FEBRUARY 1998

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

FEBRUARY 1998

There were no cases filed in which review was granted or denied in the month of February.

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 6, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. WEST 98-23-M A.C. No. 24-00500-05512 A
BRIAN D. FORBES	:	

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

ORDER

BY: Jordan, Chairman; Riley, Verheggen, 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 17, 1997, the Commission received a request from Brian D. Forbes ("Forbes") 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). Attached to his motion were a memorandum in support of his motion for relief and an affidavit of Forbes. Forbes requests relief from the final order, a hearing, and that the $1000 civil penalty assessed against him be set aside.

Under Rule 25 of the Commission's Procedural Rules, an operator or other person against whom a penalty is proposed 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. 29 C.F.R. § 2700.25. If the operator or other person fails to so notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

In his request, Forbes asserts that he failed to timely file a notice of contest because he was not aware that he had been cited for this violation in his individual capacity until August 8, 1997, when he received a letter from the Department of Treasury notifying him that he owed an unpaid delinquent debt to MSHA. F. Mem. at 3. Forbes asserts that, upon subsequent inquiry to MSHA, he was informed on September 5, 1997, that he had been fined in connection with a violation identified in a citation originally issued on September 22, 1993, to his former employer,

Maricorp, Inc. ("Maricorp"). *Id.* at 1-3. Forbes retained an attorney, who was informed by the Chief of MSHA's Civil Penalty Compliance Office that certified letters informing Forbes of the proposed penalty assessment — dated March 24, 1994, April 26, 1994, October 25, 1996, and September 27, 1997 — were all returned to MSHA marked "unclaimed." *Id.* at 3. Forbes claims that these attempts by MSHA to notify him of the proposed penalty by certified mail were unsuccessful because he was not in Montana at these times, and instead was working at locations in Idaho, Utah, and Alaska. *Id.* at 2, 3-4. Forbes' affidavit attests to these factual assertions.

The Secretary opposes Forbes' request, arguing that service of the proposed penalty assessment upon Forbes by certified mail satisfied due process requirements, and that he failed to satisfy any of the requirements for obtaining relief under Fed. R. Civ. P. 60(b). S. Opp'n at 5-16. The Secretary's opposition contains numerous attachments, including affidavits from an MSHA supervisory special investigator and the Chief of MSHA's Civil Penalty Compliance Office, several "unclaimed" certified mail receipts, and a copy of the original citation.

The Secretary alleges that, after she discovered that Forbes had left the employ of Maricorp, she made numerous attempts between April 26, 1994, and October 25, 1996, to notify Forbes by certified mail addressed to a post office box he maintained in Marion, Montana, of the civil penalty assessed against him and subsequent impending efforts to collect the penalty assessed. S. Opp'n at 2-3. On August 8, 1997, the U.S. Department of the Treasury notified Forbes by regular mail that "aggressive legal collection action [would] commence" regarding the unpaid civil penalty owed to MSHA. *Id.* at 4.

We have held that, in appropriate cases and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen assessments that have become final by operation of section 105(a). *See, e.g., Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (September 1994). Relief from a final order is available under Rule 60(b) in circumstances such as a party's "mistake, inadvertance, surprise, or excusable neglect" (Fed. R. Civ. P. 60(b)(1)), or for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6).[1]

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[1] Rule 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . ., misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have

Rule 60(b) provides that motions pursuant to the section "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b). Therefore, if Forbes' motion is treated as one brought pursuant to subparagraph (1) of Rule 60(b), it would be subject to dismissal on grounds of untimeliness since it was filed over a year after the proposed penalty assessment became a final order of the Commission in September 1994. *See Lakeview Rock Products, Inc.*, 19 FMSHRC 26, 28-29 (January 1997); *Thomas Hale*, 17 FMSHRC 1815, 1816-17 (November 1995); *Ravenna Gravel*, 14 FMSHRC 738, 739 (May 1992); *Pena v. Eisenman Chemical Co.*, 11 FMSHRC 2166, 2167 (November 1989) (one year time limit contained in Rule 60(b) "is an extreme limit" and may not be extended).[2]

Motions brought under subsection (b)(6) must be made within a reasonable time. Fed. R. Civ. P. 60(b). What constitutes a "reasonable time" under Rule 60(b)(6) depends on the facts of each case. Moore's Federal Practice 60.65[1], at 60-197 to 60-200; *see Washington v. Penwell*, 700 F.2d 570, 572-73 (9th Cir. 1983) (four-year delay not unreasonable because of extraordinary circumstances); *Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir. 1981) (six-year delay unreasonable in part because no extraordinary circumstances); *Clarke v. Burkle*, 570 F.2d 824, 831-32 (8th Cir. 1978) (six-year delay not unreasonable); *see also United States v. Holtzman*, 762 F.2d 720, 725 (9th Cir. 1985) (analyzing whether opposing party was prejudiced by delay and whether moving party had a good reason for failing to take action sooner). In this case, Forbes asserts that his failure to timely notify MSHA of his intent to contest the citation and his subsequent delay in filing a motion to reopen were attributable to lack of notice of the proposed penalty assessment resulting from his absence from Montana for the greater part of the preceding four years.

The Commission has 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 Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (September 1995). In accordance with Rule 60(b), the Commission has previously afforded parties relief from a final order of the Commission. *See*

> prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b).

Rule 1(b) of the Commission's Procedural Rules provides that the Federal Rules of Civil Procedure shall apply "so far as practicable" in the absence of applicable Commission Rules. 29 C.F.R. § 2700.1(b).

[2] The Secretary, however, takes the position that "this case does not clearly fit within the circumstances set out in Rule 60(b)(1)," and thus "is not subject to the one-year time limitation for seeking relief from a final judgment." S. Opp'n at 11-12 n.8.

Peabody Coal Co., 19 FMSHRC 1613, 1614-15 (October 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (September 1996); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

On the basis of the present record, we are unable to evaluate the merits of Forbes' motion or whether his delay in filing the motion was reasonable. It is not entirely clear from the record whether Forbes had actual knowledge of the citation issued against him and the subsequent default judgment before August 1997. Forbes' explanation that he did not receive the certified mail from MSHA because he was absent from the state of Montana during the periods of attempted service is a defensible one. The Secretary asserts, however, that Forbes failed to cooperate with MSHA after being informed by telephone that he was entitled to a conference concerning the proposed assessment. S. Opp'n at 2. On the existing record we cannot resolve this and other factual disputes which must be resolved in order to determine whether Forbes has met the requirements for Rule 60(b) relief.

Therefore, in the interest of justice, we remand this matter for assignment to a judge to determine whether Forbes' motion was timely filed under Rule 60(b) and, if so, whether he has met the criteria for relief under Rule 60(b). 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, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Marks, dissenting:

I vote to deny Forbes' motion.

Marc Lincoln Marks, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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February 24, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. YORK 94-76-M through 94-83-M
ROCK OF AGES CORPORATION	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners[1]

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 801 et seq. (1994), involves citations issued by the Mine Safety and Health Administration ("MSHA") against Rock of Ages Corporation ("ROA"). The citations at issue arose from an investigation into a fatal accident at ROA's Smith Quarry and involve 30 C.F.R. Part 56, Subpart E, which governs the use and handling of explosives at surface metal/nonmetal mines. Administrative Law Judge Jerold Feldman upheld the citations and assessed penalties totaling $180,000. 17 FMSHRC 1925 (November 1995) (ALJ). The Commission granted the petition for review filed by ROA in which it challenges the judge's decision that ROA violated the Mine Act as charged in the citations and that its violations were due to its unwarrantable failure. In addition, ROA challenges the penalty assessment and contends that it did not receive a fair trial because the judge was biased against ROA and its counsel. For the reasons that follow, we affirm the judge's findings of violations and determinations of unwarrantability; we reject ROA's allegations of bias; and we vacate the penalty assessments and remand them for further consideration.

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[1] Commissioner Beatty assumed office after his case had been considered at a decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n. 2 (June 1994). In the interest of efficient decision making, Commissioner Beatty has elected not to participate in this matter.

I.

Factual and Procedural Background

A. How Granite is Quarried

ROA is a granite-quarrying company with twelve quarries and over 300 employees. 17 FMSHRC at 1927; Tr. II 453.[2] The Smith Quarry, where the fatal accident occurred, is a massive granite formation where granite is quarried through the removal of large benches in the shape of cubes. 17 FMSHRC at 1927. A typical bench is 40 feet wide, 35 feet deep and 16 feet high. *Id.* at 1929.

In the beginning of the quarrying process, an automatic torch is used to burn a channel or seam, approximately 6 inches wide, around the top of a bench to separate the bench for blasting and quarrying. *Id.* The channel burning begins at the front face on top of a bench, proceeds across one side, across the back, across the opposite side, and ends back at the front face. *Id.* Burning the channels on the bench takes approximately 15 days. *Id.* After the channels are burned, a series of holes are drilled horizontally at intervals along the bottom of the base of the bench. *Id.* at 1930. The holes are approximately 1 7/8 inches in diameter and 32 feet long. The horizontal "lift" or detonation holes are completed after about 26 days into quarrying the bench. *Id.* Next, a series of vertical holes are drilled every 5 1/2 feet in the top of the bench to within about 1 foot of the horizontal lift holes. *Id.* The vertical holes are completed after about 34 days into the quarrying process. *Id.*

The bench is separated from the quarry floor by detonating explosives loaded into the horizontal lift holes. *Id.* Not all the holes are loaded and different loading patterns — explosives in every third or fourth hole — are used. *Id.* With the exception of seven pyrodex shots from February to July 1993, ROA used seismic cord, which is a continuous rope-like cord of blasting material, placed in various lift holes, connected to a trunk line and detonated by blasting caps. *Id.* Following a detonation, the powderman, his assistant and a foreman go to the face of the bench to evaluate the success of the lift and check for any misfires. *Id.* They look for proper cracking from lift hole to lift hole, signs of discoloration from blast residue, and any evidence of non-detonated blasting materials. *Id.* The greatest danger with undetonated seismic cord arises when it breaks as it is being unrolled and pushed into the lift holes; however, the powderman generally can detect such a break because the roll of cord usually stops before reaching the back of the bench. *Id.* at 1931. The blasting process occurs after 35 days into quarrying the bench. *Id.* at 1930.

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[2] "Tr. I" references are to the consecutively numbered transcript volumes from the first four days of hearing conducted on January 10-13, 1995, and "Tr. II" references are to the consecutively numbered transcript volumes from the second four days of hearing conducted on April 25-28, 1995. Exhibits designated with the letter "R" are those introduced into evidence by the Secretary, and exhibits designated with the letter "C" are those introduced by ROA.

After the detonation, the bench is further divided by driving shims and wedges into the vertical holes drilled at 5 1/2 foot intervals on top of the bench. *Id.* Slabs are split off from the main bench by a front-end loader with a boom. *Id.* As each slab is removed, new stone is exposed and the powderman conducts a further examination of the newly exposed area. *Id.* at 1930-31. When a lift is clean, the top half of the hole becomes part of the lifted bench, and the bottom half becomes the top of the bench to be quarried on the next level below. *Id.* at 1927. If the lift is not clean, "caprock," or a layer of rock over the lift hole, may remain in place on the surface after the bench is removed with the lift hole intact, sometimes with undetonated explosives inside. *Id.* at 1927-28. Similar to caprock, "underbreak" occurs when the rock underneath the lift holes cracks, leaving lift holes intact that are removed as the vertical slabs of the bench are quarried. Tr. II 528-29.

The slabs are split into smaller pieces of granite that are transported from the bench to a loading area where they are lifted by a derrick out of the quarry. 17 FMSHRC at 1931. This process is repeated until the entire bench is removed, a process that takes about 10 to 12 days after the blasting. *Id.* In all, the entire bench is quarried in a period of about 47 days from the initial channel burning. *Id.* After the bench has been removed, the surface is cleaned and scraped with a loader and examined further. Tr. II 843-45. The granite surface underneath the removed bench then becomes the top of the bench that will be quarried in future years as the level of the quarry descends.

B. The Use of Pyrodex as an Explosive

Beginning in 1986, ROA tested the use of pyrodex as a substitute for seismic cord. 17 FMSHRC at 1932. The Hodgdon Powder Company manufactures pyrodex, which has the same chemical ingredients as black powder plus additional binders and burn rate modifiers. *Id.* at 1931. Pyrodex is generally referred to as a "replica" of black powder and is classified as a Class B explosive by the United States Department of Transportation ("DOT"), while black powder is a Class A explosive.[3] *Id.* at 1931, 1932. Black powder is a detonating explosive, while pyrodex is a propellant explosive. *Id.* at 1931. A propellant explosive generates gas and energy as it burns; a detonating explosive generates gas, energy and shock when it detonates. *Id.* at 1931-32. Pyrodex is regarded as having superior qualities in blasting rock without radial fracturing, which causes more waste. *Id.* at 1932.

ROA performed several test detonations with pyrodex in 1986, but decided against further use of it because of the labor needed to pressurize the hole in which the pyrodex was used. *Id.* Pressurization, which could be accomplished through stemming the collar of the lift hole with rags or paper, was essential for proper lift. *Id.* Pressurization also channeled gas and energy to the back of the hole to ensure that other bags of pyrodex in the middle and rear of the hole would ignite following ignition of pyrodex in the front of the hole, which was accomplished with an

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[3] "Explosive" is defined in 30 C.F.R. § 56.6000, as "[a]ny substance classified as an explosive by the Department of Transportation . . . ."

electric "squib," sometimes referred to as a match. *Id.* A further test detonation in 1987 did not adequately split the granite bench, and ROA ceased experimenting with pyrodex. *Id.* Hodgdon Vice President Glenn Barrett supervised the test firings in 1986 and 1987. *Id.*

In January 1993, ROA informed Hodgdon that it was interested in resuming use of pyrodex as an explosive. *Id.* 1933. Hodgdon Vice President Barrett sent ROA information concerning the use and handling of pyrodex. *Id.* Barrett recommended that pyrodex be used by spacing several bags of it in a pressurized 30 to 40-foot lift hole without using any connecting detonating cord. *Id.* The bag of pyrodex in the front of the lift hole was ignited by using the electric squib. *Id.* Succeeding bags were ignited by the first detonation if there were no obstructions in the hole. *Id.*

From February to May 1993, ROA used pyrodex at the Smith Quarry and a second quarry. *Id.* Because ROA did not generally use pyrodex in quarrying, it prepared detailed blasting reports, specifying the location and dimensions of the bench at which pyrodex was used, the number and loading sequence of bags of pyrodex in each lift hole, and the number and location of lift holes that were loaded. *Id.* at 1933-34. On June 22, 1993, the pertinent report indicates that the 42-foot bench had 80 lift holes that were 37 feet deep and spaced at 6-inch intervals across the face. *Id.* at 1934. Four bags of pyrodex were placed in each fourth hole.[4] *Id.* One bag was placed in the front of each hole, one in the middle, and two in the back, approximately 32 to 37 feet away from the mouth of the hole. *Id.*; Ex. R-7. Neither blast foreman Earl Kelty nor powderman Bud Reynolds pressurized the lift holes in which pyrodex was used. Tr. I 588-89. Following the blast, Kelty and Reynolds inspected the bench and reported their observations of the condition of the bench in the blast report. 17 FMSHRC at 1934. Other blast reports indicated significant variation in the number and sequence of lift holes loaded and the number of bags of pyrodex loaded into each hole. *See* Ex. R-7.

