to establish any likelihood of an injury to employees as a result of the cited conditions.

The Federal Mine Safety and Health Review Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

> The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). Thus, a violation is found and a penalty is assessed even if the chance of an injury is not very great. The risk of injury and the appropriate penalty for each citation is discussed below.

The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984). In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down. In such an instance, the employee's clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. The fact that no employee has ever been injured by an unguarded tail pulley at Higman Gravel's operations is not a defense because there is a history of such injuries at crushing plants throughout the United States. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . . " *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

Ten of the seventeen citations at issue in these cases allege that Higman Gravel failed to adequately guard moving machine parts. Higman Gravel argues that it did not receive fair notice of MSHA's determination that its existing guards were inadequate. The Akron Plant has been inspected at least annually since MSHA was created. Higman Gravel contends that many of the guards that were cited by Inspector LeGrand have been present in the same condition since MSHA began enforcing the Mine Act in 1978 and that all of these guards have been present for at least ten years. It states that MSHA never cited these guards until the Inspector LeGrand's inspection. At the hearing, the Secretary stipulated that none of the pulleys cited by the inspector have been cited in the past. Higman Gravel states that, although it has received citations for failing to guard moving machine parts in the past, these prior citations were issued because the guard had been removed and had not been replaced at the time of the inspection. I analyze this issue below.

B. Guarding Citations at the Akron Plant (IA Portable #1), CENT 2000-208-M.

Inspector LeGrand issued nine guarding citations at the Akron Plant. Inspector LeGrand was a new MSHA inspector who graduated from MSHA's Mine Safety and Health Academy about six months prior to this inspection. With one exception, all of the cited pulleys were protected by substantial metal guards. Inspector LeGrand believed that additional guarding was required, as discussed in more detail below.

Section 56.14107(a) provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head , tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving machine parts that can cause injury." The standard makes clear that guarding is required, but leaves unanswered what is required to protect persons from contacting moving machine parts. Consequently, I find that this standard is ambiguous, especially when applied to moving machine parts that are already protected by a guard. As discussed in more detail below, I find that the Secretary's determination to construe the standard in a broad manner is reasonable. The standard was written broadly to cover a wide range of moving machine parts within the standard's protective purpose. Higman Gravel is not arguing that the cited pulleys did not come within the purview of the standard.

The Secretary must provide fair notice of the requirements of a broadly written safety standard. The language of section 56.14107(a) is "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is

prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Id. (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. "The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated." *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

The Commission addressed this issue with respect to the Secretary's guarding standard in *Good Construction*. The Secretary has been enforcing this standard for about 23 years. Relying, in part, on *Good Construction*, Higman Gravel believes that the guarding citations should be vacated because the Akron Plant has been inspected by MSHA over many years; MSHA inspectors have examined the guards during these inspections; and no citations were previously issued at the cited locations. It believes that if a mine operator has been guarding its moving machine parts in a particular manner without receiving citations from MSHA, the Secretary must provide notice of her intention to require additional guarding before civil penalties may be assessed. The Secretary contends that the citations should be affirmed because Higman did not meet the burden of proof for this notice defense. The Secretary maintains that "to establish such an affirmative defense, the operator must demonstrate particularized facts, such as: the prior inspector actually examined the machine part in question, that the operator's representative discussed the situation (here, the partial guards), and was told that the guarding was adequate." (S. Br. at 6). The Secretary contends that the operator has a "heavy burden" of demonstrating a lack of notice, given the strict liability nature of the Mine Act. *Id.* at 7.

In *Good Construction*, the mine operator contended that it did not have adequate notice of the requirements of 30 C.F.R. § 56.14107(a) because the language of the safety standard "does not provide reasonably clear guidance regarding how any particular moving part should be guarded, allows inconsistent interpretation by inspectors, and is unconstitutionally vague based on the fact that other MSHA inspectors never cited these same conditions over the past 18 years." *Good Construction* at 1002. The moving machine parts were guarded, but the MSHA inspector determined that the guarding was insufficient.

The Commission's decision was split on the issue of how that particular case should be handled. Nevertheless, when put in the context of previous Commission decisions, I believe that

the holding is essentially the same in both opinions with respect to how this issue should be analyzed in future cases, as summarized in the opinion of Commissioners Jordan and Beatty.

> In applying the reasonably prudent person standard to a notice question, the Commission has taken into account a wide variety of factors, including the text of a regulation, its placement in the overall enforcement scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question. Also relevant is the testimony of the inspector and the operator's employees as to whether the practices affected safety. Finally, we have looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine.

23 FMSHRC 1005 (citations and footnote omitted). The facts raised by Higman Gravel relate to the consistency of MSHA's enforcement. I discuss the notice issues in the context of specific citations below.

Citation No. **7815172** alleges a violation of section 56.14107(a) because the left, right, and rear sides of the fin-type tail pulley on the South Dakota flat sand conveyor were not provided with a guard. The citation states that the roller was about two feet above the ground. Inspector LeGrand determined that the violation was not significant and substantial ("S&S") and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $55 for this alleged violation.

The inspector testified that the cited tail pulley was guarded at the time of his inspection but that there were openings in the guard through which a miner could get his hand or arm caught if he stumbled and fell. (Tr. 67, Exs. G-10 & 11). He believes that the opening at the back measured about 9 by 30 inches and the openings on the sides to be about 6 by 6 inches. (Tr. 69-70). He determined that the violation was not S&S because water and a Bobcat (skid loader) are used to clean up any accumulations under the pulley. Inspector LeGrand determined that someone could be seriously injured as a result of this condition, but such an injury was not likely because employees do not work in the area. The inspector determined that the operator's negligence was moderate because Ray Haneklaus, a Higman Gravel employee who accompanied LeGrand during his inspection, told him that he did not believe that the condition created a hazard. Inspector LeGrand testified that the tail pulley was required to be completely enclosed by a guard as shown in Figure 3 of MSHA's Guide to Equipment Guarding. (Ex. G-3).

Harold Higman, the owner of Higman Gravel, testified that the cited tail pulley has been in the same condition since 1962. (Tr. 303). He also testified that the plant was inspected by MSHA at least annually since the Mine Act was passed. Mr. Higman stated that, because the

Akron Plant is small, it is thoroughly inspected each time an MSHA conducts an inspection. (Tr. 315). Higman testified that during these past inspections, no inspector ever suggested that the tail pulley needed to be more completely guarded. (Tr. 316). Higman stated that accumulations are cleaned out with water and a skid loader. Consequently, employees do not work or walk around the plant while it is operating. The only employee working around the plant when it is operating is Steve Haneklaus, the plant operator, who performs all maintenance when the plant is shut down.

Mr. Higman testified that the pulley is recessed more than twelve inches from the back of the guard and eight inches from each side. (Tr. 313, 317). He believes that it would take an intentional act for someone to get his hand or arm caught in the moving tail pulley. Someone stumbling or falling in the area would not get any part of his body or clothing into the moving pulley because the existing guard provided sufficient protection.

The language of the standard states that moving machine parts that can cause injury, including drive, head, tail, and take-up pulleys, must be guarded. In the preamble to the final rule, the Secretary emphasized the broad construction of this safety standard. The preamble states:

> [T]he final standard requires the installation of guards to protect persons from coming into contact with hazardous moving machine parts. The standard clarifies that the objective is to prevent contact with these machine parts. *The guard must enclose the moving parts to the extent necessary to achieve this objective.*

53 Fed. Reg. 32496, 32509 (Aug. 25, 1988) (emphasis added). The preamble further provides:

> Under the final rule, the standard applies where the moving machine parts can be contacted and cause injury. Some commenters believed that guards should provide protection against inadvertent, careless, or accidental contact but not against deliberate or purposeful actions. They consider guards which totally enclose moving parts as counter-productive to other safety considerations such as proper work procedures, training, and general attention to hazardous conditions.

Id. In rejecting these comments, the Secretary stated that most injuries caused by moving machine parts occur when persons are "performing deliberate or purposeful work-related actions with the machinery" and that the installation of a guard would have prevented these injuries. *Id.* The Secretary stated that "[g]uards provide a physical barrier, which offers the most effective protection from hazards associated with moving machine parts." *Id.* Thus, the Secretary provided notice to the regulated community that she would interpret this safety standard very

broadly to protect persons from coming into contact with moving machine parts and that the standard covers deliberate actions by employees.

The Secretary's Program Policy Manual ("PPM") provides additional information to the public about the Secretary's interpretation of safety standards. The PPM provides, in part, as follows:

> All moving parts identified under this standard are to be guarded with adequately constructed, installed and maintained guards to provide the required protection. The use of chains to rail off walkways and travelways near moving machine parts, with or without the posting of warning signs in lieu of guards, is not in compliance with this standard.

IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 56/57.14107 (2000) ("PPM"). Although the PPM is not binding on the Secretary, it does provide the mining community with notice of MSHA's interpretation of her safety standards.

I vacate this citation for the following reasons. Although the Secretary's broad interpretation of the standard is reasonable, she failed to give adequate notice that the guard on the cited tail pulley was no longer sufficient to meet the requirements of the safety standard. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized that additional guarding was required, given MSHA's enforcement history at the Akron Plant. The text of the safety standard is broadly written and does not describe the extent of the guarding required other than to state that moving machine parts shall be guarded to protect persons from contacting the moving parts. It does not state that moving machine parts must be totally enclosed by a guard. The regulatory history provides some guidance. The history makes clear that guards must "provide a physical barrier" because such a barrier "offers the most effective protection from hazards associated with moving machine parts." 53 Fed. Reg. 32509. It also states that the Secretary interprets the safety standard to protect against deliberate and purposeful actions of employees because most injuries caused by moving machine parts occur when employees are "performing deliberate or purposeful work-related actions with the machinery." *Id.* The language of the PPM merely states that the standard should be interpreted to require guards that are "adequate" to "provide the required protection." These aids to regulatory interpretation state that moving machine parts must be guarded to the extent necessary to prevent contact with the moving parts.

Based, in part, on MSHA's Guide to Equipment Guarding, Inspector LeGrand required the pulley to be completely enclosed by a guard. (Ex. G-3). All of the illustrations in the guide picture metal cages around moving machine parts. With respect to the guarding of head and tail pulleys, every example shown in the guide depicts a wire cage built around the entire pulley structure. The language of the safety standard and the other aids to its interpretation discussed above do not indicate that mine operators must construct such cage-type guards in order to

comply with the safety standard. I conclude that the regulatory history, the PPM, and MSHA's guide are ambiguous. I conclude that MSHA has not "published notices informing the regulated community with 'ascertainable certainty' of [Inspector LeGrand's] interpretation of the standard" as applied to this pulley. Clearly the tail pulley was required to be guarded, so the issue is whether MSHA provided notice that the type of guard that Higman Gravel had in place was inadequate under the standard.

The guard that was installed by Higman Gravel was quite substantial. (Exs. G-10 & 11). I credit the testimony of Mr. Higman that the conveyor, tail pulley, and guard have existed at the Akron Plant for a significant length of time. I also credit his testimony that the plant has been inspected by MSHA at least once a year since MSHA's inception. The plant is small and the cited tail pulley was obvious. It is inconceivable that MSHA has been inspecting this plant for all of these years and not a single inspector examined the tail pulley in question. Indeed, Mr. Higman testified one MSHA inspector terminated a citation issued because a guard was missing by accepting as abatement the exact type of guard that Inspector LeGrand cited in this instance. (Tr. 347).

I agree with the Secretary that the fair notice issue is an affirmative defense and that a judge should not assume that a condition has been observed by MSHA inspectors during previous inspections. Nevertheless, an operator is not required to prove that an MSHA inspector examined the cited moving machine part, discussed the existing guard with the mine operator, and told the operator that the guard was adequate. The Commission rejected this approach in *Good Construction*. In any event, Mr. Higman credibly testified that in at least one instance an inspector accepted the type of guard cited here.

It is also important to understand that the hazard created by the openings in the existing guard were negligible. The statement in the citation that the back and sides of the tail pulley were not guarded is not correct. Those areas were guarded by metal panels or a metal guard but the guarding did not completely enclose the pulley. Employees did not use a shovel to remove accumulations of material from around the tail pulley and the openings were small. Employees did not work or travel in the vicinity of the tail pulley. The pulley was also well-recessed within the existing guard.

Applying the factors set forth in the opinion of Commissioners Jordan and Beatty in *Good Construction* to the facts of this case, I find that Higman Gravel was not provided with fair notice that additional guarding was required at the tail pulley cited by Inspector LeGrand in Citation No. 7815172. My holding relies heavily on the fact that the existing guard has been in place for many years through numerous MSHA inspections and has never been cited under the safety standard. Higman Gravel was led to believe by prior citation-free inspections that its guard complied with the standard. A reasonably prudent person would have reached the same conclusion as Higman Gravel. A civil penalty cannot be assessed under such circumstances and, consequently, I vacate this citation.

Citation No. **7815174** alleges a violation of section 56.14107(a) because guarding was not provided for the head pulley v-belt drive and spoked sheave on the South Dakota flat conveyor. The citation states that the moving machine parts were about six feet above ground level. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $55 for this alleged violation.

Inspector LeGrand testified that he walked under the pulley and determined that the sheave for the v-belt drive that powers the pulley was about six feet above the ground level by using his own height as a gage. (Tr. 78, 285; Ex. G-13). He stated that it was unlikely that anyone would be around this sheave during normal operations. (Tr. 80). He did not use a tape measure to determine the height of the sheave because of the muck and mud under the sheave. (Tr. 17172). The inspector determined that the negligence was moderate because Ray Haneklaus did not believe that the condition presented a hazard. On cross-examination Inspector LeGrand admitted that he was not positive that the sheave was less that seven feet above the ground. (Tr. 172).

Mr. Higman testified that the moving machine parts cited by Inspector LeGrand are in excess of eight feet above the ground. (Tr. 318, 379-81). He also testified that the mud and muck under the sheave is about 18 inches deep. He stated that nobody would ever want to walk in the area because the mud would come up over his boots. If someone did walk into the area, he would sink into the mud to such an extent that the moving machine parts would be out of reach. Higman testified that the area is always this muddy. He further testified that this condition has existed since 1962; that it is an obvious feature at the plant; and the area has been inspected by MSHA at least annually for years. (Tr. 319).

Steve Haneklaus testified that anyone walking under the cited sheave would sink into the mud at least two feet. (Tr. 398). He stated that Inspector LeGrand did not walk under the sheave during his inspection. Haneklaus further stated that the moving machine parts are about eight to nine feet above the solid ground. (Tr. 399). He also testified that a loader is used to clean up the area. (Tr. 400-01).

Section (b) of the standard provides that guards are not required if the exposed moving machine parts are at least seven feet away from walking or working surfaces. I find that the Secretary did not establish a violation. The sheave for the v-belt drive was not guarded. Inspector LeGrand estimated the height of this sheave above the ground and could not testify with certainty that it was less than seven feet above the ground. In addition, I credit the testimony of Higman and Haneklaus as to the conditions in the area. The area was extremely muddy as shown on Exhibit 13. As a consequence, the ground under the moving parts was not really a walking or working surface. The fact that this condition existed for many years without being cited by MSHA supports Higman Gravel's case. The condition was obvious and would have been easily observed by other MSHA inspectors. Consequently, I vacate this citation.

Citation No. **7815176** alleges a violation of section 56.14107(a) because the left and right sides of the fin-type tail pulley on the wash plant feed conveyor were not provided with a guard. The citation states that the pulley was about one foot above the ground and that the openings on the sides of the guard measured about five by eight inches. Inspector LeGrand determined that the violation was S&S and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $90 for this alleged violation.

Inspector LeGrand testified that the existing guard on this tail pulley was the same type that was installed on the tail pulley cited in Citation No. 7815172 discussed above. (Tr. 87-88; Ex. G-17). LeGrand testified that he designated this citation as S&S because Ray Haneklaus told him that Steve Haneklaus cleans out accumulations around the pulley several times a day using a shovel.

Mr. Higman testified that the tail pulley and the existing guard have been in the same location for over 30 years. (Tr. 329). He stated that water is used to clean out the area around the pulley. The conveyor sits on a concrete platform and water is used to wash away accumulations. (Tr. 329-30). A pay loader is then used to scoop any material that is washed up against the retaining wall adjacent to the conveyor. Mr. Higman testified that accumulations are not cleaned up manually. (Tr. 330). Steve Haneklaus testified that he uses a Bobcat and a loader to clean the area of accumulations. (Tr. 403). Mr. Higman testified that Ray Haneklaus, who is Steve's father, is a mechanic at the plant. Because he spends most of his time in the shop, he does not have specific knowledge of the clean-up procedures at the plant. (Tr. 306-10).

For the reasons set forth with respect to Citation No. 7815172, I vacate this citation. The cited tail pulley assembly has been in existence at the same location for many years; MSHA has inspected this plant many times; the plant is small; and the pulley is in plain sight. There is no doubt that MSHA inspectors have examined this tail pulley during previous inspections without issuing citations. Taking into consideration all the factors to be considered in applying the reasonably prudent person test set forth in *Good Construction*, I find that Higman Gravel was not provided with sufficient notice that the existing guard failed to meet the requirements of the safety standard.

Citation No. **7815177** alleges a violation of section 56.14107(a) because the left and right sides of the fin-type tail pulley on the one-inch rock conveyor were not provided with a guard. The citation states that the pulley was about two feet above the ground and that the openings on the sides of the guard measured about five by eight inches. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $55 for this alleged violation.

The testimony with respect to this citation is essentially the same as with Citation No. 7815176. (Tr. 93-94, 331-32, 405). Unlike that citation, however, Inspector LeGrand determined that the condition did not present an S&S hazard. For the reasons set forth with respect to Citation Nos. 7815172 and 7815176, I vacate this citation.

Citation No. **7815181** alleges a violation of section 56.14107(a) because the left, right, and rear sides of the fin-type tail pulley on the rock conveyor were not provided with a guard. The citation states that the pulley was about three feet above the ground and that the openings on the sides of the guard measured about five by eight inches. The citation also states that the opening at the back was about 24 by 9 inches. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $55 for this alleged violation.

The testimony with respect to this citation is essentially the same as with Citation No. 7815172. (Tr. 106-09, 216-19, 342-47, 410-11; Ex. G-23). Mr. Higman testified that sometimes a guard will be torn up by a loader, but the guard is always replaced by the same type of guard. (Tr. 344). Steve Haneklaus testified that MSHA inspectors have examined the guards on tail pulleys during previous inspections. (Tr. 411). For the reasons set forth with respect to Citation Nos. 7815172, 7815176, and 7815177, I vacate this citation.

Citation No. **7815182** alleges a violation of section 56.14107(a) because a guard was not provided on the drive pulleys on the raw material stacker conveyor. The citation states that a round six-inch diameter hole had been cut into the right side of the drive pulleys. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $55 for this alleged violation.

Inspector LeGrand testified that the hole presented a hazard because someone could be "drawn in by contacting the pulleys that are on the inside, resulting in cuts, lacerations, and broken bones." (Tr. 112; Ex. G-25). He testified that Ray Haneklaus told him that the hole was cut to provide access to the bearings for the pulleys. He admitted that the bearings could not be changed while the unit was operating. (Tr. 225). He also did not know how far in the opening the pulley was located. He did not observe a grease fitting. He believes that the opening was about chest high. (Tr. 226).

Mr. Higman testified that there are no moving machine parts directly inside the hole. (Tr. 350). He stated that the condition of the bolts shown in the photograph demonstrates that the "area has not been touched for a significant number of years." (Tr. 351). The bearings cannot be replaced while the machinery is in operation. Steve Haneklaus also testified that the opening did not present a hazard to employees. (Tr. 412). He stated that if someone were walking in the area and slipped, he is not going to accidentally put his hand through the cited hole.

As with the other guarding citations, the condition cited by Inspector LeGrand existed for many years without being cited during previous MSHA inspections. As a consequence, this citation is infected by the same notice problems noted above. I vacate this citation on a more fundamental basis, however. The standard requires that moving machine parts be guarded to protect persons from contacting moving machine parts. As shown in the photograph, the pulley was covered by a substantial metal guard. (Ex. G-25). The small opening did not present any hazard to employees. I credit the testimony of Higman and Haneklaus that it would be virtually

impossible to get one's hand or arm through the hole and contact a moving machine part. If an employee tripped in the area, his hand would not enter this opening. In addition, there is absolutely no proof that anyone would or could perform maintenance in or around the hole while the unit was operating. I find that the moving machine parts were adequately guarded under the safety standard. Consequently, I vacate this citation..

Citation No. **7815183** alleges a violation of section 56.14107(a) because the left, right, and rear sides of the fin-type tail pulley on the rock-return conveyor were not provided with a guard. The citation states that the pulley was about one foot above the ground, that the opening at the rear was five inches high and two feet wide, and side openings were about five by six inches. Inspector LeGrand determined that the violation was S&S and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $90 for this alleged violation.

Inspector LeGrand testified that the conditions that led him to issue this citation were the same as with the previous citations. (Tr. 115; Ex G-27). He determined that this citation was S&S because Ray Haneklaus told him that someone cleans up accumulations around this tail pulley "throughout the day whenever it's needed." (Tr. 115, 231-32) The inspector believes that the area is cleaned by an employee using a shovel.

Mr. Higman testified that this area is cleaned out by an employee using a shovel, but that it is only cleaned once a day prior to commencing operations. (Tr. 354). He stated that the pulley is recessed about a foot from the back opening. Steve Haneklaus cleans the area each day using a shovel and a skid loader, but only when the conveyor is not running. (Tr. 413). He stated that neither he nor anyone else is around the pulley during operations. He also testified that he personally observed at least one other MSHA inspector examine this conveyor without issuing a citation. (Tr. 414-15).

As with other tail pulleys at the Akron Plant, this one was protected by a guard that had openings on the back and sides. The record establishes that this condition existed for many years and was observed by other MSHA inspectors. The guard that was present appears to be similar to the guards that were used at the other pulleys cited by Inspector LeGrand. For the reasons stated with respect to Citation No. 7815172, above, I vacate this citation. Higman Gravel was not provided with fair notice that additional guarding was required at this location.

Citation No. **7815186** alleges a violation of section 56.14107(a) because the rear side of the fin-type tail pulley on the raw material conveyor under the truck feed hopper was not provided with a guard. The citation states that the pulley was about one foot above the ground and that the opening was about 17 by 48 inches. Inspector LeGrand determined that the violation was S&S and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $90 for this alleged violation.

Inspector LeGrand testified that the tail pulley was not guarded at the back. (Tr. 122). He determined that the condition created a hazard because Ray Haneklaus told him that "the

plant person normally cleans out around this area on a daily basis as needed." (Tr. 123). The inspector believed that an employee's clothing could become entangled in the moving machine parts, pull him into these parts, and severely injure him. Inspector LeGrand credibly testified that these types of accidents occur with some frequency at unguarded tail pulleys.

Mr. Higman testified that the cited area was between "two cement high walls." (Tr. 355). He further stated that a pay loader is used to keep the area clean of accumulations. He testified that no employees work or travel in the area. He further testified that if anyone were to slip and fall next to the pulley, he would not be injured by the moving machine parts because there are "additional bars around it that keep people away." (Tr. 356). Steve Haneklaus testified that he is the "plant person" referred to by Inspector LeGrand. (Tr. 415). He stated that he does not manually clean up accumulations in the area with a shovel. He further testified that there is no reason for anyone to be in the vicinity of the tail pulley when it is in operation. (Tr. 416). Although the pulley needs to be greased, he performs that task prior to starting operations. Finally, he stated that he saw at least one other MSHA inspector look at the area without issuing a citation. *Id.*

No photographs were taken of the cited condition. This cited area does not appear to be similar to the other cited areas, given its location and the size of the opening. Ordinarily, an unguarded area that measures 17 by 48 inches adjacent to a tail pulley that is about a foot above the ground would violate the safety standard. Such a condition creates a risk that someone could become entangled in the moving machine parts as described by the inspector. Mr. Higman testified that metal bars were present to keep people away. Both Higman and Haneklaus testified that no employees work in the vicinity of the tail pulley. I credit this testimony.

Taking into consideration the factors set forth in *Good Construction*, I find that the Secretary did not provide adequate notice that additional guarding was required at this location. As stated above, the safety standard is broadly written to apply to a wide range of situations. The cited condition existed for many years and has been inspected by MSHA on a regular basis. The Akron Plant is not a large facility. The hazard presented was not very great because employees do not walk or travel in the area. Although it is within MSHA's authority under the standard to require a guard at the cited location, a reasonably prudent person familiar with the mining industry and the protective purposes of the safety standard would not have realized that one was required, given MSHA's enforcement history and the low risk of injury. Consequently, I vacate this citation.

Citation No. **7815179** alleges a violation of section 56.14108 because two v-belts for the head pulley drive on the rock conveyor were not guarded to prevent whipping action hazards if a belt broke. The citation states that the v-belts were about 7.5 feet directly above the rock screw elevated walkway. Inspector LeGrand determined that the violation was S&S and was the result of Higman Gravel's moderate negligence. The safety standard provides that "overhead drive belts shall be guarded to contain the whipping action of a broken belt if that action could be hazardous to persons." The Secretary proposes a penalty of $90 for this alleged violation.

Inspector LeGrand testified that if either of the two belts were to break, anyone on the platform or on the ladder to the platform could be struck by the broken belt. (Tr. 98-99; Ex. G-20). Ray Haneklaus told him that the belts were about nine feet long and that the plant person would go up the ladder once a day to monitor the material flow and the rock screws. (Tr. 99-100). The inspector did not observe anyone on the platform or on the ladder during his inspection. (Tr. 202). He estimated that the distance from these belts to the ground to be about 20 feet. (Tr. 205). He also testified that he relied on the statements made to him by Ray Haneklaus when issuing this citation. (Tr. 207-09). The inspector does not know if the plant is operating when employees are on the platform. (Tr. 209-10). The citation was abated when the operator removed the ladder.

Mr. Higman testified that no employees travel to the platform while the pulleys are in operation. (Tr. 336). Higman testified that there are only two reasons to travel up onto the platform. First, someone goes up while the plant is down to check for wear and tear on the parts. (Tr. 336-67). Second, if the screws plug up with rock, someone has to go up onto the platform to remove the plugged up rock. By necessity, the unit is shut down while this occurs. Otherwise, the conveyor continues to dump rock onto the area. (Tr. 337-38). The conveyor is shut down at the control house before any plug-ups are removed. The pulleys in question are attached to the conveyor motor. (Ex. G-20).