C. Events Surrounding the Fatal Accident

Around July 1, 1993, derrick operator Earnest Batchelder was loading blocks of granite to be lifted out of the quarry when he saw four unexploded bags of pyrodex that were shaken loose and hanging from one of the blocks. 17 FMSHRC at 1934. There were no detonators attached to the bags. *Id.* at 1935. He reported the presence of the bags to Foreman Kelty. *Id.* Subsequently, Kelty noted on the report for the June 22, 1993 pyrodex blast that four bags of pyrodex had failed to detonate. *Id.*; Ex. R- 7. However, Kelty did not conduct any further search to check for the presence of more undetonated pyrodex. 17 FMSHRC at 1935-36. MSHA

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[4] The loading pattern began with the first and fourth holes and then went to each fourth hole thereafter, resulting in a sequential loading pattern of 1, 4, 8, 12, 16, 20, 24, 28, etc. 17 FMSHRC at 1934. The judge based this finding on ROA's initial accident report (Ex. R-8), testimony, and other exhibits, including a diagram, Ex. R-10, drawn by ROA foreman Earl Kelty indicating the loading pattern and bags of unexploded pyrodex located after the accident. *Id.* at 1939-41 & n 5.

Inspector Donald Fowler testified without contradiction that he questioned Kelty during the investigation into the accident as to why he did not follow up on the discovery of the undetonated bags of pyrodex and Kelty responded that he "forgot." *Id.*; Tr. I 586-87.

On May 20, 1994, channel burner operator Michael Bassett had completed a channel on the side of a bench and was initiating the burning of a channel at the rear of the bench. 17 FMSHRC at 1936. Unbeknownst to Bassett, his torch passed within two feet of a lift hole with two bags of unexploded pyrodex that remained from the detonation and quarrying of the bench directly above the new bench. *Id.* His torch then passed over three empty holes. *Id.* at 1937. Just before 11:00 a.m., Bassett's torch ignited two unexploded bags of pyrodex as he passed over another lift hole. *Id.* at 1936-37. Bassett was thrown 10 feet into the air and killed instantly. *Id.* at 1936.

A subsequent search for more unexploded pyrodex on the bench where the accident occurred revealed seven more lift holes, each with two bags. *Id.* at 1937. A total of 22 bags of pyrodex were discovered — the four bags uncovered in 1993, the four bags that Bassett encountered on the day of the accident, and the 14 additional bags uncovered after the accident.[5] *Id.* Based on the loading sequence of the lift holes and the loading pattern within the holes, MSHA concluded that the accident location was at the base of a removed bench where ROA had used pyrodex on June 22, 1993. *Id.* The 22 misfires represented 26 percent of the 84 bags of pyrodex loaded into the lift holes for the June 22 detonation. *Id.*

Following its accident investigation, MSHA issued four citations against ROA. *Id.* at 1928. MSHA charged ROA with violating 30 C.F.R. § 56.6311(b), for permitting work other than work necessary to remove a misfire in the blast area; 30 C.F.R. § 56.6306(g), for permitting work to resume prior to an adequate post-blast inspection following the June 22, 1993 detonation; 30 C.F.R. § 56.6904, for permitting an open flame within 50 feet of explosive material; and 30 C.F.R. § 56.6300(a), for inadequately training blasting personnel. *Id.* at 1928-29. MSHA alleged that the violations were significant and substantial ("S&S")[6] in nature and a result of ROA's unwarrantable failure.

D. Judge's Decision

Following an eight-day hearing, the judge issued his decision in which he affirmed the four

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[5] In addition, following the accident, 18 other pyrodex misfires were found at other blast sites at Smith Quarry and at a second quarry where pyrodex was tested, yielding a total of 40 unexploded bags of pyrodex. *See* 17 FMSHRC at 1941.

[6] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

citations and determined that the violations were S&S and occurred as a result of ROA's unwarrantable failure. 17 FMSHRC 1938-54. The judge assessed penalties totaling $180,000 based on the four violations and special findings. *Id.* at 1954.

II.

Disposition

A. Whether Pyrodex Misfires Are Governed by Part 56 Regulations

Before the judge, ROA argued that pyrodex was not an explosive and, therefore, not covered by the Part 56 regulations. 17 FMSHRC at 1938; ROA Post-Trial Br. at 9-11. ROA has abandoned this argument on review, contending instead that, because pyrodex burns rather than detonates, it does not fit within the definition of "misfire" in 30 C.F.R. § 56.6000.[7] ROA Br. at 26-27 n. 21. In response, the Secretary contends that pyrodex is an explosive under DOT regulations, 49 C.F.R. § 173.88 (1996), and to interpret the misfire regulations to exclude pyrodex would defeat their purpose. S. Br. at 47 n. 19. The Secretary argues that the regulatory history of the Part 56 regulations demonstrates her intent to include all explosives that fail to perform as planned. *Id.* at 47-48.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *see also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993). If, however, a regulation is ambiguous, courts have deferred to the Secretary's reasonable interpretation of it. *See Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) ("agency's interpretation is 'of controlling weight unless it is plainly erroneous or inconsistent with the regulation'") (quoting *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945)). The Secretary's interpretation of a regulation is reasonable where it is "logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (alteration in original) (quoting *Rollins Environmental Services, Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *Energy West*, 40 F.3d at 463 (citing *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992).

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[7] Part 30 C.F.R. § 56.6000 defines "misfire" as "[t]he complete or partial failure of explosive material to detonate as planned. The term also is used to describe the explosive material itself that has failed to detonate."

Because the regulation at issue here is ambiguous, we defer to the Secretary's reasonable interpretation. The Secretary correctly notes that the regulatory definition of explosives includes pyrodex. The MSHA regulations defining "explosives" incorporate by reference regulations issued by DOT and its classification of explosives. 30 C.F.R. § 56.6000. These DOT regulations clearly include propellants as explosives. 49 C.F.R. § 173.59.

Although ROA concedes that pyrodex is an explosive, it nonetheless argues that because pyrodex burns rather than detonates, the definition of misfire does not include pyrodex. ROA Br. at 26 n. 21. This interpretation, however, would create glaring inconsistencies in the regulations — pyrodex would be covered for some purposes of the MSHA regulations but not for others. Further, the regulatory history of the definition of "misfire" at 30 C.F.R. § 56.6000 indicates that the choice of the word "detonate" was not intended to carry with it any technical meaning but was substituted for the word "explode" to maintain "consistency" in terminology. *See* 56 Fed. Reg. 2070, 2073 (1991).

Failing to interpret the regulations to include pyrodex would defeat the Mine Act's purpose of enhancing miner safety through the regulations. *See Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). For these reasons, we affirm the judge's determination that pyrodex misfires are covered by the Secretary's Part 56 regulations.

B. Section 56.6311(b)[8]

1. Violation

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[8] Section 56.6311 provides:

> Handling of misfires.
>
> (a) Faces and muck piles shall be examined for misfires after each blasting operation.
>
> (b) Only work necessary to remove a misfire and protect the safety of miners engaged in the removal shall be permitted in the affected area until the misfire is disposed of in a safe manner.
>
> (c) When a misfire cannot be disposed of safely, each approach to the area affected by the misfire shall be posted with a warning sign at a conspicuous location to prohibit entry, and the condition shall be reported immediately to mine management.
>
> (d) Misfires occurring during the shift shall be reported to mine management not later than the end of the shift.

ROA argues that it complied with subsection (b) when it properly disposed of the four misfires located by derrick operator Batchelder, noting that it was not cited under subsection (a) of the standard for failing to properly examine the blast site. ROA Br. at 27-28. ROA further argues that the judge misinterpreted the language of the regulation by requiring it to seek and remove misfires throughout the bench removal process. *Id.* at 28-29. ROA contends that the judge's interpretation and application of the regulation in requiring ROA to search for further misfires once the four misfires were found is contrary to the plain language of the regulation. *Id.* at 29-32. Finally, ROA concludes that, because the citation was not based upon any work performed at the quarry prior to the disposal of the four bags of pyrodex discovered by Batchelder, the citation must be vacated. *Id.* at 32.

The Secretary responds that the judge correctly accepted her interpretation of section 56.6311(b) that operators must properly handle and dispose of misfires about which they know or should know. S. Br. at 48. The Secretary further contends that the standard must be read in its entirety because the obligation to properly handle a misfire does not arise unless there has been an examination for misfires. *Id.* at 47-50 n. 19. Finally, the Secretary argues that her interpretation is consistent with the regulatory history and the protective purposes of the Act and that it would defeat the purposes of the Act and the standard if ROA were only required to dispose of known misfires when it has reason to believe there are other misfires. *Id.* at 50-51.

The judge held that ROA violated the standard when it did not make a reasonable effort to locate and remove misfires at the quarry after Batchelder's discovery of the four bags of pyrodex. 17 FMSHRC at 1948. We agree with the judge that ROA violated the standard, but for reasons different than those relied on by the judge.

The "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d at 1066 (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Id.*; *Utah Power & Light Co.*, 11 FMSHRC at 1930; *Consolidation Coal*, 15 FMSHRC at 1557.

The citation at issue charged ROA with violating section 56.6311(b) by permitting "work not necessary to remove a misfire and protect the safety of miners" on the accident bench. Citation No. 4282251. The clear language of the standard restricts the work that can be performed in an area containing misfires. Barrett was killed while he was burning a channel when his torch made contact with unexploded bags of pyrodex. Channel burning does not constitute work "necessary to remove a misfire or protect the safety of miners," and therefore cannot be carried out in an area that contains misfires. Thus, ROA's authorization of Bassett's channel burning violated the plain terms of the regulation.

ROA argues that the standard only applies "where a misfire *has been found*." ROA Br. at 32. The operator further contends that it fully complied with the standard because Kelty's

inspection of the blast site immediately after the June 22 detonation disclosed no misfires,[9] and ROA properly disposed of the misfires that Batchelder subsequently found on July 1. *Id.* However these contentions are without merit. As the Commission has previously stated, "[t]he Mine Act is a strict liability statute and an operator may be held liable for violations without regard to fault." *Wyoming Fuel Co.*, 16 FMSHRC 19, 21 (January 1994). The standard prohibits all but a specific category of work in areas containing misfires. ROA's interpretative gloss on the standard — that it only applies once a misfire has been found — is contrary to the clear language of the standard.[10] Whether or not ROA knew or had reason to know about the presence of the misfires at the accident bench, the prohibition applied to Bassett's activity.

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[9] Substantial evidence supports the judge's finding that the June 22, 1993 blast site was the location of the fatal accident, 17 FMSHRC at 1939-43. Particularly compelling is the blast report for that site, Ex. R-7, concluding that the four misfires Batchelder found originated from that site. In addition, the accident report which ROA submitted to MSHA, Ex. R-8, identified the accident bench as the location of the June 22 blast. We also note that the loading pattern of pyrodex within the lift holes and the loading sequence of the lift holes at the June 22 blast site and the accident bench indicate that the blast site and the accident bench were the same.

When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[10] In support of its argument that section 56.6311(b) should be read to only apply to "found" misfires, ROA asserts that the present language of section 56.6311 was taken from 30 C.F.R. § 56.6106 (1990), which provided, in pertinent part: "undetonated explosives . . . found shall be disposed of safely." ROA Br. at 30 (citing 56 Fed. Reg. at 2081). However, ROA ignores language in the preamble which stated that section 56.6311 was also based on a second regulation, 30 C.F.R. § 56.6168 (1990) (Handling of Misfires), which prohibited work in a blast area where there were misfires without reference to those "found" or any other words of limitation. *See* 56 Fed. Reg. at 2082. Faced with the differing language of these two predecessor provisions, we find it more persuasive that the Secretary drafted section 56.6311(b) and the reference to misfires with no limiting language. Similarly, in the regulatory preamble to the standard, the Secretary rejected a more restrictive reference to the areas affected by misfires ("blast site") and opted for a broader reference ("affected area") in the standard. *Id.* *See* also *id.* ("The final standard retains 'affected areas' because an accidental detonation during the removal of a misfire is likely to affect an area larger than the blast site.").

2. Unwarrantable Failure[11]

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). In addition, the Commission has relied upon the high degree of danger posed by a violation to support an unwarrantable failure finding. *See BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (August 1992) (finding unwarrantable failure where unsaddled beams "presented a danger" to miners entering area); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992) (finding violation aggravated and unwarrantable based upon "common knowledge that power lines are hazardous, and . . . that precautions are required when working near power lines with heavy equipment"); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure where roof conditions were "highly dangerous").