Steve Haneklaus testified that he is the person who would go up onto the platform if the need arose. (Tr. 405). He further testified that he would not travel up the ladder to the platform to fix a problem such as a plugged rock screw while the conveyor was operating. He stated that rock would fall on him from the conveyor if he tried to do so.

I find that the Secretary did not establish a violation. The pulley was too high to pose a hazard to anyone on the ground. An employee could be injured only if a belt were to break while he was on the ladder or platform. I credit the testimony of Messrs. Higman and Haneklaus as to the use of the ladder and platform. There were no grease fittings or other service items at the cited location. The rock screws are checked for wear when the plant is shut down. If there is a plug-up, the conveyor is shutdown as soon as possible. It is quite obvious from the photograph that the operator would not want the conveyor to continue dumping rock over the top of the screws in the event of a plug-up. Moreover, the plant person could not fix the problem if the conveyor continued to operate. Thus, no employee would be on the ladder or platform when the pulleys were in operation. No employee has ever been injured by the whipping action of a belt at this location. If one of the cited belts broke, its whipping action would not create a hazard because employees do not work or travel on the ladder or platform while the conveyor is operating. Accordingly, I vacate this citation.

C. Guarding Citation at the Bergdale Pit, CENT 2001-140-M.

Citation No. **7919642** alleges a violation of section 56.14107(a) because the fan blades on the Detroit engine used to provide power to the screen plant were not guarded to prevent persons

from coming into accidental contact with them. The citation states that the fan blades were about 30 inches from the ground and about 30 inches from the control levers. It also states that employees are in the area on a daily basis. MSHA Inspector Joe Steichen determined that the violation was S&S and the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $90 for this alleged violation.

Inspector Steichen testified that the back side of the fan blades for the diesel engine on the generator were not guarded. (Tr. 29; Ex. G-2). He believed that someone walking by the generator motor could "perhaps trip and fall" into the fan blades. *Id.* The fan blades were recessed about four inches into the frame for the radiator. (Tr. 38). Steichen testified that if an employee were to get a hand or arm caught in the fan blades, he could suffer serious injuries. He was concerned that someone could try to make adjustments to the engine without turning it off. He also stated that the Bergdale Pit had never been inspected by MSHA.

James Abbott, who ran the excavator at the pit, testified that sometimes he starts the diesel engine but that the loader operator usually starts it. (Tr. 10-11). The engine operates during the entire shift. The fluid levels are checked and other maintenance is performed before the engine is started. (Tr. 16, 39). He testified that there is no reason for anyone to perform any maintenance on the generator unit while it is operating. (Tr. 39). The controls for the generator are about four feet from the engine. Abbott further testified that it is not necessary to clean up any material in or around the generator. (Tr. 20). He does not believe that it is very likely that anyone would become entangled in the fan blades because the fan "sits way back in there next to the radiator." (Tr. 21).

Mr. Higman testified that this generator was used by Higman Gravel at its Volin, South Dakota, pit for about ten years before it was moved to the Bergdale Pit. (Tr. 42). He also stated that the cited condition has existed since the generator was purchased and that no employees have been injured. He further testified that there is no reason for anyone to be anywhere near the generator after it is started. The two employees at the pit operate heavy equipment during the entire shift. In addition, the generator sits under a conveyor assembly so it is protected by its location. (Tr. 45).

I find that the Secretary established a violation, which is not S&S. The fan blades are moving machine parts that are required to be protected. The likelihood of such an injury was not very great, however. I credit the testimony of Higman Gravel's witnesses on the likelihood of an injury issue. I also find that Higman Gravel's negligence was low. I assess a penalty of $40 for this violation.

D. Other Citations at the Akron Plant (IA Portable #1), CENT 2000-208-M.

Citation No. **7815175** alleges a violation of section 56.12008 because a bushing was not provided for the 220-volt cord where it entered the metal junction box for the electric motor on the South Dakota flat conveyor. The citation states that no bare wires were discovered.

Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The safety standard provides, in pertinent part, that power "cables shall enter metal frames of . . . electrical components only through proper fittings ." It further states that "[w]hen insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector LeGrand testified that the power cord was a "three-wire Romex type cord." (Tr. 84). It had "three wires in it with plastic wrap around." *Id.* It appears to me that the power cord in question was an electrical cable rather than an insulated wire, as these terms are used in the safety standard. Nevertheless, I will interpret Inspector LeGrand's testimony concerning the lack of a bushing to include the lack of a proper fitting. The Secretary's regulations and her PPM do not provide any guidance. Inspector LeGrand was concerned that the cord could rub against the metal opening and energize the metal frame of the conveyor. He observed the condition while standing on the ground some distance away. The muddy conditions described in the discussion of Citation No. 7815174 above, were located directly under the motor. The inspector estimated that the cited area was about nine feet above the ground. (Tr. 176; Ex. G-15). The cord entered into the motor through, what the inspector called, a "metal elbow." *Id.* He believed that the cord could vibrate within that elbow. (Tr. 177). He could not state with certainty that the cord was not tightly clamped within that elbow, but he did not see a bushing or any other device holding the cord. (Tr. 177-78, 290).

Mr. Higman testified that the cord was not free to move around because it entered the junction box through a metal conduit. (Tr. 320-21). He stated that the cited equipment had been in use since the 1960s, but that it was taken out of service prior to the hearing. He further testified that no change was made to abate the cited condition. (Tr. 324, 325-26). He took a photograph of the cited area after the equipment was taken out of service. (Tr. 322; Ex. R-C). Mr. Higman testified that because the cord was tight and secure in the metal fitting, the condition did not present a hazard. Finally, he stated that because of location of the motor, it was difficult if not impossible to see the fitting from the ground. (Tr. 323-24).

I find that the Secretary did not establish a violation. The cord was a cable that was required to enter the frame of the motor through a "proper fitting." The cord entered the motor through a metal elbow or conduit. I credit Higman Gravel's evidence that the cord was secure within this metal conduit which served as a fitting. (Ex. R-C). It was difficult to see this fitting from the ground, as evidenced by the fact that the citation was terminated even though Higman Gravel did nothing to abate the condition. Consequently, I vacate this citation.

Citation No. **7815180** alleges a violation of section 56.11004 because the 12-foot portable metal ladder to the elevated platform for the rock screw was not secured in place. The citation states that the plant person uses this ladder daily to access the rock screw elevated walkway. Inspector LeGrand determined that the violation was S&S and was the result of Higman Gravel's moderate negligence. The safety standard provides that "[p]ortable ridged ladders shall be

provided with suitable bases and placed securely when used." The Secretary proposes a penalty of $113 for this alleged violation.

Inspector LeGrand testified that the cited metal ladder was leaning against the metal frame of the walkway adjacent to the rock screws. (Tr. 101). The ladder was not affixed to the walkway at the top. (Ex. G-20). He stated that the ladder slid to one side when he first stepped onto the ladder. (Tr. 102). He was not concerned whether the base of the ladder was suitable. Rather, he was concerned that the ladder was not secured at the top and feared that it could slide off the walkway. *Id.* If the ladder fell while a person was climbing it, he could sustain serious injuries. He issued the citation because the ladder shifted when he first stepped on it. (Tr. 215).

Mr. Higman testified that the bottom of the ladder was buried in rock. (Tr. 340). Higman Gravel abated the citation by removing the ladder. A payloader had to be used to dig out the ladder from the accumulated rock. Steve Haneklaus testified that the ladder could not be removed by hand because it was buried about two to three feet in accumulated rock. A payloader was used to remove some of the rock and then a chain was attached between the bottom of ladder and the bucket of the loader. (Tr. 409). The ladder was then pulled out of the remaining rock.

I find that the Secretary did not establish a violation. The safety standard requires that portable ladders be "placed securely when used." The mere fact that the ladder shifted some when the inspector first stepped on it does not establish that it was not secure. Although it would be a good idea to attach the top of the ladder to the frame of the walkway, the standard does not specifically require that ladders be affixed at the top. In addition, the fact that the ladder had to be pulled out of the rock with a loader shows that the ladder was secure. Consequently, I vacate this citation.

Citation No. **7815185** alleges a violation of section 56.4101 because a sign prohibiting smoking or open flame was not provided at or near the 500 gallon diesel tank under the raw material feed conveyor. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The safety standard states that "[r]eadily visible signs prohibiting smoking and open flames shall be posed where a fire or explosion hazard exists." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector LeGrand testified that there were no signs posted at or near the diesel fuel storage tank. (Tr. 116; Ex. G-29). The only source of a flame would be someone smoking or welding in the area. (Tr. 120). Mr. Higman testified that diesel fuel has a very low flash point so that the possibility of someone starting a fire or causing an explosion by smoking or using an open flame was virtually nonexistent. (Tr. 354-55).

I find that the Secretary established a violation. Diesel fuel storage facilities are covered by the safety standard. The fact that the likelihood of a fire was not great relates to the gravity of the citation. I find that the violation was not serious and that Higman Gravel's negligence was low. A penalty of $40 is appropriate.

Citation No. **7815187** alleges a violation of section 56.14132(a) because the horn and back-up alarm on the Kamotsu loader were not in operating condition. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The safety standard provides that "[m]anually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector LeGrand testified that he asked the loader operator to test the horn and it did not work. (Tr. 127; Ex. G-32). He stated that the loader operator should have detected this deficiency in his pre-operational check. He also determined that the back-up alarm did not work when he asked the loader operator to put the loader in reverse. (Tr. 130). The loader was operating at the pit, which is across the road from the plant. *Id.* The inspector testified that there were no pedestrians in the area. (Tr. 131). The loader operator had an obstructed view to the rear of the vehicle. Mr. Higman did not know that the horn was not working and does not know when it ceased operating. (Tr. 357). He also disputed LeGrand's testimony that there was limited visibility to the rear of the loader.

I find that the Secretary established a violation of section 56.14132(a). There is no dispute that the horn and the backup alarm were not working. The violation was not serious because pedestrians are not in the pit area of the plant. Higman Gravel's negligence was moderate because these safety defects should have been detected during the required examinations of mobile equipment. The Secretary's proposed penalty of $55 is appropriate.

Citation No. **7815189** alleges a violation of section 56.9300(a) because berming was not provided for a distance of about 100 feet along the edge of the pond in the sand pit. The citation states that the Kamotsu loader was operating in the area and that loader tracks were observed within two feet of the pond edge. Inspector LeGrand determined that the violation was S&S and was the result of Higman Gravel's moderate negligence. The safety standard provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." The Secretary proposes a penalty of $113 for this alleged violation.

Inspector LeGrand testified that he observed the loader operating ten feet away from the pond. (Tr. 134). He stated that there was no berm separating the work area of the loader from the pond. (Exs. G-32, G-34). The inspector testified that the loader scoops up the sand that is pulled out of the edge of the pond by the excavator. The excavator operator positions the equipment at the edge of the pond and scoops out fine material from the pond. The inspector testified that it did not violate the standard for the excavator to work at the edge of the pond. The sand is loaded into belly load dump trucks and is transported across the road to the plant. Ray Haneklaus told the inspector that berms had never been required along the edge of the pond. (Tr. 136). Haneklaus also told the inspector that the pond is about 15 to 20 feet deep at the edge. LeGrand determined that the loader travels within a few feet of the edge of the pond based on his

evaluation of the tire tracks he observed in the area. He issued the citation because the loader operator could accidentally back into the pond while traveling in the area.

Mr. Higman testified that the edge of the pond must be clear of material so that the excavator can "come in and begin excavation." (Tr. 359). The loader operator must clear an area that is about 100 feet long because that is the distance the excavator will "cover in a one-day period." *Id.* The excavator "digs the material out of the water, swings it to the side, and stockpiles it for dewatering." (Tr. 360). The loader removes the mined material so that the excavator can extract more material on the next cycle. Mr. Higman testified that the loader operates parallel to the edge of the pond when cleaning the area adjacent to the pond. (Tr. 363). He stated that the loader does not travel within 20 feet of the pond when it is required to operate perpendicularly to the edge of the pond. The dump trucks do not travel near the edge of the pond. Mr. Higman does not consider the area adjacent to the pond to be a roadway or travelway. (Tr. 364-65).

Mr. Abbott, who operates the excavator, testified that he must have a smooth area to operate safely. (Tr. 431; Exs R-A, R-B). The loader operator tries to keep an area that is about 80 to 100 feet long clear for the excavator. The loader operator and excavator operator work together in cycles up and down the edge of the pond. When the loader operator is loading the dump trucks, he stays about 50 to 60 feet away from the edge of the water. (Tr. 436). If a loader is in the vicinity of the pond, the loader operator is supposed to turn away from the pond or travel parallel to the edge of the pond. (Tr. 447).

I find that the Secretary did not establish a violation. The Secretary is correct when she states that there was no physical barrier preventing the loader from driving into the pond. (Tr. 471). The safety standard, however, does not require berms "wherever a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." The safety standard requires berms only "on the banks of roadways." I find that because the cited area is not a roadway, the safety standard does not apply to the cited condition.