We agree with the judge that the violation of the standard was the result of ROA's unwarrantable failure. *See* 17 FMSHRC at 1948-49. The discovery of the four unexploded bags of pyrodex should have alerted foreman Kelty to the possibility of additional misfires, particularly in light of the experimental nature of the pyrodex blasting. As a supervisor, Kelty had to appreciate that any pyrodex misfires would pose an extreme danger to the miners in the area. As the judge noted (17 FMSHRC at 1948), unexploded bags of pyrodex would not lie harmlessly under piles of rock but would eventually be exposed as benches were removed and pose a hazard as channel burning resumed. As a supervisor, Kelty is held to a high standard of care. *Midwest Material Co.*, 19 FMSHRC 30, 35 (January 1997). We agree with the judge that Kelty's failure to order any meaningful search for unexploded pyrodex, such as probing caprock at the blast site, "evidenced a callous disregard for the hazards associated with misfires." 17 FMSHRC at 1948; *see also Midwest Material Co.*, 19 FMSHRC at 35 (foreman's negligent conduct in the face of obvious hazard indicates serious lack of reasonable care). Finally, ROA's failure to provide any

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[11] We note that ROA raised in its PDR only the judge's determination of unwarrantability with regard to the standard limiting the handling of explosives to miners trained and experienced in the handling of explosives, 30 C.F.R. § 56.6300(a). *See* ROA PDR at 10, ¶ 29. Petitioner failed to specifically raise the judge's unwarrantability determinations with regard to the three other violations. ROA raised generally the judge's conclusions regarding ROA's negligence. *Id.* at 5, ¶ 7. We address the unwarrantability determinations with regard to these three violations that ROA has addressed in its brief, because those arguments are sufficiently related to the negligence issue in the PDR. However, we admonish petitioner and counsel to adhere to the requirements of the Mine Act and the Commission's procedural rules. *See* 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(d) and (f).

explanation for its negligence and the lack of safety precautions that resulted in this fatal accident supports an unwarrantable failure determination. *Midwest Material Co.*, 19 FMSHRC at 35. In short, the record evidence overwhelmingly supports the judge's determination that ROA's violation was the result of a lack of reasonable care greater than ordinary negligence serious enough to constitute aggravated conduct.

C. Section 56.6306(g)[12]

1. Violation

The judge affirmed the citation charging a violation of section 56.6306(g) for exposing miners to hazardous conditions, because a qualified person failed to inspect the blast site. 17 FMSHRC at 1949-50. The judge rejected ROA's argument that the regulation did not apply to areas blasted before January 31, 1994, the effective date of the regulation. *Id.* at 1950. The judge also rejected ROA's argument that it had already "resumed work" at the blast site in 1993 when it continued to quarry the June 22, 1993 bench. The judge held that resumption of work is a "continuing process" and that ROA did not escape liability by resuming work prior to implementation of the standard. *Id.*

ROA's main argument is that the provision did not go into effect until January 31, 1994, well after the June 22, 1993 pyrodex blast, and that the standard may not be applied retroactively. ROA Br. at 32. ROA further argues that the provision only requires a single post-blast examination and that the judge interpreted it to require multiple examinations for a blast that occurred well before the effective date of the standard. *Id.* at 32-34. ROA contends that the standard fails to inform a "reasonably prudent quarry operator" that it applies to events prior to its effective date. *Id.* at 35. ROA argues that, even if the standard is applied retroactively, it resumed work after the 1993 blast, following a properly conducted post-blast inspection. *Id.* at 35-38.

The Secretary responds that the violative conduct occurred at the time of the fatal accident on May 20, 1994, after the effective date of section 56.6306, when ROA failed to conduct an adequate post-blast examination. S. Br. at 53. The Secretary contends that ROA's

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[12] Section 56.6306 states,

> Loading and blasting.
>
> * * * *
>
> (g) No work shall resume in the blast area until a post-blast examination addressing potential blast-related hazards has been conducted by a person with the ability and experience to perform the examination.

interpretation of the regulation is contrary to its history and purpose. *Id.* at 53-54. The Secretary further argues that in the context of granite quarrying, section 56.6306(g) requires continuing inspections for misfires as new rock is exposed. *Id.* at 54. The Secretary notes that the preamble to section 56.6306(g) explained that the subsection requires "post-blast examinations to minimize hazards to persons who will perform subsequent work in the area." *Id.* at 55 (citing 55 Fed. Reg. 69,596, 69,603 (1993)). The Secretary contends that the duty to inspect included a duty to probe lift holes under caprock. *Id.* at 57.

Section 56.6306(g) was issued in January 1991, along with other regulations dealing with explosives at surface metal/nonmetal mines. The preamble to the 1991 Federal Register publication stated:

> Paragraph (g) is a new provision requiring post-blast examinations to minimize hazards to persons who will perform subsequent work in the area. . . . Trained and experienced persons conduct these examinations and would address all the potential hazards present at a blast area including ground conditions [and] undetonated explosives . . . .

56 Fed. Reg. at 2081.[13]

If, as in this instance, a standard is ambiguous, we defer to the Secretary's reasonable interpretation of the regulation. *See* cases cited slip op. at 6. Contrary to ROA's argument, there is nothing in the plain language of the regulation that requires only a single inspection at a blast site. To the extent ROA relies on the reference in the rule to "*a* . . . post-blast examination" (ROA Br. at 32), the regulation is either silent or ambiguous on the issue of what may trigger the inspection. The preamble cited by the Secretary is fully consistent with her reading of the regulation that multiple inspections might be necessary depending on the hazards and the people in the area performing subsequent work. *See also Coal Employment Project v. Dole,* 889 F.2d 1127, 1131 (D.C. Cir. 1989).

As the judge held, "the concept of resumption of work is a continuing process." 17 FMSHRC at 1950. Indeed, it is apparent from the practice at ROA's quarry that inspections in blast areas were an ongoing process. *See id.* at 1931. Thus, ROA's argument that resumption of work occurred only once while quarrying a bench and that, for the accident bench, it occurred in 1993 following the blast at the bench, is contrary to the record. As ROA noted in its post-trial brief to the judge:

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[13] MSHA stayed the effective date of several of the regulations, including section 56.6306(g), in order to reopen the rulemaking record. The stay was extended on several occasions, and on December 30, 1993, MSHA published the revised regulations with an effective date of January 31, 1994. *See* 58 Fed.Reg. 69,596 (1993). The final rule lacked any substantive changes but was "edited for clarity." *Id.* at 69,603-04.

> After the immediate post-blast examination, the nature of the ROA quarrying process necessarily produces subsequent examinations of the bench. As Mr. Murray explained, lines are split and toppled away from the blasted bench. This process exposes new stone as each line is removed. The ROA powdermen perform a safety inspection before each line is toppled. Then, after each new line is exposed, the powdermen examine the freshly exposed stone for misfires and other safety hazards in the same manner as they did the face.

ROA Post-Trial Br. at 22. *See also* PDR at 7 n. 11; 17 FMSHRC at 1947. This process was repeated when removal of the bench was completed, the floor of the bench was completely exposed, and preparation for quarrying on the top of the adjacent bench was begun. *See generally* Tr. II 841-45 (testimony of ROA witness Bolio).[14]

In short, ROA's practice belies the interpretation of section 56.6306(g) it urges before the Commission — that the regulation only requires one examination before work resumes on the bench following a blast. Application of the regulation to require ongoing examinations of the quarry floor, especially prior to resumption of channel burning on the adjacent bench, is reasonable.[15] The operative events to which the regulation applies are not, therefore, the June 1993 blast and subsequent inspection by foreman Kelty and Reynolds. Rather, ROA had an ongoing obligation to inspect the blast site as new granite was exposed during the quarrying process. Thus, ROA's retroactivity argument fails.

2. Unwarrantable Failure

We agree with the judge that the violation was the result of ROA's unwarrantable failure. *See* 17 FMSHRC at 1950. In light of the discovery of the four unexploded bags of pyrodex in 1993, Kelty's failure to probe the caprock for more misfires evidenced a disregard for the hazards associated with misfires in the presence of torch flames. The danger of misfires was evident from the fact that they would eventually be uncovered as benches were removed in the quarrying process. This obvious danger supports the judge's unwarrantable failure determination. *See BethEnergy Mines*, 14 FMSHRC at 1243-44. The discovery of 40 bags of pyrodex after the fatal

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[14] Testimony to the contrary, that a post-blast examination was a single inspection immediately after the blast, was elicited from ROA's expert witness in response to a leading question from ROA counsel. Tr. II 892.

[15] ROA's notice argument (ROA Br. at 35), that the regulation would not inform "a reasonably prudent person" of its requirements is undermined by its own conduct — ROA performed numerous inspections after the blast. *See* ROA Br. at 34 n. 28. Thus, the Secretary's interpretation is consistent with industry practice and ROA was on notice of the requirements of the regulation. *See Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990).

explosion further indicates the inadequacy of ROA's efforts to ensure that misfires were not present before miners resumed work on benches after detonations. Substantial evidence supports the judge's findings. Accordingly, we affirm the judge's unwarrantable failure determination with respect to this violation.

D. Section 56.6904[16]

1. Violation

The judge affirmed the citation charging a violation of section 56.6904, which prohibits the use of an open flame within 50 feet of explosive material. 17 FMSHRC at 1951-52. The judge found that ROA had constructive knowledge of the likelihood of the existence of unexploded pyrodex once derrick operator Batchelder discovered the four bags of pyrodex. *Id.* He further found that ROA had actual knowledge of the placement of the explosives and location of the bench from which those unexploded bags came. *Id.* at 1951. Thus, the judge concluded that permitting the use of the channel burning torch in light of that actual and constructive knowledge established a violation of the standard. *Id.* at 1952.

ROA argues that the phrase "shall not be permitted" requires knowledge on the part of the operator before a violation can be established. ROA Br. at 38. ROA contends that, because it was not aware of the location of any misfire, the citation must be vacated. *Id.* at 39-40. ROA further argues that the record does not support a finding of constructive knowledge of misfires. *Id.* at 40-41. ROA also contends that application of section 56.6904 has been limited to storage or placement of explosives, not misfires. *Id.* at 38-39.

In response, the Secretary contends that, as used in the regulation, the term "permit" does not require that the operator know that flames are being used within 50 feet of explosives. S. Br. at 58-59. Even if it did, the Secretary continues, knowledge includes constructive knowledge, deliberate ignorance, and reckless disregard. *Id.* Lastly, the Secretary notes that MSHA should not be estopped from citing a mine operator for having an open flame within 50 feet of a misfire because it has not applied the regulation in that circumstance before. *Id.* at 60 n. 25.

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[16] Section 56.6904 provides:

> Smoking and open flames.
>
> Smoking and use of open flames shall not be permitted within 50 feet of explosive material except when separated by permanent noncombustible barriers. This standard does not apply to devices designed to ignite safety fuse or to heating devices which do not create a fire or explosion hazard.

We agree with the Secretary that the regulation does not require actual knowledge on the part of the operator. Such an interpretation of the standard would undermine the strict liability principles of the Mine Act. *See generally Western Fuels-Utah, Inc.*, 10 FMSHRC 256 (March 1988). We note that other more commonly cited standards use the word "permitted" (*see* 30 C.F.R. § 75.400 ("Coal dust . . . and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.")), and the Commission has not held knowledge to be a prerequisite to finding a violation of those regulations.

Chairman Jordan and Commissioner Marks would affirm the judge's determination that ROA violated the standard and that the violation was the result of ROA's unwarrantable failure. Commissioner Riley and Commissioner Verheggen would reverse the judge's determination that there was a violation. Under *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1562-63 (August 1990), *aff'd on other grounds*, 969 F.2d 1501 (3rd Cir. 1992), the effect of a tie vote is to allow the judge's decision to stand as if affirmed.[17]

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[17] Chairman Jordan and Commissioner Marks conclude that the plain language of the regulation reaches ROA's conduct at issue — permitting an open flame within 50 feet of unexploded pyrodex. Furthermore, they do not view the reference to barriers as restricting application of the regulation solely to storage or transportation of explosives. The standard is located in a section of the regulations entitled "General Requirements—Surface and Underground" and is not found in the "storage" section (sections 57.6100-57.6133) nor in the transportation section (sections 57.6200-57.6205). Chairman Jordan and Commissioner Marks also agree with the judge that the violation was the result of ROA's unwarrantable failure. As the judge noted, once Batchhelder discovered the four misfires from the June 22, 1993, blast site, ROA was aware of the likelihood of the continued existence of unexploded pyrodex. 17 FMSHRC at 1951-52. Allowing Bassett's use of the channel burner with its open flame near the old blast site in light of the previous discovery of the unexploded pyrodex evinces a serious lack of reasonable care that well supports an unwarrantable failure determination. *See Midwest Material Co.*, 19 FMSHRC at 35.

Commissioners Riley and Verheggen would reverse the judge's finding of a violation because they find that section 56.6904 clearly does not apply to the conduct at issue. *Dyer*, 832 F.2d at 1066. There appears to be nothing in the language of the standard or its regulatory history which supports the Secretary's interpretation that would have the standard address the hazard of unexploded misfires. Regulations discussed earlier, section 56.6311(b) (handling of misfires) and section 56.6306(g) (loading and blasting), fully address the problem of allowing Bassett back onto the bench to work with a torch in the presence of unexploded pyrodex. In Title III of the Mine Act, which applies to underground coal mines, the standard that is analogous to section 56.6904 is clearly aimed at the safe *storage* of explosives, rather than the proper handling of misfires. *See* 30 U.S.C. § 873(g). Similarly, it is more reasonable to interpret the reference in section 56.6904 to "permanent noncombustible barriers" as referring to storage or transportation of explosives, but not to misfires. Commissioners Riley and Verheggen thus conclude that the

E. Section 56.6300(a)[18]

1. Violation

The judge found that ROA violated section 56.6300(a) when it permitted miners who were not properly trained and experienced in the use of pyrodex to direct the June 22, 1993 blast. 17 FMSHRC at 1952-54. The judge relied on the 26 percent misfire rate of the June 22 detonation and foreman Kelty's failure to take any meaningful action following Batchelder's discovery of the four bags of unexploded pyrodex. *Id.* at 1953. The judge further held that the violation was due to ROA's unwarrantable failure in light of its apparent failure to follow proper loading procedures for pyrodex. *Id.* In addition, the judge noted the lack of training of ROA personnel during the six years after the initial use of pyrodex in 1986. *Id.* at 1954. Finally, in upholding the unwarrantable failure designation, the judge noted that it was the absence of a competent inspection following the discovery of the misfires that led to Bassett's death, rather than problems related to the loading procedures of pyrodex. *Id.* at 1954.

ROA argues that it satisfied the training requirement of the regulation because its employees were trained in "explosives." ROA Br. at 41-42. Further, ROA argues that its employees were trained in the use of pyrodex as a result of the visits of Dean Barrett, vice president of Hodgdon Powder. *Id.* at 42. According to ROA, section 56.6300(a) does not require retraining. *Id.* at 43. Finally, ROA contends that the existence of misfires and an accident does not prove the training violation. *Id.* at 44.