The Commission has interpreted this safety standard to include various transportation corridors. For example, the term "roadway" in the standard applied to elevated ramps that lead up to dumping points. *Capitol Aggregates, Inc.*, 4 FMSHRC 846, 847 (May 1982). The Commission has also concluded that a bench at an open pit mine is a roadway if haulage trucks are driven along the bench. *El Paso Rock Quarries, Inc.* 3 FMSHRC 35, 36 (Jan 1981). Under the facts of this case, however, the area in question was not being used as a roadway.

Three types of vehicles enter the area along the pond. The excavator, the loader, and the dump trucks. By necessity, the excavator is used along the edge of the pond to remove material from the pond. Inspector LeGrand did not consider this use of the excavator as a violation of the safety standard. The excavator is mounted on caterpillar tracks. He also did not express any concern about the trucks. The inspector believes that a berm was required to protect the loader operator. He stated that the "loader [operating] there makes it a travelway." (Tr. 249). The

inspector was primarily concerned that the loader operator would accidentally back into the pond. There is a slight drop-off at the edge of the pond to the top of the water. The bank continues to drop under the water. A berm would let the loader operator know that he was close to the edge. He further stated that other gravel operators place berms around their ponds to provide this protection. (Tr. 263-64). Higman Gravel contends that the loader operator does not travel closer than 20 feet from the edge of the pond except when smoothing out the area for the excavator and that he performs that task while traveling parallel to the edge of the pond.

As described above, the excavator and loader work in tandem in about 100-foot increments up and down the edge of the pond pulling and loading material from the pond. The excavator is pulled away from the pond as the loader prepares a new area for excavation. When the area has been prepared, the excavator is brought in to scoop up material along the 100-foot distance. The loader stockpiles the material for dewatering and then loads it onto trucks for transportation to the plant. When all of the mined material has been transported away or stockpiled, the mining cycle starts again along an adjacent area of the pond. Before Higman Gravel started mining, the pond did not exist. The pond was created as excavation occurred because the water table is high in the area.

I find that the cited area is a "working place." The Secretary defines a "working place" as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. The cited area along the pond is not a "roadway." Vehicles do not travel along the pond to get from one point of the mine to another. Term "roadway" has not been defined by the Secretary and its meaning in the standard is not plain on its face.[1] The loader works in the pond area and does not transport material out of the area. The cited area is not akin to a ramp for a hopper or a bench used as a roadway. It is not a transportation corridor. Although placing a berm along the edge of the pond may enhance safety, the Secretary's interpretation of the term "roadway" to include the work area along the pond is unreasonable. As a consequence, I do not defer to her interpretation.

In addition, even if I were to defer to the Secretary's interpretation here, Higman Gravel was not provided with sufficient notice of her interpretation. The PPM and other interpretative materials do not provide any guidance. Although Inspector LeGrand spoke of other operations, it is not clear that providing berms along ponds in this situation is an industry practice. Higman Gravel has been mining out of this pond since the 1960s without receiving a citation for failing to provide a berm along the edge of the pond. MSHA has inspected this operation at least once a year since the Mine Act became effective in 1978 and only Inspector LeGrand determined that the safety standard required a berm around the edge of the pond. Consequently, for the reasons set forth with respect to the guarding citations, I would also vacate this citation because the

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[1] The Secretary's regulations and interpretative material do not define the term "roadway." A "roadway" can be defined as "a strip of land through which a road is constructed" and "the part of a road over which vehicular traffic travels." *Webster's Third New Int'l Dictionary* 1963 (1976).

Secretary failed to provide notice of the requirements of the standard. Consequently, I vacate this citation.

Citation No. **7815191** alleges a violation of section 56.18002(a) because adequate examinations of working places were not being performed as indicated by the multiple citations issued in the inspection. The citation states that contact with most of the cited conditions would have injured employees. Inspector LeGrand determined that the violation was S&S and was the result of Higman Gravel's moderate negligence. The safety standard provides, in part, that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health." The Secretary proposes a penalty of $66 for this alleged violation.

Inspector LeGrand testified that he issued the citation because he believed that the workplace examinations were not sufficiently thorough to meet the requirements of the standard. (Tr. 148). He reached this conclusion because he issued 14 citations including 9 guarding citations. The inspector believed that, because Ray and Steve Haneklaus did not recognize that the cited conditions created hazards, their examinations were inadequate. (Tr. 150).

Mr. Higman testified that competent examinations were being performed but that the conditions cited by Inspector LeGrand did not create hazards. (Tr. 369). He contends that the fact that most of the cited conditions had been previously inspected by MSHA helps prove his point. (369-71).

I find that the Secretary did not establish a violation. First, I vacated most of the citations in this case because the Secretary either did not establish a violation or because she failed to provide adequate notice of her interpretation of the cited safety standard. Most of the cited conditions existed for 20 years and have never been cited in previous inspections. In addition, the fact that an inspector finds a number of violations does not, by itself, establish a violation. *Dumbarton Quarry Associates*, 21 FMSHRC 1132, 1135-36 (Oct. 1999) (ALJ Manning). Higman Gravel may have allowed the cited conditions to exist because it believed that they were not hazardous and did not violate the Secretary's safety standards, rather than because workplace examinations were not competently performed. *Higman Sand & Gravel, Inc.*, 18 FMSHRC 951, 962-63 (June 1996) (ALJ). Consequently, I vacate this citation.

Citation No. **7815190** alleges a violation of section 56.18002(b) because there were no records of daily work place examinations available for review. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The safety standard provides that "[a] record that such examinations were conducted shall be kept by the operator for a period of one year and shall be made available for review by the Secretary." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector LeGrand testified that Ray Haneklaus advised him that no written records of workplace examinations were kept at the mine. (Tr. 151). Higman Gravel did not produce any records for him to review.

Mr. Higman testified that the person responsible for each area of the plant examines his workplace once each shift. (Tr. 366). Most areas are examined by Steve Haneklaus. Higman stated that the record kept to show that the examination was completed is Mr. Haneklaus's time sheet. If he reported to work, he performed the examination because that is an important part of his job. (Tr. 366-67). Higman further testified that the citation was abated by placing a calendar at the work station where the examiner is required to indicate that he performed the required examination. (Tr. 367).

The Secretary established a violation. An examiner's time sheet which simply shows that he reported to work that day is not sufficient to meet the requirements of this safety standard. He may forget to perform the examination, yet the time sheet would indicate that the work place examination was performed. The $55 penalty proposed by the Secretary is appropriate.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. With respect to the history of paid violations, I find that no citations were issued at the IA Portable #1 (Akron Plant) and no citations were issued at the Bergdale Pit in the 24 months preceding these inspections. (Tr. 154-56; Ex. G-44). Higman Gravel is a small operator that worked 6,500 man-hours at the Bergdale Pit in 1999 and 5,597 man-hours at the IA Portable #1 in four quarters beginning with the fourth quarter of 1998. (Tr. 4-5). All of the violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Higman Gravel's ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation No.	30 C.F.R. §	Penalty
CENT 2000-208-M		
7815172	56.14107(a)	Vacated
7815174	56.14107(a)	Vacated
7815175	56.12008	Vacated

Citation No.	30 C.F.R. §	Penalty
7815176	56.14107(a)	Vacated
7815177	56.14107(a)	Vacated
7815179	56.14108	Vacated
7815180	56.11004	Vacated
7815181	56.14107(a)	Vacated
7815182	56.14107(a)	Vacated
7815183	56.14107(a)	Vacated
7815185	56.4101	$40.00
7815186	56.14107(a)	Vacated
7815187	56.14132(a)	$55.00
7815189	56.9300(a)	Vacated
7815190	56.18002(b)	$55.00
7815191	56.18002(a)	Vacated
CENT 2001-140-M		
7919642	56.14107(a)	$40.00

Accordingly, the citations contested in these cases are **AFFIRMED, MODIFIED**, or **VACATED** as set forth above and Higman Sand & Gravel, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $190.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

Ann M. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Certified Mail)

Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, P.O. Box 717, Sioux City, IA 51102-0717 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 17, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-136
Petitioner	:	A.C. No. 15-16666-03547
	:	
v.	:	Docket No. KENT 2001-137
	:	A.C. No. 15-16666-03548
WILLIAMS BROTHERS COAL CO., INC.,	:	
Respondent	:	No. 3 Mine

DECISION

Appearances: J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner; Hufford Williams, President, William Brothers Coal Company Incorporated, Mouthcard, Kentucky, for the Respondent.

Before: Judge Feldman

This proceeding concerns petitions for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Williams Brothers Coal Company Incorporated (Williams). The petitions seek to impose a total civil penalty of $923.00 for ten alleged violations of the mandatory safety standards in 30 C.F.R. Part 75 of the Secretary's regulations governing underground coal mines. Three of the ten alleged violative conditions were characterized as significant and substantial (S&S) in nature.[1] These matters were heard on August 28, 2001, in Pineville, Kentucky.

At the beginning of the hearing, the parties were advised that I would defer my ruling on the citations pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. Williams waived the filing of post-hearing briefs. The Secretary waived the filing of post-hearing briefs with respect to Citation Nos. 7368778 and 7368080. Consequently, these two citations were disposed of by a bench decision.

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[1] A violation is properly designated as significant and substantial "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to [by that violation] will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

This written decision formalizes the bench decision issued for Citation No. 7368778 and 7368080. At the hearing, the Secretary moved to vacate Citation No. 4509739. The Secretary elected to file briefs with respect to the remaining seven citations. The Secretary's brief has been considered in the disposition of these matters.

I. Pertinent Case Law and Penalty Criteria

This decision applies the Commission's standards with respect to what constitutes a significant and substantial violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

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

6 FMSHRC at 3-4; *see also Austin Power Co. v. Secretary*, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission explained its *Mathies* criteria as follows:

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

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

With respect to the imposition of penalties, this decision applies the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. In this regard, section 110(i) provides, in pertinent part:

> The Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Applying the general statutory penalty criteria, Williams is a small mine operator with 11 employees that is subject to the jurisdiction of the Mine Act. (Gov. Ex. 1; Tr. 20). Williams has a good compliance history in that the vast majority of violative conditions cited during the two year period preceding the issuance of the citations in issue were designated as non-S&S. (Gov. Ex. 3; Tr. 21-24). It is not contended that the $923.00 civil penalty initially proposed by the Secretary will negatively impact Williams' ability to continue in business. (Gov. Ex. 1). Finally, Williams abated the cited conditions in a timely manner.

II. Findings and Conclusions

A. Docket No. KENT 2001-137

1. Citation No. 7368778

Mine Safety and Health Administration Inspector Danny P. Curry conducted a routine AAA inspection of Williams' No. 3 Mine facility on October 26, 2000. Curry was accompanied by his supervisor, Ken Murray, and Williams' Mine foreman, Terry Williams. The inspection party traveled the No. 3 beltline. The No. 3 Mine is a low seam mine with entry heights ranging between approximately 35 to 37 inches. (Tr. 40). The mandatory safety standard in section 75.1100-2(b), 30 C.F.R. § 75.1100-2(b), governing the location of fire fighting equipment at belt conveyors requires fire hose outlets along each belt conveyor at a minimum of 300-foot intervals and at tailpieces. Although fire hose outlets were installed at 300-foot intervals, Curry noted there was no fire hose outlet at the No. 3 conveyor tailpiece as required by section 75.1100-2(b). The closest fire hose outlet was approximately 50 feet outby the No. 3 tailpiece. (Gov. 5; Tr. 36). Consequently, Curry issued Citation No. 7368778 for a non-S&S violation of this mandatory safety standard.[2] (Gov. Ex. 4). Although Curry was concerned that a lack of a tailpiece water outlet would inhibit the capacity to fight a fire caused by over-heated bearings at the tailpiece, Curry did not consider the cited condition to be a serious hazard because there were

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[2] Curry erroneously cited the No. 4 conveyor tailpiece instead of the No. 3 tailpiece in Citation No. 7368778. At the hearing the Secretary made an unopposed motion to amend the citation to reflect the No. 3 tailpiece. The Secretary's motion was granted because Terry Williams had accompanied Curry during the inspection and Williams does not contend that it was surprised or otherwise prejudiced by the Secretary's amendment. (Tr. 32-35).

adequate fire hose outlets along the full length of the beltline. The Secretary proposed a $55.00 civil penalty for this violation.

On cross examination, Curry conceded that he did not measure the distance from the tailpiece to the closest hose outlet and that the distance may have been closer to 40 feet. (Tr. 47-48). Curry also conceded there may have been a water deluge system that sprayed water at the point where the No. 4 beltline dumped onto the No. 3 tailpiece. (Tr. 46, 50-52). Hufford Williams testified that the fire deluge system is heat activated and serves as a sprinkler system in the event of a tailpiece fire. In addition, Williams opined that it is safer and more effective to locate the tailpiece hose outlet a short distance away from the tailpiece so that the hose connection can be safely made away from the heat of a fire, and so that the hose can be extended from the outlet to a safe distance from the fire location. (Tr. 57-59). In this regard, Williams testified that fire hoses are as long as 500 feet in length. (Tr. 58).