The Secretary counters that the regulation requires training in the particular explosive used at the mine, not simply training in handling any explosive. S. Br. at 61-62. The Secretary relies on the language of the preamble to support her contention that training in the specific

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Secretary's interpretation of section 56.6904 is unreasonable. Accordingly, they would reverse the judge's finding of a violation.

[18] Section 56.6300 provides:

> Control of blasting operations.
>
> (a) Only persons trained and experienced in the handling and use of explosive material shall direct blasting operations and related activities.
>
> (b) Trainees and inexperienced persons shall work only in the immediate presence of persons trained and experienced in the handling and use of explosive material.

explosive in use is required. *Id.* at 62-63. According to the Secretary, the record evidence supports the judge's finding that neither foreman Kelty nor powderman Reynolds were trained by Barrett in the use of pyrodex. *Id.* at 63-64. The Secretary further contends that neither were trained to look for misfires. *Id.* at 64-65.

The judge concluded that the standard requires that blasting personnel be trained and experienced in the "particular explosive being used." 17 FMSHRC at 1952. We agree. The preamble to the standard in the Federal Register illustrates the Secretary's intent to require training in explosives actually utilized by employees:

> The training and experience needed to supervise or direct blasting operations in today's mines where the technology is continually changing and may exceed the training provided to miners who simply handle explosives under a supervisor's direction. As new explosive materials are introduced at the mine, the persons directing the blasting operations must be trained in the safe handling and use of the products. . . . These new products may create hazards in storage, transportation, loading, blast hook-up, blast area security, firing and post blast examinations. Training must address these areas where appropriate.

56 Fed. Reg. at 2079. We agree with the Secretary that, in order to avoid "absurd results" (*see Consolidation Coal*, 15 FMSHRC at 1557), the standard must be interpreted to require that individuals handling explosives be trained in the type of explosives they are actually utilizing. This is demonstrated here where ROA employees, who were trained and experienced in the use of black powder, were clearly ill prepared to properly handle and dispose of pyrodex. ROA's insistence that general training in explosives suffices to meet the standard's requirements is antithetical to the Mine Act's goal of protecting miner safety. *See Freemen Coal Mining Co. v. Interior Board of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974).

Moreover, the record shows that Hodgdon Vice President Dean Barrett did not recall that Kelty or Reynolds were present in 1986 or 1987 during the experimental testing of pyrodex.[19] 17 FMSHRC at 1953. Nor was there any evidence that anyone at ROA had been trained during the six-year interval between the test firings and the resumed use of pyrodex in 1993. *Id.* at 1953-54. Further, as the Secretary points out (S. Br. at 64), Barrett testified without contradiction that, during the 1986-87 experimental blasts, he did not participate with *anyone* at ROA in a post-blast examination. Tr. I 177-78. Finally, the judge relied on the 26 percent misfire rate of pyrodex, and foreman Kelty's failure to engage in a further search for additional misfires after Batchelder's discovery of the four bags, as strong circumstantial evidence of inadequate training in light of the

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[19] Neither Kelty or Reynolds testified at the hearing.

sequential ignition process.[20] 17 FMSHRC at 1952-53, 1954. On this record, substantial evidence supports the judge's findings that Kelty and Reynolds had not been adequately trained in the use and handling of pyrodex. Accordingly, we affirm the judge's finding of violation.

2. Unwarrantable Failure

We also agree with the judge that the violation was the result of ROA's unwarrantable failure. Even if Kelty and Reynolds were present at the 1986-87 test firings of pyrodex, it is apparent from the testimony of Barrett that no one from ROA was trained in how to conduct a post-blast examination. As MSHA Inspector Fowler testified, Reynolds stated during the accident investigation that he did not know how to search for a pyrodex misfire. 17 FMSHRC at 1953. Kelty clearly failed to understand the significance of the sequential ignition process, as evidenced by his lack of followup after Batchelder's discovery of the misfires. Substantial evidence supports the judge's determination. Therefore, we affirm the judge's ruling that ROA's failure to adequately train employees using pyrodex, given the extreme consequences of misfires in the presence of a channel-burning torch, was an unwarrantable failure to comply.[21]

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[20] ROA argues that Barrett's instructions for loading pyrodex were flawed, which was the reason for the fatal misfire. *See* ROA Br. at 43. However, it is more significant that there was an absence of any training, particularly in conducting post-blast inspections, than whether all of the information concerning the handling of pyrodex was completely accurate.

[21] Commissioner Riley dissents on the issue of unwarrantability, offering the following rationale:

> [T]he Secretary and the Commission interpret the words "unwarrantable failure" to require a culpability determination similar to gross negligence or recklessness. . . . Citing the Restatement (2d) of Torts § 283 (1965), the Secretary argues that this negligence-based definition of "unwarrantable failure" requires consideration of *surrounding circumstances*. ("[T]he standard of conduct to which [the actor] must conform to avoid being negligent is that of a reasonable man *under the circumstances*.") (emphasis added).

Secretary of Labor v. FMSHRC, 111 F.3d. 913, 919-920. (D.C. Cir. 1997) (citations omitted) (alteration in original).

For almost a century hardy souls around Barre, Vermont have been carving a living and a legend out of the granite of the Green Mountains. For Rock of Ages to continue to fulfill its historic role, it must remain profitable in a competitive industry. Realizing this, the miners at ROA also have the United Steelworkers of America ("USWA") to help them secure adequate wages, promote safe working conditions, and otherwise look out for their interests. While such

F. Whether the ALJ Denied ROA Due Process

ROA argues that the judge was biased against ROA. ROA Br. at 57-62. ROA contends that the judge's decision itself evidenced a lack of impartiality, noting several of the judge's characterizations of ROA's position. *Id.* at 58. ROA asserts that the judge exhibited bias in the hearing and cites 15 instances of conduct that, according to ROA, support a finding of bias. *Id.* at 58-62. In response, the Secretary argues that ROA has not pointed to any direct evidence of bias but rather asks the Commission to infer bias from rulings of the judge. S. Br. at 77. The Secretary contends that the judge's actions in sustaining objections, questioning witnesses, and making findings adverse to ROA are insufficient to support a finding of bias. *Id.* at 78-80. The Secretary also notes that the judge made many rulings during the hearing favorable to ROA and that ROA's counsel engaged in provocative conduct at the hearing. *Id.* at 80-81.

When reviewing matters involving a judge's conduct of trial, the Commission is governed by the abuse of discretion standard. *See, e.g., In re: Contests of Respirable Dust Sample Alteration Citations,* 17 FMSHRC 1819, 1843-44, 1853, 1864 (November 1995), *appeal docketed sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, No. 95-1619 (D.C. Cir. Dec. 28, 1995); *Big Horn Calcium Co.*, 12 FMSHRC 1493, 1496 (August 1990). With regard to the judge's role at trial, the Commission has stated, "a judge is an active participant in the

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relationships can be adversarial, enlightened labor relations have become more consultive and cooperative.

Working together, ROA and the USWA developed and administered a joint training program. The program has operated successfully for a number of years and would seem to have achieved a measure of respect. Even the MSHA inspector, on site for several of the pyrodex blasts, was trained in the handling of explosives as an employee of ROA. In retrospect we know that, in fact, nobody had been adequately trained to guard against the particular threat that turned parts of the quarry into a mine field. Procedures that had proven adequate for primacord blasting were found to be insufficient to detect and eliminate numerous pyrodex misfires.

Surely someone should have discovered deficiencies in the post blast inspection procedure which with the benefit of hindsight seem glaring. In fact, up until the day of this accident, neither the operator, the union, the workers or MSHA believed they had any reason to question the adequacy of training for anyone responsible for the post blast inspection regime. Unfortunately, even the discovery of unexploded ordinance did not seem to awaken those involved to the heightened danger posed by ROA's experiment with pyrodex. Under the circumstances, in the absence of proper instruction from the manufacturer on the safe use of pyrodex as well as the lack of intervention from MSHA, which was on site and aware of the use of experimental explosives, I am unable to characterize the now obvious deficiencies in ROA's training program as unwarrantable failure.

adjudicatory process and has a duty to conduct proceedings in an orderly manner so as to elicit the truth and obtain a just result." *Secretary on behalf of Clarke v. T.P. Mining, Inc.*, 7 FMSHRC 989, 993 (July 1985). In reversing a judge's sua sponte post-hearing joinder of a party, the Commission held, "[t]he role of the Commission and its judges is to adjudicate, not to litigate cases — a procedural axiom followed by this Commission from its formation." *Lonnie Jones v. D&R Contractors*, 8 FMSHRC 1045, 1053 (July 1986).

Addressing allegations of judicial bias that deprived a party of a fair trial, one court has noted that a judge "has the prerogative to interrogate witnesses, and the duty to do so where necessary to clarify testimony, but the judge must maintain an air of impartiality." *Deary v. City of Gloucester*, 9 F.3d 191, 195 (1st Cir. 1993); *see also Canterbury Coal Co.*, 1 FMSHRC 1311, 1312-13 (September 1979).[22]

We have reviewed the judge's decision and the transcript of the hearing, particularly the transcript pages cited in ROA's brief. We conclude that the judge's actions were well within the bounds of his proper role in conducting the trial. *See Liteky v. United States*, 510 U.S. 540 (1994) (judicial rulings, routine trial administration efforts, and ordinary admonishments to counsel and witnesses inadequate grounds for disqualification); *see also T.P. Mining*, 7 FMSHRC at 993 ("A judge is an active participant in the adjudicatory process . . . ."). None of the cited pages, either individually or cumulatively, indicate that the judged harbored bias towards ROA or its counsel.[23] *Cf. United States v. Donato*, 99 F.3d 426, 434-39 (D.C. Cir. 1996) (jury conviction set aside for several reasons, including judge's prejudicial comments to defendant and "near constant criticism of defendant's counsel").

Accordingly, we reject ROA's argument that the judge's decision or his conduct of the trial require reversal due to the judge's lack of impartiality.

F. Penalties

Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (April 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in

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[22] In *Canterbury*, the Commission reversed the decision of an administrative law judge and remanded the case for reassignment to a new judge after concluding that the judge's conduct at the hearing was an abuse of discretion. While noting "the considerable leeway afforded administrative law judges in regulating the course of a hearing and in developing a complete and adequate record," the Commission concluded that the judge interjected himself in the proceedings "so often and so extensively that [the parties] were denied the opportunity to develop their case." 1 FMSHRC at 1312-13.

[23] We note that ROA did not allege bias of the judge until after it lost the case and petitioned the Commission for review. *See* ROA Post-Trial Br. at 8 n. 2.

section 110(i) of the Act.[24] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). In reviewing a judge's penalty assessment, the Commission must determine whether the judge's findings with regard to the penalty criteria are supported by substantial evidence. The judge must make "[f]indings of fact on each of the criteria [to] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg*, 5 FMSHRC at 292-93.

It does not appear that the judge considered all of the statutory criteria in determining an appropriate penalty for ROA's violations. The judge did not separately discuss facts relating to any of the criteria. Rather, the judge referred only to the extremely high negligence and serious gravity associated with each of the violations. 17 FMSHRC at 1949, 1950, 1952, 1954. This does not satisfy the requirements the Commission set out in *Sellersburg*.

Accordingly, we vacate the judge's penalty assessment and remand for entry of detailed findings as to each of the six section 110(i) criteria, and assessment of an appropriate penalty.

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[24] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

III.

Conclusion

For the foregoing reasons,[25] we affirm the judge's findings of violation and his determinations of unwarrantable failure, but vacate the penalty assessment and remand it for further consideration.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[25] Following the Commission's October 10, 1997 Order in which it denied the Motion to Participate in Oral Argument by David Gomo, he submitted a written Oral Argument Statement to the Commission on October 17, which he requested the Commission to accept. We have considered Mr. Gomo's request, and we deny it. We have not considered the statement in our deliberations in this matter.

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February 25, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. YORK 95-70-M
GOUVERNEUR TALC COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners[1]

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). At issue is Administrative Law Judge Avram Weisberger's determination that Gouverneur Talc Company ("GTC") did not violate 30 C.F.R. § 57.4362.[2] 18 FMSHRC 73, 77-78 (January 1996) (ALJ). The Secretary of Labor seeks reversal of that decision and remand for determination of whether the violation was significant

[1] Commissioner Beatty assumed office after this case had been considered at a decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Beatty has elected not to participate in this matter.

[2] Section 57.4362 requires that "[f]ollowing evacuation of a mine in a fire emergency, only persons wearing and trained in the use of mine rescue apparatus shall participate in rescue and firefighting operations in advance of the fresh air base."

and substantial ("S&S") and the result of GTC's unwarrantable failure.[3] For the reasons that follow, the judge's decision is affirmed in result.

I.

Factual and Procedural Background

GTC operates the No. 1 Mine, an underground talc mine in St. Lawrence County, New York. 18 FMSHRC at 73. At the time of the alleged violation, the primary mining method there was open stope.[4] *Id.* Men and supplies were transported into the mine via a production shaft, with openings into the ore veins every 200 feet, starting at the 300-foot level and ending at the 1100-foot level. *Id.* at 74.

On the morning of June 21, 1994, Mark Trombley, a repairman, and Vincent Woods, a maintenance mechanic, were using a Miller welder to repair a bucket blade on stope 19-A at the 500-foot level. *Id.* at 75-76; Tr. 283-84. According to Trombley, the welder began "sparking," "growling," "sizzling," "popping," and "lighting up the drift." 18 FMSHRC at 76; Tr. 285. The two stopped working, and when the noise grew louder and smoke started rolling, they headed for an exit. 18 FMSHRC at 76; Tr. 285-86.

Walking up the stope they met two miners who were close enough to hear the noises the welder was making. 18 FMSHRC at 76; Tr. 286. Together, the four then went to the 300-foot level, where they attempted to call the hoist man. 18 FMSHRC at 76; Tr. 286-87. When the telephone at that level did not work, they decided to leave the mine and have the power to the 500-foot level shut off. 18 FMSHRC at 76; Tr. 287. Once out of the mine they reported the situation to the acting general mine foreman, Donald Fuller. 18 FMSHRC at 76; Tr. 262-63.

Fuller notified Terry Jacobs, GTC's personnel and safety director, who came over to Fuller's office. Tr. 192, 263. The mine's electrician, Steven Smith, came by during a conversation between Fuller and Trombley and told Fuller that he thought that the power to the 500-foot level should be shut off. 18 FMSHRC at 76; Tr. 264, 298. Fuller and Smith then

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[3] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious in nature any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology is also taken from section 104(d)(1) and refers to more serious conduct by an operator in connection with a violation.

[4] "Stope" is defined as "[a]n excavation from which ore has been removed in a series of steps." U.S. Dep't of Interior, *Dictionary of Mining, Mineral, and Related Terms* 541 (2d ed. 1997) ("*DMMRT*"). The "open-stope method" is one "in which no regular artificial method of support is employed, although occasional props or cribs may be used to hold local patches of insecure ground." *Id.* at 377.

headed together underground, but neither took along self-contained breathing apparatus ("SCBA"). 18 FMSHRC at 76; Tr. 94.

Once on the 500-foot level, approximately 1500 feet from the 19-A stope, Smith shut off power to the 19-A stope. 18 FMSHRC at 76. Fuller and Smith proceeded to the 19-A stope where Smith turned off the disconnect to the welder and unplugged it. *Id.* Fuller and Smith then exited the 500-foot level, along with acting underground mine foreman Craig Woodard and three or four miners, all of whom had been working at that level. *Id.*; Tr. 201, 225. At trial, Fuller stated that he and Woodard discussed bringing the miners up because it was lunchtime, and "we said as long as it is this close to noon, let's bring them up and see what's going on." 18 FMSHRC at 76; Tr. 272. The seven other men remaining in the mine left the mine around 11:45 a.m. Tr. 202-03.

Safety director Jacobs' written report on the sequence of events states that between 11:00 and 11:15 a.m., after speaking with Trombley and Wood, and reviewing a ventilation map, he "decided to get all personnel off the 500 level." Pet. Ex. 2 at 3. When asked at trial what he did to implement that decision, Jacobs could not recall. Tr. 388. Jacobs did alert the local office of the Department of Labor's Mine Safety and Health Administration ("MSHA") regarding the welder incident at approximately 11:20 a.m. Tr. 212. He identified the incident as a fire, but MSHA never ordered an evacuation of the mine. Tr. 212-15. Jacobs also summoned the official mine rescue team, which went underground after all of the miners had come up. Tr. 205.

MSHA Electrical Mine Inspector William L. Korbel, Jr., after inspecting the welder and interviewing some of the GTC personnel involved, issued a section 104(a) citation, subsequently amended to a section 104(d)(1) order, alleging that GTC violated section 57.4362 when Fuller and Smith went underground without SCBA protection. 18 FMSHRC at 74. At trial, the Secretary contended that the departure of the four employees from 500-foot level to the surface of the mine constituted an evacuation in a fire emergency, thus triggering the regulation and obligating Smith and Fuller to take SCBA when they went underground. S. Post-Hearing Br. at 9; Tr. 103-04, 485.

Both Korbel and MSHA supervisory mine inspector Randall Gadway also opined that GTC should have implemented its emergency evacuation plan for the mine. Tr. 102-03, 109, 481-82. Gadway further stated that MSHA considered the surface of the mine to be the "fresh air base" referenced in section 57.4362. Tr. 481.

The judge concluded that, while the term "fire emergency" is not defined in the regulations, and there is no common meaning of the term in the mining industry, there was a "fire emergency," due to the presence of sparking and rolling smoke in the area of the welder. 18 FMSHRC at 77. Relying on a dictionary definition of the term "evacuation," the judge also concluded that because the first group of four miners all left together after two of them had observed sparking and smoke, they had evacuated in a fire emergency. *Id.* at 77-78. The judge

further held that, because miners remained on the 500-foot level, the evacuation was not total. *Id.* at 78.

The judge also found that Fuller and Smith went to the 500-foot level to shut off the power to the 19-A stope. *Id.* While recognizing that the two had subjected themselves to the hazards of smoke and gas inhalation by not being equipped with SCBA, the judge determined that there had not been a violation of section 57.4362. *Id.* Finding insufficient evidence to establish that Fuller and Smith were participating in rescue or fire fighting operations, the judge concluded that the regulation was not violated. *Id.*

II.

Disposition

The Secretary argues that the language of section 57.4362 is clear, but that if the Commission finds it ambiguous, it should defer to the Secretary's interpretation of the standard, which, according to her, is consistent with both the language and purpose of the regulation. S. Br. at 5-6. The Secretary contends that the judge erred in concluding that the actions of Fuller and Smith did not constitute "firefighting" under the terms of the standard, as the purpose of those actions was to stop the spread of, or put out, a possible fire. *Id.* at 7-9. The Secretary also submits that the judge's decision leads to the absurdity of section 57.4362 being interpreted to permit individuals to enter a mine during a fire emergency without SCBA protection as long as they do not intend to engage in fire fighting or rescue operations. *Id.* at 9-12.

In response, GTC contends that the judge correctly found that Fuller and Smith were not engaged in "firefighting," as they only went underground to examine the situation, turned off the power when they got there, and found no fire. GTC Br. at 11-13. Asserting that the situation was not covered by GTC's evacuation plan, no evacuation was ordered, and there were many miners engaged in normal mining operations in the mine when Fuller and Smith entered the mine to turn off the power, GTC also attacks the judge's conclusion that there was an "evacuation" under section 57.4362. *Id.* at 6-8. GTC further argues that the judge erred in finding a "fire emergency," citing the condition of the welder as evidence that there was simply an electrical problem with the welder. *Id.* at 8-11.

In reply, the Secretary states that the judge's conclusion that an "evacuation" occurred is supported by substantial evidence and that the judge applied a proper interpretation of the term as it is used in the section 57.4362. S. Reply Br. at 1-4. The Secretary contends that the judge's conclusion that there was a "fire emergency" is also supported by the evidence. *Id.* at 5-6.

A majority of Commissioners vote to affirm the judge's decision in result. Commissioners Riley and Verheggen would affirm the judge's decision on the ground that section 57.4362 was not violated because there was no "evacuation." Chairman Jordan would affirm the judge's decision on the ground that the Secretary failed to prove that Fuller and Smith

traveled "in advance of the fresh air base." Commissioner Marks would reverse the judge's decision that there was no violation.

III.

Separate Opinions of the Commissioners

Commissioners Riley and Verheggen, in favor of affirming the decision of the administrative law judge:

We believe that proper construction of the term "evacuation" in section 57.4362 disposes of this case. It is undisputed that the alleged "evacuation" was merely the response by the four miners on the 500-foot level to the malfunctioning of the welder. According to the Secretary's interpretation of the standard, the requirements of section 57.4362 were triggered when those miners exited the mine. In the Secretary's view, this obligated GTC to treat the incident as one covered by section 57.4362. We do not agree, based on the plain meaning of the term "evacuation."

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987). *See also Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993). In the absence of statutory or regulatory definitions or technical usage, the Commission applies the ordinary meanings of words chosen by the drafters. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996). However, this does not necessarily mean each word in a given regulation should be viewed in isolation.

The Secretary, like the judge and GTC, interprets section 57.4362 by parsing its language into the individual terms and phrases "evacuation," "fire emergency," and "participate in rescue and firefighting operations." However, while "[i]t is recognized that, in the absence of express definitions, terms in regulations should be defined according to their 'commonly understood definitions[,]' in interpreting such terms . . . 'reviewing bodies cannot concentrate on individual terms and ignore a consideration of the context in which the term appears.'" *Pyramid Mining Inc.*, 16 FMSHRC 2037, 2039 (October 1994) (citations omitted).[1] Therefore, consideration of

[1] *See also Deal v. United States*, 508 U.S. 129, 132 (1993) (fundamental principle that meaning of word cannot be determined in isolation, but must be drawn from context in which it is used); *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 n.6 (1988) ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.") (*quoting NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (L. Hand, J.)); *United States v. CDMG Realty Co.*, 96 F.3d 706, 714 (3rd Cir. 1996)

the context in which a term is used in section 57.4362 may also be relevant in ascertaining its ordinary meaning.

The term "evacuation" is not defined in 30 C.F.R. Part 57. In finding that a partial evacuation of the 500-foot level took place, the judge relied on a definition of "evacuation" as an organized withdrawal from a place or area, especially as a protective measure. 18 FMSHRC at 78. However, that definition of "evacuation" is actually just an illustration of the term's primary definition, which is "the act of emptying, clearing of the contents, or discharging." *Webster's Third New International Dictionary (Unabridged)* 786 (1986) ("*Webster's*").

Here, there was no "emptying" or "clearing of the contents" of the 500-foot level, much less the GTC mine. Apart from the four miners who left the mine, the rest, including some on the 500-foot level, remained underground until later. 18 FMSHRC at 78; Tr. 271-72. In our view, such circumstances do not rise to the level of an "evacuation."[2]

Further support for the view that the standard was not intended to apply to the facts of this case is supplied by the preamble to section 57.4362, in which MSHA stated that the standard

> establishes the conditions under which persons may advance beyond the fresh-air base in fire emergencies after a mine has been evacuated. It does not prevent mine personnel from fighting and controlling incipient fires prior to and during mine evacuation. However, once a fire emergency has been declared and a fresh-air base has been established, mine rescue apparatus must be worn as a precaution against the smoke, fumes, and toxic products of fire.

50 Fed. Reg. 4,022, 4,028 (1985). Thus, the preamble contemplates the situation where the mine, or at least that portion of it subject to the fire emergency, has been cleared of miners, and focuses on the terms under which rescue personnel may re-enter the cleared area.

The preamble further supports the notion that something more than the reaction of a few miners to an incident involving a fire is necessary before an operator is obligated to comply with

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(meaning derives from context, hence constructional cannon *noscitur a sociis*, which states that meaning may be inferred by examining surrounding words).

[2] Section 57.4362 restricts actions that may take place following evacuation "of a mine." While we do not believe it is necessarily unreasonable for the Secretary to interpret the term "mine" in section 57.4362 to mean less than an entire mine, *see Bituminous Coal Operators' Ass'n v. Secretary of Interior*, 547 F.2d 240, 246 (4th Cir. 1977), and *D.H. Blatner & Sons, Inc.*, 18 FMSHRC 1580, 1586 n.9 (September 1996), we do believe it is unreasonable for the Secretary to interpret "evacuation" under the regulation to cover a situation where miners remained on the same level of the mine that was purportedly evacuated. *See* 18 FMSHRC at 78.

section 57.4362. It states that the standard applies "once a fire emergency has been declared." *Id.* In addition, it clarifies the otherwise unexplained reference to "the fresh-air base" in the regulation by stating that a fresh-air base is something that is "established." *Id.* We believe that the language employed by both the standard and MSHA's explanation of it leads to the conclusion that the regulation is designed to apply when fire emergency procedures more formal than those GTC followed are invoked.[3]

Evidence of official company involvement of the type anticipated by the regulation is simply not present. There is no evidence that "a fire emergency [was] declared" by GTC. Nor was any evidence presented that "a fresh-air base [was] established" by GTC beyond which those "participat[ing] in rescue and firefighting operations" could "advance."[4] Instead, the "firefighting" that took place was on a less formal basis, similar to the manner in which the alleged "evacuation" occurred.

The Secretary asserts that the safety purposes of the Act are furthered by her interpretation. S. Br. at 5-6. We believe the opposite is true. Safety is enhanced whenever a worker retreats from an area at the first apprehension of danger, whether the perceived threat of harm is real or later determined to be unfounded. The miners here acted prudently and swiftly with an abundance of caution in the interest of their own safety. They moved away promptly, attempted to report the faulty welder, and, after being unable to contact management because of an inoperable telephone, proceeded to the surface, leaving verification of an emergency to their superiors. 18 FMSHRC at 76; Tr. 285-87. These miners should be commended. Their employer should also be lauded for its rapid response in immediately notifying rescue crews, rather than risking mobilization delays while striving to determine whether such extraordinary measures were necessary. By stretching the plain language of section 57.4362 beyond its ordinary meaning, the Secretary would tie operators' hands with respect to how they may respond in the event of similar incidents. We ought not discourage workers from being able to protect themselves by fleeing at the first hint of danger. The more formal our characterization of their withdrawal, however, the more obligations for their employer we attach to their actions. With

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[3] The statement in the preamble that unprotected fire fighting "during" mine evacuation is permissible also militates against the conclusion that the standard applies to the "partial" evacuation that occurred at the GTC mine. *See* 18 FMSHRC at 78.

[4] Our colleague Chairman Jordan concludes there was no violation "because the Secretary has failed to demonstrate that Fuller and Smith traveled 'in advance of the fresh air base.'" Slip op. at 9-10 (quoting 30 C.F.R. § 57.4362). Since we find as a threshold matter that no evacuation occurred, we do not reach this question. We note, however, that the regulatory history is silent regarding how a "fresh-air base" is "established," and the Secretary has failed to supply a consistent explanation of what she understands those terms to mean. The Secretary's brief implies that GTC should have taken steps "underground" to "set[] up a fresh air base." S. Br. at 10-11. This contradicts her expert witness, who testified that in the case of GTC fire, MSHA considered the outside of the mine to be the fresh-air base. Tr. 481.

each escalating regulatory burden will come, of necessity, a higher premium on verification before the possible overreaction of one or more miners triggers an "evacuation" of an entire mine.

It appears to us that the Secretary may have charged GTC with a violation of section 57.4362 because she disagreed, in hindsight,[5] with GTC's response to the incident.[6] However, the regulations are silent regarding when an operator is obligated to evacuate a mine, and also fail to impose on operators the duty to comply with their mine evacuation and rescue plans. *See* 30 C.F.R. Part 57, Subpart C; 30 C.F.R. § 57.11053. If the Secretary is concerned that mines are not being evacuated when they should be, or that evacuation and rescue plans are not being adhered to, her proper course is to fill those holes in the regulatory scheme by engaging in notice and comment rulemaking, rather than to attempt to invoke an existing regulation that addresses a different hazard.

For the foregoing reasons, we affirm the judge's determination that GTC did not violate section 57.4362.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[5] MSHA did not fault GTC for its handling of the incident when it occurred. At that time, more than one MSHA representative was in contact with GTC regarding how the incident was being handled, but evacuation was never discussed. Tr. 212-15.

[6] MSHA's witnesses testified that GTC should have activated its emergency evacuation procedures for the mine. Tr. 102-03, 109, 481-82.