As previously noted, the parties waived their filing of post-hearing briefs with respect to Citation No. 7368778. Consequently, the following is the edited version of the bench decision issued at the hearing:

> The Mine Act is a strict liability statute. Thus, mine operators are liable without regard to fault. *Sewell Coal Co. v. FMSHRC*, 686 F. 2d 1066, 1071 (4th Cir. 1982); *Allied Products Co. v. FMSHRC*, 666 F.2d 890, 893-94 (5th Cir. 1982); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (March 1988), *aff'd on other grounds*, 870 F.2d 711 (D.C. Cir. 1989); *Asarco, Inc.*, 8 FMSHRC 1632, 1634-36 (November 1986), aff'd, 868 F.2d 1195 (10th Cir. 1989).
>
> In this instance, Williams concedes that there was no water hose outlet at the No. 3 tailpiece as required by section 75.1100-2(b). Thus, the Secretary has demonstrated the fact of occurrence of the cited violation. However, while it is true that the water deluge system does not satisfy the cited mandatory safety standard, the heat activated water sprinkler system is a mitigating factor. It is also noteworthy that Williams had complied with the 300-foot interval for water outlets along the beltline that resulted in an outlet within 40 to 50 feet of the tailpiece.
>
> Finally, although the standard literally requires a fire hose outlet "at the tailpiece," it is clear that section 75.1100-2(b) contemplates that the outlet should be located within a reasonably short distance of the tailpiece to allow firefighters to safely connect the fire hose as well as to permit the hose to be extended and positioned to safely extinguish a fire. While the closest water outlet located approximately 40 feet away from the tailpiece does not strictly comply with the "at the tailpiece" terms of section 75.1100-2(b), the negligence associated with the cited condition is, at best, minimal. Accordingly, given the strict liability nature of the Mine Act's enforcement scheme, **a civil penalty of $30.00 shall be imposed for Citation No. 7368778.**

(Tr. 67-71).

B. Docket No. KENT 2001-136

1. Citation No. 7368744

During the course of a routine AAA inspection of Williams' No. 3 Mine on April 25, 2000, Curry observed the No. 3 belt conveyor that is located in the No. 5 entry. The waterline servicing the No. 3 belt was located in the No. 6 entry parallel to the No. 3 belt. Curry noted that two fire valve outlets were located at 300-foot intervals at the waterline in the No. 6 entry approximately 60 feet from the No. 3 belt in the No. 5 entry. (Gov. Ex. 7). The mandatory safety standard in section 75.1100-2(b) requires water valves to be installed at 300-foot intervals along the beltline. Section 75.1100-2(b) further specifies that "[w]aterlines may be installed in entries adjacent to the conveyor entry belt as long as the outlets project into the belt conveyor entry."

As a result of his observations that these two water valves did not project from the waterline in the No. 6 entry into the No. 5 belt entry, Curry issued Citation No. 7368744 citing a non-S&S violation of section 75.1100-2(b). (Gov. Ex. 6). Curry testified the location of the water valves in an adjacent entry would make it difficult for beltmen to connect a fire hose to extinguish a belt fire because of the low seam conditions. (Tr. 78). However, Curry designated the violation as non-S&S because ". . . the [No. 3] beltline was well-cleaned, rock dusted, [and] the entire area was damp, which reduced the likelihood of a fire occurring." (Tr. 79).

Curry attributed the violation to Williams' high degree of negligence because a similar citation had been issued in December 1999 for the same failure to extend 23 water valves into the No. 5 belt entry. (Tr. 103-04). Abatement of that citation was held in abeyance pending Williams' petition for modification. The petition for modification was still pending, and the abatement of the December 1999 citation was suspended, when Curry issued Citation No. 7368744 on April 25, 2000, for two additional water valves that were installed off the waterline in the No. 6 entry as the No. 3 belt advanced. Despite the pending modification petition, and the abeyance of the abatement for the previous citation, Curry established April 28, 2000, as the abatement for the Citation No. 7368744. (Tr. 92-93). Citation No. 7368744 was terminated on May 1, 2000, after the two water outlets were extended into the No. 3 belt entry. (Gov. Ex. 22). The Secretary seeks to impose a $200.00 civil penalty for Citation No. 7368744.

On cross examination, Curry admitted discussing Williams' water outlet locations with Roy Compton, MSHA's Assistant District Manager in District 6 Pikeville, after the December 1999 citation was written. Curry testified Compton instructed him to indefinitely extend the abatement date for the December 1999 citation until the petition for modification was decided. (Tr. 82-83; 132-33). However, Compton was replaced by Acting District Manager Anthony Webb who, shortly before Curry's April 2000 inspection, directed Curry "to take some action" to ensure that the water valves would be extended into the belt entry because "the petition [was] not going to be approved." (Tr. 93). Consequently, Curry issued Citation No. 7368744 on April 25, 2000. Although the Secretary could not provide the date the petition for modification for the 23 water outlets was denied, it was ultimately denied after Citation No. 7368744 was terminated on May 1, 2000, after the subject two water outlets were extended into the No. 3 belt entry. (Gov. Ex. 22; Tr. 150-54).

The Secretary, relying on *C F &I Steel Corp.*, 5 FMSHRC 1376, 1378 (July 1983) (ALJ), asserts that a pending petition for modification does not preclude the Secretary from enforcing the subject mandatory safety standard. In *C F & I*, Judge Carlson noted that, in the absence of an application for temporary relief filed pursuant to section 44.16, 30 C.F.R. § 44.16, there is no administrative suspension of enforcement pending resolution of a petition for modification. *Id.*

However, unlike *C F & I*, in this instance, it is undisputed that Hufford Williams was informed by MSHA's assistant district manager Compton that Compton had decided to suspend enforcement of section 75.1100-2(b) pending the outcome of the modification petition. Although the Secretary contends that Compton afforded Hufford Williams "personal favoritism," it is neither contended nor shown that Compton's suspension of the enforcement of section 75.1100-2(b) was *ultra vires*. (Tr. 132-55). In fact, suspension of abatement was understandable given the non-S&S nature of the cited violative condition. Williams relied on Compton's determination.

Along comes Webb, Compton's successor, who is no longer willing to permit Williams to continue installing the water valves at the waterline in the No. 6 entry. However, equity dictates that Williams had a right to rely on Compton's decision to withhold enforcement pending a decision on the modification petition when Williams installed the two cited water valves. These valves had to be installed as the beltline advanced. These two water valves were installed in the identical manner as the 23 previously installed water valves that were permitted to remain under Compton's watch during the pendency of the petition.

In the final analysis, Compton told Hufford Williams that it was permissible to continue installing hose outlets at the waterline in the No. 6 entry until MSHA advised otherwise. Without advising otherwise, Curry issued Citation No. 7368744 on April 25, 2000.

Webb's decision to, in effect, retroactively reverse Compton's decision by reinstating the abatement requirements despite the continuing pendency of the modification petition, constituted an abuse of discretion. While, at the hearing, I was initially inclined to affirm the citation and reduce the degree of negligence based on Hufford Williams' reliance on Compton's directive, after further deliberation, I have concluded that Webb's abuse of discretion warrants vacating the citation. **Accordingly, Citation No. 7368744 shall be vacated.**

2. Citation No. 4509735

At the hearing, Hufford Williams stipulated that the approved roof control plan for the No. 3 Mine generally required the maximum width of crosscut entries to be 20 feet. (Tr. 164-65). When such entries exceeded 20 feet in width additional roof support consisting of additional roof bolts and conventional supports was required. (Tr. 163-64). However, additional roof support in areas more than 20 feet wide does not negate the fact that the roof control plan has been violated. (Tr. 166-67).

MSHA Inspector Jerry Bellamy, accompanied by MSHA Inspector Michael Pruitt, inspected Williams' No. 3 Mine on August 29, 2000. Bellamy and Pruitt measured the last open crosscut between the No. 1 and No. 2 entries and determined it was 21 to 23 feet wide over a

distance extending approximately 40 feet. (Gov. Exs. 8, 23; Tr. 165-66). Consequently, Bellamy issued Citation No. 4509735 citing a violation of section 75.220, 30 C.F.R. § 75.220, that requires each mine operator to follow its approved roof control plan. (Gov. Ex. 8). Bellamy characterized the violation as S&S because there was a hazard of a sudden roof fall that could result in serious or fatal injuries. (Tr. 166). Bellamy attributed the violation to a moderate degree of negligence because he did not observe any additional roof bolts or additional support. The Secretary seeks to impose a civil penalty of $131.00 for Citation No. 4509735.

Hufford Williams stipulated to the fact of the occurrence of the violation admitting that the crosscut was mistakenly cut too wide. (Tr. 231-32). On cross-examination, Bellamy conceded that the cited area was the last break in the crosscut that had not been scooped or rock dusted. Pruitt gave permission to Terry Williams to scoop the area so that the floor could be cleaned before timbers were set. (Tr. 186).

As noted Williams has stipulated to the fact of the roof control plan violation. Turning to the S&S issue, it is clear that it is reasonably likely that the additional stress caused by the additional 3 feet of width that exceeded the maximum permissible 20 feet would have resulted in a roof fall within the context of continued mining operations. In the event of a roof fall, it is also reasonably likely that serious injury would occur. Thus the Secretary has demonstrated that it is reasonably likely that the hazard contributed to by the violation, *i.e.*, inadequately supported roof, will result in an event, i.e., a roof fall, causing serious injury. Accordingly, **the S&S designation in Citation No. 4509735 shall be affirmed.**

With respect to Williams' degree of negligence, it is a mitigating factor that Williams was prevented from installing additional timbers because the last break in the crosscut had just been completed and the crosscut had not been scooped clean. Consequently, the negligence attributable to Williams is reduced from moderate to low. Although the gravity of the violation remains serious given its S&S nature, the $131.00 **civil penalty proposed by the Secretary for Citation No. 4509735 shall be reduced to $75.00 in recognition of the reduction in the degree of negligence.**

3. Citation No. 4509739

The Secretary initially sought to impose a $55.00 civil penalty for Citation No. 4509739. However, the Secretary agreed to vacate Citation No. 4509739 at the hearing. (Tr. 538). The citation was vacated because of confusion concerning the method of determining which side of a return stopping was the positive pressure side that required plastering or mortared jointing pursuant to the mandatory safety standard in section 75.333(e)(1)(i), 30 C.F.R. § 75.333(e)(1)(i).

4. Citation No. 7368080

During the course of his August 30, 2000, inspection inspector Bellamy noted the weekly examiner had failed to take methane and oxygen level readings at the #1 evaluation point (#1 E.P.) in the bleeder designated in Williams' approved ventilation plan because the roof in the vicinity was unsupported and the area was inaccessible. (Gov. Ex. 13). Consequently, Bellamy

issued Citation No. 7368080 citing a non-S&S violation of section 75.364, 30 C.F.R. § 75.364, that requires weekly methane examinations of worked out areas. (Gov. Ex. 12). The violation was attributed to Williams' moderate degree of negligence. The Secretary proposes a $55.00 civil penalty for Citation No. 7368080.

At the hearing, Hufford Williams stipulated that the location of the #1 E.P. specified in the approved ventilation plan was inaccessible. (Tr. 303). Williams explained that he didn't realize that the area in the vicinity of the #1 E.P. had not been roof-bolted because the coal seam was extremely low when he agreed to designate the area as an evaluation point. (Tr. 306-08). Williams admitted he did not file to modify the mine's ventilation plan by designating a new evaluation point until after Citation No. 7368080 was issued. (314-15).

The parties waived briefing on this citation. Inasmuch as Williams admits the fact of the violation, a bench decision was issued affirming the citation as issued. (Tr. 315-16). **A civil penalty of $55.00 shall be assessed for Citation No. 7368080.**

5. Citation No. 7368081

Bellamy observed the bleeder system during his August 30, 2000, inspection. Bellamy noted five separate areas, or rooms, in the bleeder that were not roof-bolted or otherwise supported. (Gov. Ex. 14-A). However, Bellamy testified that one of the five areas was in fact roof-bolted. (Tr. 332). These unsupported rooms were in the farthest areas of penetration. Section 75.220 requires a mine operator to follow its approved roof control plan. The roof control plan required all mined areas to be roof-bolted unless they were dangered-off. Bellamy testified these rooms should have been roof-bolted because they may have required ventilation curtains to be hung in them. Bellamy stated there was nothing to prevent someone from going back under these areas with the exception of three small timbers with no danger board on them. (Tr. 335).

Bellamy testified the proper way to prevent miners from going under these unsupported areas was to block the entrances with cribs and timbers and to hang a proper danger board. As a result of his observations, Bellamy issued Citation No. 7368081 citing an S&S violation of section 75.220. (Gov. Ex. 15). Bellamy attributed the violation to Williams' moderate degree of negligence. Following a Manager's Safety and Health Conference, the citation was ultimately modified to a non-S&S violation and Williams' negligence was lowered from moderate to low. (Gov. Ex. 15, p.2). The citation was abated after the subject unsupported rooms were dangered-off. (Tr. 339). The Secretary seeks to impose a $55.00 civil penalty.

At the hearing the Secretary attempted to distance herself from Gerald McMasters, the MSHA Conference and Litigation Specialist who was responsible for deleting the S&S designation and reducing the degree of Williams' negligence. The Secretary's belated motion, proffered at the hearing, to modify the citation back to S&S and to increase Williams degree of negligence was denied. (Tr. 342-46).

Hufford Williams testified that the coal seam was approximately 32 inches high with an eight inch layer of jack rock on top. Ordinarily, the jack rock is removed with the coal.

However, in these remote areas of deepest penetration that were not required to be traversed, the coal was removed leaving the jack rock on the roof. In these areas the jack rock had fallen to the floor leaving the unsupported area with approximately 24 inches in height. Williams testified that since these areas were already inaccessible, further actions to danger the areas off were not required. In essence, Williams disputed the Secretary's interpretation of the roof control plan that all mined areas must be roof-bolted even if they are inaccessible.

Under the Mine Act's statutory scheme, the Commission and its judges are required to accord deference to the Secretary's interpretations of the law and regulations provided the interpretations are reasonable. *Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F. 2d 1432, 1435 (D.C. Cir. 1989). Here, the dispositive question is whether the Secretary's application of the broad terms of a roof control plan in a low seam coal mine to require all mined areas to be roof-bolted, even if the very small dimensions of some areas render them physically inaccessible, is reasonable.

In applying broad regulatory provisions, the Commission looks to whether "a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation." *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982). Given the circumstances of this case, the Secretary's interpretation is counter-intuitive. Attempting to roof bolt very low, inaccessible areas that are in danger of collapse exposes roof bolting personnel to unnecessary hazards.

Consequently, it is unreasonable to conclude that Williams should have recognized that MSHA required inaccessible areas to be roof-bolted under the roof control plan. This conclusion is consistent with the MSHA's Safety and Health Conference official who deleted the S&S designation in apparent recognition that these unsupported areas were not hazardous in view of their inaccessibility. **Accordingly, Citation No. 7368081 shall be vacated.**

6. Citation No. 7368085

Bellamy and Pruitt traveled the full length of the intake primary escapeway on August 30, 2000. The escapeway is approximately 38 inches in height. Bellamy noted there was a water accumulation of approximately six inches deep for a distance of approximately 120 feet stretching from the No. 3 head drive to outby the fan. Bellamy also noted approximately six inches of fallen draw rock from the No. 3 head all the way out to the surface, a distance of approximately 2,000 feet. (Tr. 413-15). As a result of his observations, Bellamy issued Citation No. 7368085 citing a violation of the mandatory safety standard in section 75.380(d)(1), 30 C.F.R. § 75.380 (d)(1). (Gov. Ex. 16). This mandatory safety standard requires, in pertinent part, that each escapeway must be "maintained in a safe condition to always assure passage of anyone, including disabled persons[.]" Although the violation was designated as S&S in nature, Citation No. 7368085 was subsequently modified to delete the S&S designation. (Gov. Ex. 16, p.2). The Secretary proposed a $55.00 civil penalty for Citation No. 7368085.

Although Hufford Williams asserts the water accumulation was 40 feet in length rather than the 120 feet alleged by Bellamy, Williams does not deny that the primary intake escapeway was cluttered with fallen draw rock. In this regard, Williams admitted:

> The secondary escapeway is a neutral entry that we travel beside the belt. If I had a man injured, that's the way I'd bring him out, the secondary escapeway on the battery-powered personnel carrier. I wouldn't bring him down the intake. Matter of fact, I have had a couple of men with minor injuries and that's the way we bring them down the neutral entry.

(Tr. 416).

With respect to whether the facts support the cited violation, the Commission has determined that the language in section 75.380(d)(1) is "plain and unambiguous" in that it imposes on an operator an obligation to maintain escapeways that pass the general functional test of "passability." *Utah Power and Light*, 11 FMSHRC 1926, 1930 (October 1989). In this regard, escapeways must be passable for everyone, including disabled persons. In this case, Williams has conceded that the neutral secondary escapeway rather than the primary escapeway was relied upon to remove injured personnel. Consequently, the Secretary has satisfied her burden of demonstrating a violation of the cited mandatory standard. **Accordingly, Citation No. 7368085 shall be affirmed and Williams shall pay the $55.00 civil penalty initially proposed by the Secretary.**

7. Citation No. 7368086

Inspector Bellamy examined the weekly examination book on August 31, 2000. Section 75.364(h), 30 C.F.R. § 75.364(h), requires that at the completion of any shift during which a portion of the weekly examination is conducted, all hazardous conditions found during the examination, and the corrective actions, taken must be recorded in the examination book by the examiner. Bellamy examined the record book to determine if the hazardous conditions he observed the previous day were recorded. Bellamy determined the rooms of deepest penetration in the bleeder that were unsupported and not dangered-off that were the subject of Citation No. 7368081 were not noted in the book. In addition, Bellamy noted that mined out rooms in excess of 20 feet that lacked line curtains as required by section 75.333(g), 30 C.F.R. § 75.333(g), were not recorded in the examination book. To maintain adequate ventilation, in the absence of a crosscut, section 75.333(g) requires line curtains in a room where mining has been discontinued and the room extends more than 20 feet from the inby rib. (Tr. 438-39). Bellamy had issued a citation for the section 75.333(g) violations the previous day that was not contested by Williams and is not in issue in these matters.

Based on Bellamy's examination of the weekly record book, Bellamy issued Citation No. 7368086 citing a non-S&S violation of the weekly examination requirements in section 75.364(h). (Gov. Ex. 17). The cited violation was attributable to Williams' moderate negligence. The Secretary seeks to impose a $55.00 civil penalty for this citation.

In defense of the citation, Hufford Williams testified that the weekly examiner did not believe the conditions cited by Bellamy were hazardous with the exception of two rooms which were driven 21 and 22 feet without curtains. As previously noted, Williams stated he did not

contest the citation concerning these two rooms and that the civil penalty for that citation had been paid.

Having vacated Citation No. 7368081 in this decision because the unsupported rooms were not hazardous in that they were remote and inaccessible, the weekly examiner was not obliged under section 75.364(h) to note the conditions in the record book. However, the lack of the requisite curtains specified in section 75.333(g), which Williams candidly concedes was a violative condition requiring corrective action, does provide an adequate basis for establishing a section 75.364(h) violation. **Consequently, Citation No. 7368086 shall be affirmed and Williams shall pay the $55.00 civil penalty initially proposed by the Secretary.**

8. Citation No. 7368775

Inspector Curry inspected the No. 3 Mine on October 19, 2000. Curry traveled the No. 001 MMU and noted that the No. 3 right crosscut was being cut from the No. 4 to the No. 3 entry. In driving the crosscut, Williams had left a large area of roof into the No. 3 entry that was left unsupported. (Gov. Ex. 19). Curry was concerned that Williams had failed to post a physical warning device or a physical barrier at the last row of bolts in the No. 3 entry that would have prevented a miner's exposure to this newly mined section of unsupported roof. (Tr. 449-51, 457-58, 465, 468-70, 474-78). At the time Curry observed this condition, the continuous miner was mining in the No. 4 entry and the roof bolting machine was in the No. 5 entry rather than in the vicinity of the unsupported area in the No. 3 entry. (Tr. 456, 463, 465).

As a result of his observations, Curry issued Citation No. 7368775 citing a violation of the mandatory safety standard in section 75.208, 30 C.F.R. § 75.208, that requires "[e]xcept during the installation of roof supports, the end of permanent roof support shall be posted with a readily visible warning, or a physical barrier . . . to impede travel beyond permanent support." (Gov. Ex. 18). Curry attributed the violation to Williams' moderate degree of negligence. Curry considered the violation to be S&S because of the extended period of time the roof had been left unsupported and because of the likelihood of a miner's exposure to a roof fall. (Tr. 466-69). The Secretary seeks to impose a $131.00 civil penalty for Citation No. 7368775.

In defense of the citation, Hufford Williams disputed the unsupported roof condition described by Curry. However, Williams admitted that he had no first hand knowledge of the mining sequence in issue. (486-87). Relying on the account of the events given to him by his foreman, who did not testify, Williams contends the last break in the crosscut penetrated the No. 3 entry that was already roof-bolted. (494-95). Alternatively, Williams asserts the "except during the installation of roof supports" exception to the dangering-off requirement in section 75.208 applies because the continuous miner had just finished his cut when Curry interrupted the mining cycle before the continuous miner could back out to allow the roof bolter to pass into the crosscut. (Tr. 481-83).

In resolving the fact of the violation question, it is significant that Curry is the only person with firsthand knowledge who testified. Thus, Hufford Williams' assertion that the break in the crosscut in the No. 3 entry was already roof-bolted cannot be credited. With respect to Williams alternative argument that Curry interrupted the roof bolting mining sequence, Curry

credibly testified that the roof bolter was bolting in the No. 5 entry while the continuous miner was mining in the No. 4 entry. (Tr. 485). Thus, Curry testified that the area beyond permanent roof support was left unmarked for a period of 20 to 25 minutes based on the activities of the continuous miner in the No. 4 entry. (Tr. 484-85). Consequently, the Secretary has demonstrated the fact of occurrence of the cited section 75.208 violation.

With respect to the S&S issue applying the *Mathies* criteria, it is apparent that the cited violation, *i.e.*, the failure to post warnings to prevent travel under unsupported roof, contributes to the discrete safety hazard of a miner's exposure to unsupported roof. It is also obvious, that if a roof fall were to occur, serious, if not fatal injuries, will occur. Finally, an S&S finding also requires a finding that it is reasonably likely that the hazard contributed to will result in an event, *i.e.*, a roof fall, in which there is a serious injury. *U.S. Steel*, 6 FMSHRC at 1836. Given the fact that the unsupported roof area was located in an active mine area with miners present, the Secretary has demonstrated the S&S nature of the violation in that a serious, if not fatal, injury was reasonably likely to occur.

Williams' violation of section 75.208 is serious in gravity and is attributable to no more than moderate negligence inasmuch as the mining cycle had not been completed and the roof bolter was in the vicinity of the unsupported area. **Accordingly, Citation No. 7368775 shall be affirmed and Williams shall pay the $131.00 civil penalty sought to be imposed by the Secretary.**

9. Citation No. 7368777

Section 75.1722(b), 30 C.F.R. § 75.1722(b), of the Secretary's mandatory safety standards requires that guards at conveyor drives must extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. Inspector Curry observed the No. 4 belt conveyor on October 26, 2000. Curry noted that, although there was adequate guarding of the drive sprockets and the power roller, the guard did not extend in front of the discharge roller which measured approximately 20 inches by 20 inches. (Gov. Ex. 21, p.3). As a consequence, Curry issued Citation No. 7368777 citing an S&S violation of the provisions of section 75.1722(b). (Gov. Ex. 20). Curry considered the violation to be S&S in nature because a beltman or a pre-shift examiner could contact the exposed discharge roller and sustain serious injury. In this regard, Curry explained that low seam coal increased the likelihood of contact with the unguarded roller because a potential victim would be at face level with the exposed roller. (Tr. 519, 527-28). The violation was attributed to Williams' moderate degree of negligence. The Secretary seeks to impose a civil penalty of 131.00 for Citation No. 7368777.

Once again Hufford Williams candidly conceded that he did not actually see the cited condition. However, based on the information provided to him by his foreman, Williams admitted the guard did not extend sufficiently to cover the end of the roller. (Tr. 524-26). Consequently, Williams stipulated to the fact of the violation and only contests the S&S designation. (Tr. 523). Williams contends that low seam coal minimizes the risk of inadvertent contact through stumbling because miners crawl or work from their knees. (Tr. 523-24).

As noted, a violation is properly designated as significant and substantial if it is reasonably likely that the hazard contributed to by the violation will result in an event in which there is serious injury. The commission has emphasized that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining,* 6 FMSHRC at 1868. (Emphasis in original). Curry testified that belt personnel are in proximity to the beltline on a daily basis. The beltline is also examined by the weekly examiner.

With regard to the conflicting testimony concerning whether low seam coal increases the risk of contact and injury, I note that the confines of low entries limits maneuverability and the freedom of movement. Under such circumstances, erring on the side of caution, I find that an unguarded roller operating in low seam coal increases the likelihood of inadvertent contact and serious injury. Consequently, on balance, the Secretary has satisfied her burden of demonstrating that the cited violative condition was S&S in nature and serious in gravity.

With regard to the issue of negligence, I note that it is undisputed that the conveyor was guarded although the guard was approximately 20 inches too short. In view of the fact that the conveyor was almost guarded in its entirety, the degree of negligence attributable to Williams shall be reduced from moderate to low. **Accordingly, Citation No. 7368777 shall be affirmed and Williams shall pay a $100.00 civil penalty for this citation in recognition of a reduction in Williams' degree of negligence.**

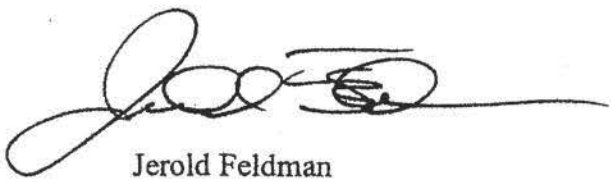
ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation No. 7368778 in Docket No. KENT 2001-137 **IS AFFIRMED.**

IT IS FURTHER ORDERED that Citation Nos. 4509735, 7368080, 7368085, 7368086, 7368775 and 7368777 in Docket No. KENT 2001-136 **ARE AFFIRMED.**

IT IS FURTHER ORDERED that Citation Nos. 7368744, 4509739 and 7368081 in Docket No. KENT 2001-136 **ARE VACATED.**

IT IS FURTHER ORDERED that Williams Bothers Coal Company Incorporated **shall pay a total civil penalty of $501.00** in satisfaction of Citation Nos. 7368778, 4509735, 7368080, 7368085, 7368086, 7368775 and 7368777. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, Docket Nos. KENT 2001-136 and KENT 2001-137 **ARE DISMISSED.**



Jerold Feldman
Administrative Law Judge

Distribution:

J. Phillip Giannikas, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215 (Certified Mail)

Hufford Williams, Williams Brothers Coal Company, Inc., 258 Cantrell Road, Mouthcard, KY 41548 (Certified Mail)

/hs

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

January 22, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2001-53-M
Petitioner	:	A. C. No. 43-00396-05537
v.	:	
	:	Harvey Bushlot
U.S. QUARRIED SLATE PRODUCTS, INC.,	:	
Respondent	:	

SUMMARY DECISION

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against U.S. Quarried Slate Products, Inc., under section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges four violations of the Secretary's mandatory health and safety standards and seeks a penalty of $456.00. The parties have filed cross-motions for summary decision.[1] For the reasons set forth below, I deny the Respondent's motion, grant the Secretary's, affirm the citations and assess a penalty of $456.00.