Chairman Jordan, in favor of affirming the decision of the administrative law judge:

This regulation requires certain events to take place in order to trigger the requirement that mine rescue apparatus be worn. First, an evacuation must occur. Second, rescue and fire fighting operations must be initiated. And third, a fresh air base must be established. The Secretary's failure to prove this final element is fatal to her case. I find no violation here because the Secretary has failed to demonstrate that Fuller and Smith traveled "in advance of the fresh air base." *See* 30 C.F.R. § 57.4362. Therefore, I would affirm the judge in result.

Although the regulations do not define "fresh air base," one authority describes it as:

> [a]n *underground station, located in the intake airway*, that is used by rescue teams during underground fires and rescue operations. The base should be as close to the fire as safety will permit, adequately ventilated, and in constant touch with the surface by telephone.

DMMRT at 223 (emphasis added). According to this definition, therefore, the regulation contemplates the formal establishment of a properly ventilated underground area to demarcate the boundary beyond which apparatus must be used.[1]

The Secretary never demonstrated the location of that boundary. Instead, the Secretary appears to treat the entrance of Fuller and Smith into the mine as the event which triggered the violation. But her regulation does not require individuals to wear mine rescue apparatus simply upon going into a mine. It explicitly dictates that the equipment be worn "in advance of the fresh air base."

The only direct evidence in the record on this point is an offhand statement by Inspector Korbel referring to the outside of the mine as the fresh air base. Tr. 481. This comment is utterly at odds with the explicit description of the elements of a fresh air base set forth above in the DMMRT. It is also inconsistent with the Secretary's brief, which implies that GTC should have taken steps "underground" to "set[] up a fresh air base." S. Br. at 10-11.[2] As the Secretary

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[1] The Secretary's own preamble to section 57.4362 emphasizes that a fresh air base is a predicate for the standard's mandate. In her preamble, the Secretary emphasized that "once a fire emergency has been declared and a fresh-air base has been established, mine rescue apparatus must be worn." 50 Fed. Reg. at 4,028.

[2] Moreover, the evidence in the record pertaining to gas levels would not lead one to conclude that the surface of the mine should be deemed the boundary beyond which SCBA should have been used, since it appears that even the members of the mine rescue team did not wear their apparatus until they entered the sub-level just above five hundred 19-A. *See* Tr. at 37.

presented no additional evidence regarding the formation of a fresh air base (and the operator did not address the issue), she failed to prove that a violation occurred.

My colleague, Commissioner Marks, has concluded that "[t]he judge implicitly ruled that the miners went past the fresh air base when he ruled that 'Fuller and Smith subjected themselves to the hazards of smoke and gas inhalation in not being equipped with SCBA.'" Slip op. at 13 (quoting 18 FMSHRC at 78). I decline to adopt this approach. If the Secretary intends to penalize an operator for violating a standard, it is incumbent on her to explain how the operator failed to comply with each element of that standard, and to offer evidence in support of her contentions. She failed to do so here.

I do agree with Commissioner Marks, however, that our colleagues, Commissioners Riley and Verheggen, erred in concluding that the departure of the four employees from the 500-foot level does not constitute an evacuation of a mine for purposes of section 57.4362. While conceding that an evacuation need not be mine-wide, my colleagues nevertheless assert that this withdrawal cannot trigger the application of section 57.4362 because it did not involve all of the miners on the 500-foot level.[3] Slip. op. at 6 n.2. The judge relied on a dictionary definition which describes evacuation as an "organized withdrawal . . . from a place or area esp[ecially] as a protective measure." 18 FMSHRC at 78 (citing *Webster's* at 786). That is precisely what occurred here. The withdrawal involved all the miners who were in the vicinity of the welder and therefore in a position to make a decision about the dangers posed when that equipment malfunctioned. After discussing the situation and unsuccessfully attempting to call outside, the four miners decided to leave the mine together. *Id.* at 76. One of the miners offered to walk down a second exit to shut off the power but, given the amount of smoke, the rest of the miners were concerned he would not return. They insisted they "stick together" and leave the mine as a group. Tr. 287.

My colleagues contend that there must be "[e]vidence of official company involvement" and that "[t]here is no evidence that 'a fire emergency [was] declared' by GTC." Slip. op. at 7 (alteration in original). The record, however, demonstrates ample company involvement and leaves no doubt that GTC viewed the situation as a fire emergency. Upon learning of the problem with the welder, Safety Director Jacobs reviewed the ventilation map and according to his notes, "decided to get all personnel off the 500 level." Pet. Ex. 2 at 3.[4] Jacobs then

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[3] The regulation refers to an "evacuation of a mine in a fire emergency." Specifying the entire 500 foot level as the minimum area to be emptied in order for an evacuation to occur is an arbitrary approach which directly contradicts my colleagues' own exhortation that reviewing bodies consider "the context in which the term appears." Slip op. at 5 (quoting *Pyramid Mining*, 16 FMSHRC at 2039).

[4] At trial Jacobs was unable to explain what he did to implement that decision. Tr. 388.

proceeded to notify MSHA[5] about the fire and also summoned the official mine rescue team. Tr. 205, 212-15. My colleagues, however, would require "fire emergency procedures more formal than those GTC followed" before the regulation could apply. Slip op. at 7.

Commissioners Riley and Verheggen explain that they are reluctant to "tie operators' hands" with respect to how they may respond to emergencies, for fear it may discourage workers from fleeing at the first hint of danger. *Id.* While I share my colleagues' view that "[s]afety is enhanced whenever a worker retreats from an area at the first apprehension of danger" (*id.*), I trust they would also agree that safety is not enhanced if fellow workers endanger themselves as they attempt to control the fire emergency that prompted the withdrawal. Here, although the fire was considered a potentially serious situation that might require the involvement of the mine rescue team, Fuller and Smith proceeded underground to combat it without taking the precaution of carrying a gas tester, much less the self-contained breathing apparatus referenced in the regulation. Tr. 266, 344-45. While underground, they resorted to using smoke from a lighted cigarette to ascertain the direction in which air was moving. Tr. 276, 331. Mine foreman Craig Woodard, who was underground when he learned of the fire, also proceeded to investigate the situation without a carbon monoxide detector, but another miner called him back to the dinner hole and reminded him to take one. Tr. 237. Thus, while there are negative safety implications that can flow from an overly broad application of the evacuation requirement, it is also worth bearing in mind the safety implications that flow from an unduly narrow approach to this term.

Mary Lu Jordan, Chairman

[5] My colleagues point out that upon learning of the fire MSHA never ordered an evacuation of the mine. Slip. op. at 8 n.5. It seems entirely possible, however, that MSHA assumed an evacuation had already occurred or was underway.

Commissioner Marks, dissenting:

I would reverse the judge's finding of no violation of 30 C.F.R. § 57.4362. That section provides that "[f]ollowing evacuation of a mine in a fire emergency, only persons wearing and trained in the use of mine rescue apparatus shall participate in rescue and firefighting operations in advance of the fresh air base." The judge found that four miners "evacuate[d]" in a "fire emergency." 18 FMSHRC 73, 77-78 (January 1996) (ALJ). Substantial evidence supports the judge's findings. It is undisputed that on the morning of June 21, 1994, the Miller welder began "sparking," "sizzling," "growling," "popping," "lighting up the drift," and the noise and smoke grew progressively worse. *Id.* at 75-76; Tr. 285-86. Thus, the judge properly found the existence of a fire emergency. Likewise, it is undisputed that the "evacuation" at issue was by the four miners from the 500-foot level as a result of the incident involving the Miller welder. 18 FMSHRC at 76. Accordingly, the dictionary definition of "evacuation" used by the judge — "any organized withdrawal or removal . . . from a place or area esp[ecially] as a protective measure"— describes the actions of the four miners. *Id.* at 78; *see Webster's Third New International Dictionary (Unabridged)* 786 (1986) ("*Webster's*"). Applying the plain meaning of the standard, which the judge correctly did, the four miners' retreat from the mine qualified as an evacuation.[1]

In rejecting the interpretation of evacuation of both the judge and the Secretary, Commissioners' Verheggen and Riley incorrectly rely on the preamble to the regulation to indicate that the evacuation must involve formal procedures. Slip op. at 6. It must be remembered that a preamble is not the law, is "not officially promulgated," and does not take precedence over the express words of the regulation. *See King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981) ("the express language of a statute or regulation 'unquestionably controls' over material like a . . . manual"); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986) (enforcement guidelines published in Federal Register held to be nonbinding on Secretary).

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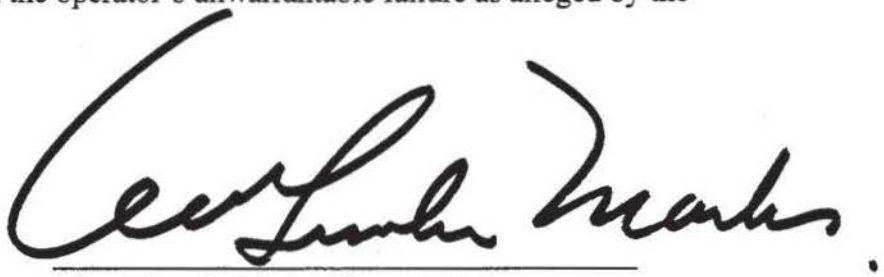
[1] Commissioners' Riley and Verheggen have taken the view that the plain meaning of the term evacuation calls for a more formal emptying of a mine than was present on these facts. Slip op. at 5-7. Such a restrictive view is at odds with the Secretary's interpretation of her own regulation, which like the judge, would apply the regulation in cases of partial evacuation. S. Reply Br. at 1-2. While I believe that the meaning of evacuation is plain and applies to a less than complete exit of miners as a result of a dangerous situation, I note that when a standard is ambiguous, the Commission must defer to the Secretary's reasonable interpretation of the regulation. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995). Given the difference of opinion on the meaning of evacuation leads me to the additional conclusion that the Secretary's interpretation, which is reasonable and based on the dictionary definition of evacuation, should be accepted by this Commission.

Restrictively applying the regulation to only those situations where the operator declares an emergency and formally acts to clear a mine, as Commissioners Riley and Verheggen suggest (slip op. at 7), will lead to the absurd result that miners will enter dangerous fire situations without wearing safety equipment when an operator fails to take the proper steps in calling an evacuation. In fact, this is exactly what happened in this case — two miners entered the mine without wearing safety apparatus when the welder was potentially on fire, subjecting themselves to dangerous levels of carbon monoxide, and, because the operator had not formally called a mine evacuation, my colleagues believe there is no violation. Such a result actually rewards operators who fail to take proper fire prevention measures, is contrary to the safety purposes of the Mine Act, and should not be countenanced. *See Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993) (rejecting construction of standard that would lead to absurd result).

Although correctly finding an evacuation and a fire emergency, the judge erred in determining that foreman Fuller and electrician Smith were not "participating in . . . firefighting operations" under section 57.4362 when they traveled to the 500-foot level with the intent of shutting the power off. 18 FMSHRC at 78. Although the term "firefighting" is not defined in the standard, its dictionary definition is "the effort to extinguish or to check the spread of a fire." *Webster's* at 855. As the Secretary points out, "it is standard firefighting procedure in fighting an electrical fire to 'first deenergize electrical circuits.'" S. Br. at 8 (citing C. Goodson, B. Adams and M. Sheed, *Industrial Fire Brigade Training: Incipient Level*, at 35 (1995)). Fuller testified that they entered the mine to shut the power off "so that it wouldn't make things worse than what it was." Tr. 265. In other words, Fuller and Smith acted in an attempt to prevent the spread of fire. Therefore, their actions fall clearly within the term "firefighting." In addition, the judge's interpretation, which would permit miners not engaged in fire fighting to enter the mine when there is a fire emergency without wearing protective equipment (18 FMSHRC at 78), is completely illogical and thwarts the safety protection purposes of the standard!

I disagree with Chairman Jordan's opinion in which she states that the Secretary failed to prove that the two miners advanced beyond the fresh air base (slip op. at 9-10), an issue that was never raised by the parties on review. The judge implicitly ruled that the miners went past the fresh air base when he ruled that "Fuller and Smith subjected themselves to the hazards of smoke and gas inhalation in not being equipped with SCBA." 18 FMSHRC at 78. The record revealed that, after Fuller and Smith descended into the mine, the mine rescue team entered the mine and detected a potentially deadly level of carbon monoxide of 700 parts per million, causing the team to utilize oxygen apparatus in order to complete their examination of the mine. Tr. 36-37, 385-87. Further, Inspector Korbel testified that, according to MSHA's view, the surface of the mine was the fresh air base, which the two men advanced beyond when they entered the mine. Tr. 481. I also find it intriguing that Chairman Jordan criticizes the "unduly narrow approach" taken by Commissioners Riley and Verheggen towards section 57.4362 (slip op. at 11), when her own view of the regulation also permits miners to enter a mine, when there is a potentially serious fire, without wearing appropriate fire safety equipment.

Therefore, I believe that all the elements of section 57.4362 were present when the two miners went into the mine, after learning that the welder was potentially on fire, to shut the power off as a fire fighting measure, without wearing mine rescue apparatus. Accordingly, I dissent from the positions of my colleagues and would reverse the judge's determination that section 57.4362 was not violated and remand for a determination of whether the violation was significant and substantial and a result of the operator's unwarrantable failure as alleged by the Secretary.



Marc Lincoln Marks, Commissioner

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February 27, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. PENN 97-20-RM through 97-25-RM
MEDUSA CEMENT COMPANY	:	

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners[1]

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

This is an interlocutory review of an order issued by Administrative Law Judge Jerold Feldman denying a motion for recusal[2] filed by Medusa Cement Company ("Medusa") in a

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[1] Commissioner Beatty assumed office after this case had been considered at a decisional meeting. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1218 n.2 (June 1994). In the interest of efficient decision making, Commissioner Beatty has elected not to participate in this matter.

[2] The Commission's procedural rule governing recusal, 29 C.F.R. § 2700.81, provides as follows:

> § 2700.81 Recusal and disqualification.
>
> (a) *Recusal.* A Commissioner or a Judge may recuse himself from a proceeding whenever he deems such action appropriate.
>
> (b) *Request to withdraw.* A party may request a Commissioner or a Judge to withdraw on grounds of personal bias or other disqualification. A party shall make such a request by

consolidated contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). Pursuant to Commission Procedural Rule 76(a)(1)(i), 29 C.F.R. § 2700.76(a)(1)(i), the judge certified for interlocutory review the order denying the recusal motion, and the Commission granted Medusa's petition for interlocutory review. For the reasons that follow, we affirm the judge's order denying recusal.

I.

Factual and Procedural Background

This proceeding involves several consolidated contests in which Medusa challenged the citations and abatement periods. Following the notices of contest, the cases were assigned to Judge Feldman. The proceeding was stayed while settlement negotiations between counsel for Medusa and representatives of the Mine Safety and Health Administration ("MSHA") were ongoing. Order Granting Mot. for Cert. at 1 (January 29, 1997). After the collapse of those negotiations, Medusa's counsel, Henry Chajet and Paul Wilson of the Patton Boggs law firm, filed a Motion to Recuse in which they argued that the judge should recuse himself.

The motion stated that in *Rock of Ages Corp.*, 17 FMSHRC 1925 (November 1995) (ALJ), *aff'd in pertinent part,* 20 FMSHRC ____, Nos. YORK 94-76-RM through 94-83-RM (February 24, 1998), the judge demonstrated "open hostility towards the party, its witnesses and particularly, his personal bias towards its counsel" (Henry Chajet) (hereinafter "counsel for ROA"), and interfered "with counsel's presentation of evidence." M. Mot. at 1. The motion requested that the proceeding be reassigned to a different judge. *Id.* In the event the judge denied the motion, Medusa asked that the matter be certified for interlocutory review. *Id.* at 1-2. The Secretary opposed the motion, arguing that the grounds for recusal were meritless and

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promptly filing an affidavit setting forth in detail the matters alleged to constitute personal bias or other grounds for disqualification.

(c) *Procedure if Commissioner or Judge does not withdraw.* If, upon being requested to withdraw pursuant to paragraph (b) of this section, the Commissioner or the Judge does not withdraw from the proceeding, he shall so rule upon the record, stating the grounds for his ruling. If the Judge does not withdraw, he shall proceed with the hearing, or, if the hearing has been completed, he shall proceed with the issuance of his decision, unless the Commission stays the hearing or further proceedings upon the granting of a petition for interlocutory review of the Judge's decision not to withdraw.

further stating that Medusa's lead attorney was Paul Wilson, who had not alleged any bias against himself. S. Opp'n at 1-3.

On December 2, 1996, the judge denied the motion to recuse. In his order, the judge stated:

> During the *Rock of Ages* proceeding, counsel engaged in provocative conduct, pursued lines of questioning deemed to be irrelevant, and examined the Secretary's witnesses in an aggressive manner. The bench rulings throughout *Rock of Ages* were necessary to discharge the judge's responsibilities to regulate the course of the hearing, to rule on offers of proof, and to ensure that only relevant evidence was received.

Order Denying Mot. to Recuse at 1 (December 2, 1996) (citations omitted).

On January 29, 1997, the judge granted Medusa's motion to certify the ruling for interlocutory review. In certifying the order, the judge noted that he had denied the motion for recusal "because regulating the course of the hearing, and making bench rulings on evidentiary matters, are fundamental duties of a presiding judge that do not support a claim of judicial bias." Order Granting Mot. for Cert. at 2 (January 29, 1997).

II.

Disposition

Medusa argues that the Commission should reassign the case to another judge to avoid either bias or the appearance of bias. M. Br. at 1. Medusa states that its counsel had experienced the judge's "personal bias" during the trial in *Rock of Ages* and that he had submitted a brief to the Commission seeking reversal of the judge's decision because, among other errors, he had improperly and unfairly conducted the trial. *Id.* at 2.

As grounds for recusal, Medusa relies on the judge's conduct in *Rock of Ages* and submits pages and an appendix from the operator's brief in that case. In its brief, Rock of Ages ("ROA") argued that the judge committed reversible error by his conduct of the hearing. *Id.* at Attach. 3 & 4. This conduct purportedly included interrupting the presentation of evidence "in an attempt to steer the case toward a predetermined conclusion," interjecting repeatedly during counsel for ROA's cross-examination, taking over his cross-examination of witnesses (thereby giving advance notice of his theories and preventing "cold" cross-examination of witnesses), encouraging witnesses to state opinions adverse to ROA, misstating legal issues, encouraging counsel for ROA to withdraw objections to the way the hearing was being conducted, and refusing to strike the testimony of a witness who conferred with another witness. *Id.* at 3-4. Medusa argues that the judge never assumed the role of a "neutral arbiter" and that the judge's

displeasure with counsel assertedly increased with the filing of the brief with the Commission in the *Rock of Ages* appeal. *Id.* at 5. As further support for the assertion that the judge was biased, Medusa relies on the objections of ROA's counsel to the judge's conduct of the hearing and the response of the judge, who admonished counsel for ROA for throwing his glasses during an off-the-record conference. *Id.* at 6-10. Medusa asserts that the Commission's precedent allows it to take a commonsense approach and reassign a case when relations between the judge and counsel create bias or the appearance of bias. *Id.* at 13-14. As attachments to its brief, Medusa submitted affidavits from counsel for ROA in which he swore that "Judge Jerold Feldman bears personal bias against me." *Id.* at Attach. 1 & 2.

The Secretary refutes the allegations of bias in *Rock of Ages,* relying on attached pages from her brief in that case. S. Br. at 4 & Attach. A. The Secretary further argues that the judge's conduct was insufficient grounds for recusal under the Supreme Court's decision in *Liteky v. United States*, 510 U.S. 540 (1994). S. Br. at 4-5. The Secretary asserts that there is a lack of supporting evidence of bias or evidence that the judge would act with bias in this case. *Id.* at 6-9. The Secretary requests that the Commission affirm Judge Feldman's decision not to recuse himself. *Id.* at 13.

In reply, Medusa asserts that the Commission should review the judge's denial of recusal *de novo*, rather than under the abuse of discretion standard suggested by the Secretary. M. Reply Br. at 2-3. In its reply brief, Medusa moved to strike that portion of the Secretary's brief, which alleged that one of the counsel for Medusa (Chajet) "ha[d] 'made a practice' of making meritless accusations of impropriety against Judges, opposing counsel and parties." *Id.* at 5-10. The Secretary opposed Medusa's motion to strike, noting that her assertions regarding that attorney's conduct were based on official records and findings. S. Opp'n to Mot. to Strike at 1.

The standard of review governing recusal matters has been previously addressed by the Commission. In *Big Horn Calcium Co.,* 12 FMSHRC 1493 (August 1990), the Commission was asked to review a judge's withdrawal from a case and termination of a hearing. The Commission held that the recusal of one judge and reassignment of a matter to a new judge was reviewed under "an abuse of discretion" standard. *Id.* at 1496. The use of an abuse of discretion standard for recusal issues is consistent with the discretion accorded judges in other discretionary matters related to the conduct of trial. *E.g., In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1843-44, 1853 and 1864 (November 1995) (qualification and crediting of expert witnesses; exclusion of trial testimony), *appeal docketed sub nom. Secretary of Labor v. Keystone Coal Mining Corp.,* No. 95-1619 (D.C. Cir. Dec. 28, 1995); *Buck Creek Coal, Inc.,* 17 FMSHRC 500, 503 (April 1995) (stay of proceedings); *Asarco, Inc.*, 14 FMSHRC 1323, 1327-28 (August 1992) (discovery orders). We reject Medusa's contention, Reply Br. at 2-3, that section 113(d)(2)(C) of the Mine Act, 30 U.S.C. § 823(d)(2)(C), establishes that the

Commission has *de novo* review authority over recusal decisions of administrative law judges.[3]

The issue of the judge's recusal in this proceeding based on his rulings and conduct in *Rock of Ages* must be considered in light of Commission decisions that address the role of the judge at trial. The Commission has recognized that, "a judge is an active participant in the adjudicatory process and has a duty to conduct proceedings in an orderly manner so as to elicit the truth and obtain a just result." *Secretary of Labor on behalf of Clarke v. T.P. Mining, Inc.*, 7 FMSHRC 989, 993 (July 1985). The Commission has noted, however, in reversing a judge's *sua sponte* post-hearing joinder of a party, that "[t]he role of the Commission and its judges is to adjudicate, not to litigate cases — a procedural axiom followed by this Commission from its formation." *Lonnie Jones v. D&R Contractors*, 8 FMSHRC 1045, 1053 (July 1986) (citation omitted). Also, in *Canterbury Coal Co.*, 1 FMSHRC 1311 (September 1979), the Commission reversed the decision of an administrative law judge and remanded the case for reassignment to a new judge. *Id.* at 1314. Acknowledging "the considerable leeway afforded administrative law judges in regulating the course of a hearing and in developing a complete and adequate record," the Commission concluded that the judge interjected himself in the proceedings "so often and so extensively that [the parties] were denied the opportunity to develop their case." *Id.* at 1312-13.

In addition to Commission cases, both parties rely on the extensive body of federal cases dealing with disqualification of judges. In *Liteky*, the Supreme Court recently interpreted the statutory provisions in Title 28 of the U.S. Code.[4] In that case, the petitioners alleged that the

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[3] Section 113(d)(2)(C) provides only that the Commission is to "affirm, set aside, or modify" a judge's decision based on the "record" in the proceeding; it does not set forth the standard of review to be applied. Nor does the fact that the Commission can decide issues of "law, policy [and] discretion," M. Reply Br. at 3 (quoting 30 U.S.C. § 823(d)(2)(A)), support Medusa's contention that the Commission should review a judge's decision on recusal *de novo*.

[4] Title 28 provides in relevant part:

> § 144. Bias or prejudice of judge
>
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> § 455. Disqualification of justice, judge, or magistrate
>
> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality

judge violated 28 U.S.C. § 455(a) in refusing to recuse himself because of his conduct in an earlier trial involving one of the petitioners. 510 U.S. at 542-43. In examining the history and meaning of sections 144 and 455(a) and (b), the Court distinguished between a judge's opinions derived from "extrajudicial source[s]" and those derived from a prior judicial proceeding. *Id.* at 550-51. The Court held:

> First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . [T]hey cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of . . . current . . . or . . . prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make a fair judgment impossible. Thus, judicial remarks during the course of trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.

Id. at 555 (citation omitted). The Court determined that the lower court's rulings, statements (assertedly made with an anti-defendant tone), and admonishments of counsel and parties (whether legally supportable or not) were inadequate grounds for recusal, because all occurred in the course of judicial proceedings, and none displayed deep-seated and unequivocal antagonism that would render fair judgment impossible. *Id.* at 556.

There is no question that the judge took an active role in the *Rock of Ages* proceeding at trial. He frequently asked questions of witnesses to clarify his understanding of the issues under examination and to expedite the lengthy trial. He interrupted the examination of witnesses to encourage the parties to stipulate to issues and shorten the examination. In addition, the judge announced to counsel what, in his view, were the significant issues in the case, to allow them to tailor their examination of witnesses. Generally in response to objections from the Secretary's

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> might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

counsel, the judge cut off ROA's counsel's use of hypothetical questions that strayed too far from the facts of the case. On occasion, the judge admonished ROA's counsel to maintain the decorum of the proceeding.

Under the relevant Commission rule and caselaw and analogous federal statute and cases, we conclude that there is no basis for Medusa's motion requesting the judge to recuse himself.[5] The judge's actions were well within the boundaries of his role in conducting the trial. *See Liteky,* 510 U.S. at 556 (judicial rulings, routine trial administration efforts, and ordinary admonishments to counsel and witnesses are inadequate grounds for disqualification); *see also Secretary of Labor on behalf of Clarke*, 7 FMSHRC at 993 (July 1985) ("[a]mong a judge's specific obligations. . . is a duty to admonish counsel, when necessary"). In particular, we note that a judge has wide discretion to interject questions in order to clarify testimony. *See Deary v. City of Gloucester*, 9 F.3d 191, 194-95 (1st Cir.1993) ("mere active participation by the judge does not create prejudice"); *see also United States v. Webb,* 83 F.3d 913, 917 (7th Cir. 1996) (a judge is not prohibited from asking questions to clarify an important issue in the case); *United States v. Olmstead*, 832 F.2d 642, 648 (1st Cir.1987) (comments and questions remedied leading questions, clarified lines of inquiry, or developed witness' answers and were within court's discretion), *cert. denied*, 486 U.S. 1009 (1988). Further, a judge's actions at trial in seeking to avoid repetition in examining witnesses and limiting use of hypothetical questions are proper. *See Desjardins v. Van Buren Community Hospital,* 969 F.2d 1280, 1282 (1st Cir. 1992) (judge's request that counsel not be repetitive and follow proper procedures in asking questions not an abuse of discretion). Finally, the judge's placing on the record his concern about counsel's throwing his glasses during an off-the-record discussion was an appropriate response to counsel's conduct. *See Arthur Pierson & Co. v. Provimi Veal Corp.*, 887 F.2d 837, 839 (7th Cir. 1989) (quoting *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 576 n.13 (7th Cir. 1989)) ("[f]riction between court and counsel does not constitute bias"). In sum, none of the judge's actions cited in Medusa's brief, either individually or cumulatively, indicate that the judge harbored inappropriate bias towards counsel that is grounds for recusal in this case.

We further reject Medusa's argument that the Commission must reassign the case in order to avoid the appearance of bias. M. Br. at 1; M. Reply Br. at 4-5; Oral Arg. Tr. at 30. This record does not indicate an appearance of bias. Even if it were present, appearance of bias is an insufficient ground upon which to order recusal when the allegation of bias is based on prior judicial proceedings (as opposed to extrajudicial conduct). *See Liteky,* 510 U.S. at 552-53 & n.2, 556; *Baldwin Hardware Corp. v. Franksu Enterprise Corp.*, 78 F.3d 550, 557-58 (Fed. Cir. 1996). *Cf. Nichols v. Alley,* 71 F.3d 347, 350-52 (10th Cir. 1995) (based on objective considerations, a reasonable person would have reason to question judge's impartiality to preside over trial of Oklahoma City bombing conspirator because of extrajudicial considerations,

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[5] In *Rock of Ages,* 20 FMSHRC ___, Nos. YORK 94-76-RM through 94-83-RM (February 24, 1998), the Commission reviewed the identical judicial conduct at issue in this case. We concluded that there was no basis for reversing the judge based on his conduct of the trial.

including damage to judge's chambers and courthouse and injury to his staff from the bombing).[6] We reject Medusa's apparent theory that a mere allegation of bias in one case may serve as grounds for recusal of that judge (and reassignment) in all subsequent cases involving the same party or counsel.