Findings of Fact

The Respondent owns and operates the Harvey Bushlot mine located in Fair Haven, Rutland County, Vermont. The mine is a surface quarry producing slate. The site has an office in the center with an old building to the left and a new one to the right.[2] The quarry is directly behind these facilities. The mine employs approximately 30 employees, three in the quarry and the rest in the buildings.

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[1] Commission Rule 67(b), 29 C.F.R. § 2700.67(b), provides that: "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."

[2] The Respondent refers to these buildings as a "manufacturing, warehouse and packaging, and distribution facility." (Affidavit of William Turner.) The Secretary calls them "mills." (Declaration of Walter E. Morgan.)

The quarry is entered by going down a long haul-road which is beside the new building. Slate is mined by loosening it from the working face with explosives. It is then dug out with an extractor, sorted as to quality, loaded into pit trucks and carried to the block yard, an area near the new building. In the block yard, large pieces of slate are graded and sorted by color and size before being broken down by an air chisel and taken into the new building.

The company also buys slate blocks from other quarries. These are delivered to the block yard, where they are handled in the same manner as slate from the Respondent's quarry.

A slate-sizing machine is located to the immediate right of the doorway of the new building. Further down the right side are several trimming machines used to trim the slate to specific sizes. To the left of the doorway is a block saw which saws the slate into blocks. The blocks then go to splitting stations where they are split with hammers and chisels to a desired thickness before being placed on pallets to be moved to the trimmers.

The old building contains a large, slate saw. In addition the building has a slate punching area and an area where slate is placed on pallets by hand and readied for transport.

Some of the mine's products are: roofing slate; floor tiles, in natural cleft or tile honed and polished; head stones; and building cladding, in natural cleft, sawn finished, flame finished or polish finished. All of the mine's products are finished goods. No raw or crude material is offered for sale.

At the present time, there are 55 active operations producing a sized, slate product in MSHA's Northeastern district. Thirty-seven are in the Rutland area; eight are in neighboring Washington County, New York; seven are in Eastern Pennsylvania and one each is in Bennington County, Vermont, Hampshire County, Massachusetts and Lewis County, Virginia. All of these have historically been subject to MSHA's jurisdiction.

MSHA has conducted inspections of the quarry, buildings, machinery and work activities at the Harvey Bushlot mine since 1985. On January 17, 2001, MSHA Inspector Walter E. Morgan conducted an inspection of the site, which resulted in the issuance of the four citations,

Citation Nos. 7734488,[3] 7734489,[4] 7734490[5] and 7734491,[6] in this case. At the time of the inspection, the old building was being renovated and the large saw was not in operation.

The Respondent asserts that MSHA does not have jurisdiction over the old and new buildings. The company bases this claim on the 1979 interagency agreement between MSHA and the Occupational Safety and Health Administration (OSHA). Interagency Agreement, 44 Fed. Reg. 22,827 (April 17, 1979). MSHA, of course, disagrees.

The parties have stipulated, for the purposes of this case, that they

> agree that if the Court . . . were to rule that MSHA does have jurisdiction over the processing facilities at the Harvey Bushlot Mine, then the four citations . . . issued on January 17, 2001, for . . . violations found in the processing facilities for a total penalty amount of $456.00 were properly issued and valid."

Conclusions of Law

The Mine Act

Determination as to whether an entity is subject to the jurisdiction of the Mine Act begins with the terms of the Act. Section 4 of the Act, 30 U.S.C. § 803, provides that: "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the

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[3] The citation alleges a violation of section 56.14112(b) of the Secretary's regulations, 30 C.F.R. § 56.14112(b), because a "machine guard on a four foot section of the chain drive rollers had been removed for maintenance and not replaced. The unguarded section was in the saw room of the new mill and was in operation at the time of the inspection."

[4] The citation alleges a violation of section 56.12032, 30 C.F.R. § 56.12032, in that "[a] cover plate for the junction box of the #3 exhaust fan located in the splitting area of the new mill was found damaged."

[5] The citation alleges a violation of section 56.14112(a)(1), 30 C.F.R. § 56.14112(a)(1), because: "The machine guard for the drive motor belt and pulley on the #3 trimming machine in the new mill was not sufficient in that it did not cover the pinch point area as required."

[6] The citation alleges a violation of section 56.14112(b), because: "The machine guard on the chain drive for the roller assembly located in the saw room of the old mill was not replaced after maintenance was performed. The roller assembly was in use at the time of inspection and employees were observed in the area."

provisions of this Act." Section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1), defines "coal or other mine," in pertinent part, as:

> (A) an area of land from which minerals are extracted in nonliquid form . . . (B) private ways and roads appurtenant to such area, and (C) lands, excavations . . . and workings, structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits . . . or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals . . . . In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment[.]

As the Commission has noted, the legislative history of the Mine Act indicates that Congress intended a broad interpretation of what constitutes a "mine" under the Act. *Oliver M. Elam, Jr., Co.*, 4 FMSHRC 5, 6 (Jan. 1982). Thus, the Senate Committee declared that "what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and . . . doubts [shall] be resolved in favor of . . . coverage of the Act." S. Rep. No. 95-181, 95th Cong., at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978). *See also Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cir. 1979) *cert. denied*, 444 U.S. 1015 (1980).

The Interagency Agreement

In an attempt to carry out the mandate of the Mine Act and to provide guidance to employers and employees in industries that might be affected by both MSHA and OSHA, the two agencies of the U.S. Department of Labor entered into an interagency agreement. The preamble to the agreement states that the parties, "have entered into this agreement to delineate certain areas of authority, set forth factors regarding determinations relating to convenience of administration, provide a procedure for determining general jurisdictional questions, and provide a procedure for coordination between MSHA and OSHA in all areas of mutual interest."

Part B of the agreement concerns "Clarification of Authority." Paragraph 4 of Part B provides that: "Under section 3(h)(1), the scope of the term milling may be expanded to apply to mineral product manufacturing processes where these processes are related, technologically or geographically, to milling." Paragraph 5 sets out some non-exclusive factors to be considered in determining what constitutes mineral milling, but concludes with this statement: "The

consideration of these factors will reflect Congress' intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act."

Paragraph 6(a) states that: "MSHA jurisdiction includes salt processing facilities on mine property; electrolytic plants where the plants are an integral part of milling operations; stone cutting and stone sawing operations on mine property where such operations do not occur in a stone polishing or finishing plant; and alumina and cement plants." Paragraph 6(b) provides that: "OSHA jurisdiction includes the following, whether or not located on mine property: brick, clay pipe and refractory plants; ceramic plants; fertilizer product operations; concrete batch, asphalt batch, and hot mix plants; smelters and refineries."

Finally, Appendix A to the agreement sets out some definitions as well as some specific examples of MSHA and OSHA areas of authority. With regard to milling, it provides that MSHA has authority to regulate the following types of milling processes: "crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching and briquetting." Of particular pertinence to this case, it states that: "Sawing and cutting stone is the process of reducing quarried stone to small sizes at the quarry site when the sawing and cutting is not associated with polishing or finishing." On the other hand, it provides that OSHA has jurisdiction over "custom stone finishing," which "[c]ommences at the point when milling, as defined, is completed, and the stone is polished, engraved, or otherwise processed to obtain a finished product and includes sawing and cutting when associated with polishing and finishing."

Discussion

The Respondent asserts that, because it produces finished products at the Harvey Bushlot site, it comes within the exception to MSHA's authority in paragraph 6(a) of the agreement, as the stone cutting and sawing on mine property occurs in a "finishing" plant. Likewise, it claims that, because the agreement assigns OSHA authority over custom stone finishing, it is not subject to MSHA jurisdiction. Taking into consideration the legislative history of the Mine Act and the fact that the Mine Act determines the breadth of MSHA's jurisdiction, not the interagency agreement which merely attempts to set out some considerations to be used in determining whether there is jurisdiction under the Act, I find that the violations alleged in the four citations are within MSHA's jurisdiction.

The Act specifically provides that in determining what constitutes milling under it, "the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." This language "gives the Secretary discretion, within reason, to determine what constitutes mineral milling . . . ." *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984). Since MSHA has historically inspected the type of slate facility operated by the Respondent and has specifically inspected the Harvey Bushlot mine since 1985, it is apparent that the Secretary has determined that there is a convenience of

administration in having MSHA inspect such facilities where the employees work at one physical establishment. That "determination is to be reviewed with deference . . . by the Commission . . . ."[7] *Id.*

Furthermore, the interagency agreement supports, rather than contradicts, the Secretary's determination in this case. Thus, it states in paragraph 3 under Clarification of Authority that: "Notwithstanding the clarification of authority provided in Appendix A, there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and the beginning of the manufacturing cycle." Such a situation is what exists here.

Next, the agreement states in paragraph 4 that "the scope of the term milling may be expanded to apply to mineral product manufacturing processes where these processes are related, technologically or geographically, to milling." Not only is this statement consistent with the discretion given the Secretary under the Act, but all of the processes at the Respondents facility are related both technologically and geographically.

Finally, turning to the specific sections of the agreement relied on by the Respondent, it would appear that missing guards on chain drive rollers in saw rooms, a missing cover plate from a junction box in the splitting area and a guard on a trimming machine all involve the process of reducing quarried stone to smaller sizes and not sawing and cutting associated with polishing and finishing. If so, this would put the areas under MSHA's jurisdiction even under the agreement.

It is not necessary, however, to reach such a conclusion in this case. There is insufficient evidence to determine exactly where in the facility the violations occurred so that a line between milling and manufacturing can be drawn with accuracy. Nevertheless, since both the Act and the agreement permit the Secretary to include a complete facility under MSHA jurisdiction, as the Secretary has done in this instance, it does not make any difference whether the sawing and cutting was associated with milling or manufacturing.

Conclusion

MSHA has historically inspected slate operations such as the Respondent's. It has been inspecting this particular mine, in it's entirety, since 1985. Obviously, then, the Secretary has determined that MSHA has jurisdiction over the mine. Given the desire of Congress that the term "mine" be given the widest possible interpretation and the guidance and discretion allowed the Secretary in the Act, this determination is perfectly reasonable and entitled to deference. Contrary to the company's position, nothing in the interagency agreement militates against that

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[7] "In this highly technical area deference to the Secretary's expertise is especially appropriate." *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 n.9 (D.C. Cir. 1984) (citations omitted).

determination.[8] Therefore, I conclude that the entire Harvey Bushlot complex is subject to MSHA's jurisdiction.[9]

Civil Penalty Assessment

As previously noted, the parties have stipulated that the four citations and the penalties assessed for them "were properly issued and are valid." Consequently, I conclude that the proposed penalties of $150.00 for Citation No. 7734488, $55.00 for Citation No. 7734489, $55.00 for Citation No. 7734490 and $196.00 for Citation No. 7734491, for a total of $456.00, are appropriate under section 110(i) of the Act, 30 U.S.C. § 820(i). Hence, I assess a penalty of $456.00.

Order

Accordingly, the Motion for Summary Decision of the Respondent is **DENIED**, the Secretary's Motion for Summary Decision is **GRANTED**, the four citations are **AFFIRMED** and U.S. Quarried Slate Products, Inc., is **ORDERED TO PAY** a civil penalty of **$456.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

Kathryn A. Joyce, Esq., Office of the Solicitor, U.S. Department of Labor, E-375, John F. Kennedy Federal Building, Boston, MA 02203

Andrew P. Andrushko, President, U.S. Quarried Slate Products, Inc., Scotch Hill Road, Fair Haven, VT 05743

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[8] If it did, it is clear that jurisdiction is ultimately controlled by the Act, not the interagency agreement.

[9] It is apparent from some of the statements made in the Respondent's motion that its real complaint is not that MSHA has jurisdiction over it, but with manner in which MSHA exercises that jurisdiction. Such a complaint, if valid, has no bearing on whether MSHA has jurisdiction and cannot be remedied in this forum.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

January 15, 2002

UNITED MINE WORKERS OF AMERICA: LOCAL 1248, Dist. 2, on behalf of miners, Complainant	:	COMPENSATION PROCEEDING
	:	Docket No. PENN 2002-24-C
v.	:	Maple Creek Mine
MAPLE CREEK MINING, INC., Respondent	:	Mine ID 36-00970

ORDER

By Motion to Dismiss filed on December 26, 2001, Maple Creek Mining, Incorporated ("Maple Creek"), seeks dismissal of the United Mine Workers' ("UMWA") Complaint for Compensation as untimely filed. The Complaint, filed November 28, 2001, seeks compensation of affected miners for the period of August 28, 2001, through October 8, 2001. Under Commission Rules, "[a] complaint for compensation under section 111 of the Act, 30 U.S.C. 821, shall be filed within 90 days after the beginning of the period during which the complainants are idled or would have been idled by the order that gives rise to the claim." 29 C.F.R. § 2700.35. The deadline for filing was November 26, 2001, two days earlier than the Complaint was filed. UMWA filed its Response to Motion to Dismiss on December 26, 2001, asserting that the late filing was due to miscalculation of the deadline.

The Commission has entertained late filings upon a showing of good cause. *See, e.g., Original Sixteen to One Mine, Inc.*, 23 FMSHRC 1217 (November 2001). Moreover, pleadings of *pro se* litigants have always been held to less stringent standards than pleadings drafted by attorneys. *Id.* at 1218; *Rostosky Coal Co.*, 21 FMSHRC 1071, 1072 (October 1999). UMWA has shown good cause for its failure to meet the filing deadline, especially in light of having filed the Complaint three months subsequent to the underlying order, on the same day of the month.

Accordingly, Maple Creek's Motion to Dismiss is hereby **Denied**, and the hearing in this matter shall be scheduled by separate Order.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

Leon J. Moscalink Jr., Chairman, Mine Health & Safety Committee, Local Union 1248, UMWA, 609 Keystone Street, Greensburg, PA 15601-4329

Marco M. Rajkovich Jr., Esq., Melanie J. Kilpatrick, Esq., Wyatt, Tarrant & Combs, LLP, 1700 Lexington Financial Center, Lexington, KY 40507

nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., Room 6003
WASHINGTON, D. C. 20006-3867
Telephone No.: 202-653-5454
Telecopier No.: 202-653-5030

January 30, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 2001-379-M A. C. No. 41-00009-05554
v.	:	
CACTUS CANYON QUARRIES, INCORPORATED, Respondent	:	Mine: Fairland Plant and Quarries

ORDER DENYING MOTION TO RECONSIDER
ORDER DENYING LEAVE TO FILE AN APPEAL
AND
ORDER DENYING CERTIFICATION UNDER RULE 76

Before: **Judge Barbour**

PROCEDURAL POSTURE

On November 5, 2001, the Commission received the Secretary's Motion to File Petition Out of Time in the above captioned case. In support of her motion, she asserts that the file was misplaced in the Office of the Solicitor, and was not brought to the attention of the assigned attorney until October 29, 2001. Sec. Mot. at 1. Further, she contends that the attorney promptly took action to file the penalty petition. *Id.* Indeed, the Certificate of Service shows that the attorney filed the petition on October 30, 2001, one day after he claims to have received the case file.

The Secretary is required to file the penalty petition with the Commission within 45 days of receipt of a timely contest of the proposed penalty assessment. 29 C.F.R. 2700.28(a). The date stamped on the notice of contest shows that the Civil Penalty Office received the notice on August 28, 2001. Hence, the Secretary should have filed her penalty petition on or before October 15, 2001. This means the penalty petition was 15 days late.

Subsequently, on November 13, 2001, the Commission received the Respondent's Response to Late Filing and for Sanctions and Answer to Petition. In the motion, the Respondent requests that the case be dismissed due to the Secretary's failure to demonstrate adequate cause for the delay in filing the penalty petition. Resp. Mot. at 1. The Respondent further states that it was prejudiced by the delay, contending that witnesses had been transferred or moved to other jurisdictions; that the delay had caused problems with a subsequent inspection; and the delay hurt its ability to offer witnesses with a clear memory. *Id.*

On December 13, 2001, I issued an order in which I determined that the Secretary had demonstrated adequate cause and accepted the late-filed penalty petition. The Respondent, thereafter, filed its Motion to Reconsider, and Motion for Leave to File Appeal of Order Granting Motion to File Petition Out of Time. I have reviewed the Respondent's arguments, and I conclude, again, that the Secretary has demonstrated adequate cause for filing her penalty petition out of time.

In addition, on January 23, 2002, I received a motion requesting certification of this ruling under Commission Rule 76 (29 C.F.R. § 2700.76). I have reviewed the Respondent's arguments and I conclude that certification is not appropriate.

DISCUSSION

Section 105(d) of the Mine Act states in pertinent part: "[i]f, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of penalty issued under subsection (a) or (b) of this section . . ., the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing." In interpreting the 45-day rule, the Commission has stated that "Rule [28] implements the meaning of 'immediately' in section 105(d)." *Salt Lake Co. Road Dept.*, 3 FMSHRC 1714, 1715 (July 1981). Thus, it is apparent that the purpose of Rule 28 is to effectuate swift enforcement. *Id.*

However, while the Secretary should adhere to the 45-day time limit, the Commission has made clear that neither the term "immediately" nor the time limit should be construed as a "procedural strait [jacket]." *Id.* at 1716. Moreover, in *Salt Lake*, the Commission considered Congress' intent when it drafted the Mine Act, stating that the "considerations of procedural fairness to operators must be balanced against the severe impact of dismissal of the penalty proposed upon the substantive scheme of the statute and, hence, the public interest itself." *Id.* Indeed, when Congress created the Mine Act, it did so with the purpose of promoting safety and health in the mining industry. S. Rep. No. 95-181, at 1 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 589 (1978).

Mindful of the Act's purpose, the Commission held in *Salt Lake* that the Secretary may request permission for late filing if the request is (1) based upon adequate cause, and (2) the operator has an opportunity to object to the late filing on the grounds of prejudice. 3 FMSHRC at 1715.

I have previously held that "adequate cause is based upon the reasons offered and the extent of the delay." *Jerry Hudgeons,* 22 FMSHRC 272, 273 (Feb. 2000). It is conceivable that a case file could be misplaced in the Solicitor's Office in light of the large number of cases processed. However, had the delay been lengthy, my disposition might have been different because the Solicitor's Office should make periodic efforts to check files to ensure that cases are processed in a timely manner. Fifteen days is not a lengthy delay, and after having balanced the procedural fairness to the operator against the severity of dismissal and in the interest of achieving the purpose of the Mine Act, I find that the Secretary's reason coupled with the short delay is adequate cause.

The Respondent should be aware that, in keeping with the public interest, the Commission grants procedural leniency not only to the Secretary, but to operators as well. An operator is required to file an answer to the penalty petition within 30 days after service of the petition pursuant to Commission Rule 29. 29 C.F.R. § 2700.29. However, in the interest of reaching the merits of the case, the Commission issues a Show Cause Order to an operator if it fails to answer within 30 days in an effort to allow a request for hearing before a case is dismissed.

Regarding prejudice, the Respondent contends that the short delay has prejudiced its ability to present its case in that witnesses have moved to other jurisdictions or memories have faded. The contentions are not convincing. The inspection, which lead to this case, occurred in August 2000. This is not such a long time ago as to assume memories of the events at issue have diminished irrevocably. Also, if witnesses are geographically unavailable the parties may agree upon, or the judge may order, other means to secure the necessary evidence — e.g., the submission of sworn statements.

Accordingly, the Respondent's Motion to Reconsider is **DENIED**.

The Respondent's Motion for Leave to File an Appeal and its Motion for Certification also are **DENIED**. The essential contention raised by the Respondent is that I have abused my discretion by permitting the Secretary to file her petition out of time. As counsel for the Secretary notes, the exercise of my discretion has been based on well established legal principles concerning late filings and the determination of prejudice (Secretary of Labor's Opposition to Operator's Motion for Certification of Interlocutory Ruling 5-9). There is no conflict within the Commission nor among its judges concerning these principles. Thus, the exercise of my discretion has not raised a controlling question of law and certification will not materially advance the final disposition of this proceeding.

The Respondent is again **ORDERED** to file its answer to the penalty petition within 30 days, i.e., on or before March 1, 2002.[1]

David F. Barbour
Chief Administrative Law Judge

Distribution: (Certified Mail)

Christopher V. Grier, Esquire, Office of the Solicitor, U.S. Department of Labor, 525 South Griffin St., Suite 501, Dallas, TX 75202

Andy Carson, Esquire, 7232 Co. Rd. 120, Marble Falls, TX 78654

/wd

[1] I note in passing that the tone of Respondent counsel's Motion to Reconsider and Response to Motion to Deny Petition for Interlocutory Review is somewhat surprising. In the future, counsel may wish to be mindful that a motion is an exercise in legal argument, not in self-serving rhetoric.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

January 30, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-528-M
Petitioner	:	A.C. No. 42-01912-05513
	:	
	:	Docket No. WEST 2001-538-M
v.	:	A.C. No. 42-01912-05514
	:	
	:	Docket No. WEST 2001-557-M
DARWIN STRATTON & SON, INC.,	:	A.C. No. 42-01912-05515
Respondent	:	
	:	Airport Pit

ORDER DENYING MOTION FOR CONTINUANCE OF HEARING

On November 14, 2001, I consolidated these cases and set them for hearing in St. George, Utah, on February 5, 2002. On January 28, 2002, I notified the parties of the specific courtroom in which the hearing will be held. On January 30, 2002, Darwin Stratton & Son, Inc. ("Darwin Stratton") filed a motion to continue the hearing in these cases. As grounds for the motion, Darwin Stratton stated that it seeks from the Secretary documents that the Secretary listed in her prehearing report dated January 25, 2002. Darwin Stratton states that it needs time to "receive and review" these documents presumably to prepare for the hearing. In addition, Darwin Stratton asks that the hearing be postponed until after the United States District Court for the District of Utah issues its decision in the injunctive relief case brought against it and its agents by the Secretary of Labor.

The Secretary of Labor opposes the motion for continuance. First, she states that Darwin Stratton did not request these documents in a timely manner. She points to the Commission's rules of procedure which required Darwin Stratton to file any document requests within 20 days after it filed its answers in these cases. In addition, the Secretary states that today she sent, by overnight mail, all of the requested documents over which she does not assert a privilege. Consequently, she argues that Darwin Stratton will have the requested documents prior to the hearing in these cases. The Secretary also states that the District Court case referred to by Darwin Stratton "will not adversely affect the outcome of the instant litigation." She argues that Darwin Stratton has not presented sufficient justification to postpone the hearing.

For the reasons discussed below, Darwin Stratton's motion to continue the hearing in these cases is denied. Darwin Stratton could have requested, well in advance of the hearing, that the Secretary provide it with any and all documents that she proposes to introduce at the hearing. A party cannot seek a continuance by filing a request for the production of documents less than a

week before the hearing. Moreover, the Secretary is sending Darwin Stratton all or most of the requested documents. The documents that Darwin Stratton requested are not complex or technical. These documents include (1) the assessed violation history; (2) field notes and citation documentation forms of the three MSHA inspectors involved in these cases; and (3) statements from miners. Once these documents are received, it will not take Darwin Stratton very long to review them. In addition, Darwin Stratton's representative can question the Secretary's witnesses about any documents that she seeks to introduce at the hearing.

The Secretary states that she is seeking an injunction in District Court to prohibit further denials of entry by Darwin Stratton and three of its agents at its mines including the Airport Pit. She states that Darwin Stratton denied entry to MSHA inspectors in May 2001. Three citations are at issue in the present cases. Citation No. 6282323, issued November 21, 2000, alleges that Darwin Stratton was not examining the crushing plant for hazardous conditions. Citation No. 7966590, issued August 2, 2000, alleges that Darwin Stratton failed to file a quarterly employment report with MSHA for the second quarter of 2000. Citation No. 7984337, issued August 8, 2000, alleges that Darwin Stratton refused to allow an MSHA inspector onto the Airport Pit on that date. As stated above, the District Court proceeding concerns a refusal of entry that occurred in May 2001. Consequently, MSHA jurisdiction is at issue in these cases and in the injunction action. Nevertheless, I am holding a hearing in these cases so that the parties can present evidence for me to consider when determining whether the citations are valid and lawful. Darwin Stratton has not presented any reason why the hearing should be delayed until after the District Court has entered its final decision in the injunction action. At the conclusion of the hearing, I will consider an oral motion from Darwin Stratton that I withhold judgment in these cases until after the District Court has ruled. If the District Court denies the injunction on the basis that MSHA lacks jurisdiction, then Darwin Stratton can argue that these cases must be dismissed.

For the reasons set forth above, the motion for continuance filed by Darwin Stratton is **DENIED**. The hearing will commence at 9:30 am, on Tuesday, February 5, 2002, at the Chamber Of Commerce, 2nd Floor Courtroom, 97 East St. George Blvd, St George, Utah. Failure to attend the hearing will result in a default decision being entered 29 C.F.R. § 2700.66(b).

Richard W. Manning
Administrative Law Judge

Distribution:

John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Fax and First Class Mail)

Darwin Stratton or Clayton or Todd Stratton, 720 West State Street, Suite 71-7, Hurricane, UT 84737-2084 (Fax 435-635-3187 and Federal Express)

Darwin Stratton & Son, Inc., 3120 South 1100 West, Hurricane, UT 84737-2528 (First Class Mail)

Johnpatrick Morgan, General Delivery, Fredonia, AZ 86022-9999 (First Class Mail)

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