III.

Conclusion

For the foregoing reasons, we affirm the judge's order denying Medusa's motion for recusal.[7]

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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[6] *UMWA on behalf of Rowe v. Peabody Coal Co.*, 7 FMSHRC 1136 (August 1985), is readily distinguishable. That decision, which addresses disciplinary sanctions of a judge, refers to a prior reassignment order of the judge in the proceeding that was issued "to avoid either the appearance or existence of judicial bias." *Id.* at 1138. However, the judge's conduct in that proceeding involved extrajudicial incidents, including several ex parte contacts with representatives of one of the parties. *Id.* 1140-44.

[7] As noted above, Medusa moved to strike a portion of the Secretary's brief to the Commission which stated that the assertion that the judge is biased must be evaluated "in light of the fact that Mr. Chajet has made a practice of making meritless accusations of impropriety against judges, other counsel, and parties in litigation." S. Br. at 10-11, *cited in* M. Reply Br. at 5-10. We vote to grant the motion to strike and, accordingly, the motion is granted. The referenced portions of the Secretary's brief have not been relied on in our decision in this matter.

Commissioner Marks, concurring in part and dissenting in part:

I concur in the result reached by my colleagues in affirming Administrative Law Judge Feldman's denial of Medusa's motion for recusal. However, I find inexplicable the majority's refusal to use Attorney Chajet's name throughout most of their opinion. There were two counsels representing Medusa in this case, Paul Wilson and Henry Chajet, both of the Patton Boggs law firm. According to the Secretary of Labor, Mr. Wilson was the lead counsel. The recusal motion was made as a result of matters that affected Mr. Chajet, not Mr. Wilson. It was Mr. Chajet who claimed he had experienced the judge's "personal bias." Maj. slip op. at 3, line 22. It was Mr. Chajet who claimed that the judge "interject[ed] repeatedly" during his cross-examination, and that he was encouraged to withdraw objections to the way the hearing was being conducted (maj. slip op. at 3, lines 29, 32-33), and it was Mr. Chajet who claimed that the judge's displeasure assertedly increased with the filing of the brief with the Commission in the *Rock of Ages* appeal. Maj. slip op. at 4, line 1. It was Mr. Chajet who objected to the judge's conduct of the *Rock of Ages* hearing (Maj. slip op. at 4, line 3) and to the judge's admonishment of him for throwing off his glasses during an off-the-record conference. Maj. slip op. at 4, lines 3-5. It was Mr. Chajet's affidavit that swore that "Judge Jerold Feldman bears personal bias against me." Maj. slip op. at 4, lines 8-9. Again, it was Mr. Chajet who claimed that the judge cut off his use of hypothetical questions. Maj. slip op. at 7, line 1. And it was Mr. Chajet that the judge admonished for lack of decorum. Maj. slip op. at 7, lines 2-3. Finally, it was Mr. Chajet who threw his glasses during an off-the-record discussion. Maj. slip op. at 7, lines 21-22.

The opinion sustaining the judge's order denying Medusa's motion for recusal should have specifically indicated that Mr. Chajet, and not Mr. Wilson, was the recipient of the trial judge's actions.

I dissent from the majority's granting Medusa's motion to strike, believing that in light of the disposition of this case there is no need to reach that matter. I must say, however, as I did at the oral argument in this case — that for the Secretary to state in her brief that Mr. Chajet has made a practice of making meritless accusations of impropriety against judges, other counsel, and parties in litigation without the slightest bit of evidence being presented to the Commission to sustain those charges (even though the Secretary's counsel was again given the chance to do so at the oral argument) is in my opinion conduct unbecoming that which one expects from the Secretary's legal staff.

Marc Lincoln Marks, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

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FALLS CHURCH, VIRGINIA 22041

FEB 5 1998

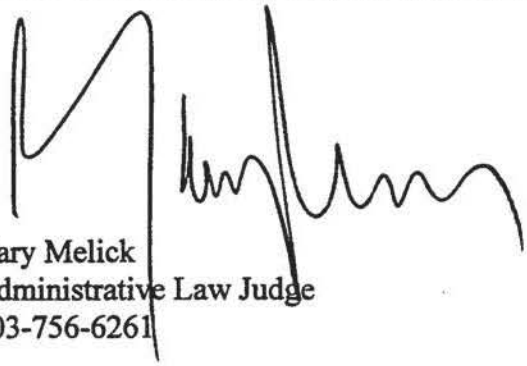
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 94-1274-D
on behalf of CHARLES H. DIXON,	:	MSHA Case No. PIKE CD 94-16
BERNARD EVANS, RICHARD	:	
GLOVER, EDGAR OLDHAM,	:	Mine ID No. 15-09571
MARK MARCH, DON RILEY,	:	Pontiki No. 1 Mine
CHARLES JOHNSON AND ELEVEN	:	
(11) UNAMED EMPLOYEES OF	:	
PONTIKI COAL CORPORATION	:	
Complainant	:	
	:	
v.	:	
	:	
PONTIKI COAL CORPORATION	:	
Respondent	:	

ORDER LIFTING STAY / DECISION APPROVING SETTLEMENT

Before: Judge Melick

This case is before me upon a complaint of discrimination under Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the Act) in which the Secretary also seeks a civil penalty of $1,500.00. The Secretary has filed a motion to approve a settlement agreement and to dismiss the case. Respondent has agreed to pay the proposed civil penalty of $1,500.00, in full. I have considered the representations and documentation submitted in this case, including Respondent's agreement to allow a non-employee, union member to be designated and serve as a miner's representative for purposes of MSHA inspections at a non-union mine, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the stay order issued July 25, 1997, is hereby LIFTED, the motion for approval of settlement is GRANTED, and is ORDERED that Respondent pay a penalty of $1,500.00, within 30 days of this order.



Gary Melick
Administrative Law Judge
703-756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

FEB 1 1 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 97-128
Petitioner	:	A.C. No. 36-06475-03553
v.	:	
	:	Homer City Coal Processing Plant
HOMER CITY COAL PROCESSING CORP.,	:	
Respondent	:	

DECISION

Appearances: Ronald M. Miller, Conference and Litigation Representative, U.S. Department of Labor, MSHA, Hunker, Pennsylvania for Petitioner; R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania for Respondent.

Before: Judge Weisberger:

This case is before me based upon a petition for assessment of penalty filed by the Secretary of Labor ("Secretary") alleging a violation by Homer City Coal Processing Corp., ("Homer City") of 30 C.F.R. Section 77.404(a). Pursuant to notice, a hearing was held in Johnstown, Pa., on November 13, 1997. Each party filed a brief on January 21, 1998.

I.

Homer City operates the Homer City Coal Processing plant located in Indiana County, Pa. The plant processes coal for a generating station. Within the plant, coal is conveyed to various points by conveyor belts. A series V-shaped structures ("chairs") containing two-wing rollers, one located on the walkway side of the belt and the other on the far side, and a bottom roller, to support and guide the belt.

II.

On November 13, 1996, John H. Kopsic, an MSHA coal mine safety and health specialist, inspected the No. 5 conveyor belt at the subject site. He indicated that starting at the belt tail, 16 of the first 23 chairs contained rollers that were frozen or stuck. He said that he

observed a lot of material, most of it coal[1], on the rollers, belt structures, frame, and under the belt. He indicated that the material was caked on some of the rollers. According to Kopsic, he observed flat spots on those rollers that were not turning. He indicated that the flat spots were created by the belt rubbing on the rollers that did not turn. According to Kopsic, two rollers were warm to the touch. One was under the decant chute, and the other was approximately eight feet away toward the head. The belt was in contact with these warm rollers, material was caked around them, and they were not turning. Kopsic indicated that he tested approximately a half dozen wing-rollers on the walkway side and they would not turn. According to Kopsic because rollers were not turning, when the belt would slide over these rollers, it would create friction which could lead to smoke. He opined that employees working in the upper floors of the plant could be overcome by the smoke.

Kopsic issued a § 104(a) citation alleging a violation of 30 C.F.R. § 77.404(a) which provides as follows: "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

III.

David William Anderson, Homer City's health & safety director and equipment supervisor, testified that he was with Kopsic at the tail of the belt at approximately 7:50 a.m. on November 13, and that the belt was in operation at that time. He said that he checked every wing-roller that was not turning, and with the exception of two near the top, he was able to get the rest to pivot with only "minimal force" (Tr. 138). He indicated that because the belt was not touching the rollers that did not turn with the belt running, no friction was created. He also opined that the accumulations that were present were typical of that belt, and did not present any hazards. He indicated that he did not see any flat spots on the rollers.

A video of the cited area, was taken a few weeks after November 13, 1996. According to Anderson, the condition of the cited area in the video is the same as seen by him on November 13 with the exception of two chairs that had been replaced the Saturday after November 13. The video indicates some rollers that were not turning. However, the moving belt was not in contact with these, or other rollers. He opined that there was no danger of fire or smoke inasmuch as the belt was not in contact with any of the rollers that were not turning on November 13. Anderson also indicated that under normal operations the belt does not touch the rollers. He also noted the presence of a fire hydrant and fire extinguishers in the areas.

In the same fashion, Donald J. Farabaugh, the midnight shift maintenance foreman who was present with Kopsic on November 13, indicated that the belt was not running on the rollers. He said that he did not see any condition that led him to an opinion that the belt was unsafe.

---

[1] He indicated that there could be other material mixed in with it.

Frank LoPresti, the shift foreman, indicated that on November 13, Kopsic pointed out to him the rollers that were not turning, and a "couple of little" flat spots (Tr. 224). He indicated that there was not anything that he thought was significant. LoPresti opined that in normal operation the belt does not come in contact with the rollers due its curvature and that it is normally approximately 18 inches above the rollers. He indicated that based on his experience, the belt that he saw on November 13 did not present a hazard.

IV.

I accept the testimony of Homer City's witnesses that in normal operations the belt does not touch the rollers and runs above the rollers. Also, I note Anderson's specific testimony that, the morning the belt was cited, when he was not in the presence of Kopsic, he noted rollers that were not turning with the belt running, as they were located in areas where the belt ran above the rollers. Homer City refers to Anderson's testimony that two of these rollers would not turn by hand, and argues that since they were not in contact with the belt, no violation existed. I reject Homer City's argument and testimony for the reasons that follow.

I observed Kopsic's demeanor and found his testimony credible that, as observed by him, on November 13 the belt was riding on the flat spots of rollers, and was in contact with two rollers. Robert G. Nelson, a supervisor inspector who accompanied Kopsic in his inspection of the belt at issue, corroborated that "the belt was touching the rollers" (Tr. 120). John Bencic, the union representative who accompanied Kopsic indicated in response to a leading question that he observed "rollers that were not turning that had the belt running over top of the rollers that's in contact with these rollers that were not running (sic)" (Tr. 92). None of Homer City's witnesses were with Kopsic at the time he made his observations, and thus could not contradict his eyewitness testimony as to what he observed at the time that he made his inspection. Also, since Kopsic did not point out the warm rollers to Homer City's agents, they could not contradict his testimony that two rollers that he touched were warm. Further, although Anderson indicated that he did not see any flat spots, LoPresti noted a couple of little spots. Moreover, since Anderson conceded that Kopsic did not point out flat spots to him, it was not possible for him to contradict Kopsic's testimony regarding the specific flat spots that he had observed. Based on these reasons, and my observations of the inspectors' demeanor, I accept their testimony regarding their observations. Based on the inspectors' testimony, I find that, when cited, there was coal material on some rollers, that the belt was in contact with rollers that were not turning, that some rollers had flat spots, and two rollers were warm to the touch. It now must be resolved whether these conditions constituted a violation of Section 77.404(a) on the ground that the belt was not longer "in safe operating condition"[2].

---

[2] Homer City argues that Section 77.404(e), *supra*, is violated only if it is established that an operator does not maintain the equipment in a safe operating condition and fails to remove it from service. Based on Ambrosia Coal & Construction Co., 18 FMSHRC 1552, 1556 (1996), I reject this argument and find that, to prevail herein, the Secretary need establish only the equipment was not maintained in safe operating condition.

V.

In Alabama By-Products Corporation, 4 FMHSRC 2128, 2129 (December 9, 1982), the Commission held that the following standard is to be used in deciding whether equipment is in safe or unsafe operating conditions[3], ". . . the alleged violative condition is appropriately measured against the standard of 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." Essentially, according to Kopsic, approximately 16 chairs contained rollers that were not turning, and the belt was riding on rollers that had flat spots. He opined, that due to the presence of coal material, this condition presented a friction source as further indicated by the presence of two warm rollers. I conclude that a reasonably prudent person, familiar with the violative conditions that I have found, would recognize that the belt was in an unsafe condition (See, Alabama By-Products, 4 FMSHRC *supra*). As stated by the Commission in Alabama By-Products, 4 FMSHRC *supra,* at 2131, as follows:

> The danger posed in underground coal mining by a friction source that will lead to a heat buildup in an area where coal accumulations could occur is obvious. Where such dangers are present due to defects in the operating condition of equipment, that equipment cannot be considered in safe operating condition.

I take cognizance of Anderson's testimony regarding the presence of extinguishers and fire hydrants in the area. I also note Kopsic's testimony that the area was very wet, and that he did not observe any smoke, fire, or hot rollers, and that any smoke produced by friction of the rollers of the belt can be seen or smelled by miners who would then extinguish the fire with the fire extinguishers and hoses in the area. In this connection, I note the Commission's discussion in Alabama By-Products, 4 FMSHRC *supra,* at 2131, as follows:

> In light of the nature of the danger, the evidence relied upon by the operator concerning other conditions in the area, i.e., that the belt was wet and fire-resistant, the area was adequately rock-dusted and ventilated, and coal accumulations were not then present, is not controlling as to whether an unsafe condition existed.

In the same fashion, I find that the lack of presence of smoke, fire, or hot rollers, to be not controlling as to whether an unsafe condition existed.

For all the above reasons, I find that it has been established that Homer City did violate Section 77.404(a), *supra.*

---

[3] Alabama By-Products *supra* involves 30 C.F.R § 75.1725(a) whose wording is the same as that set forth in Section 77.404(a) *supra.*

According to Kopsic the violation was significant ans substantial due to the presence of stuck rollers and flat spots, and the amount of material on the stuck rollers, and on the belt structures.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significant and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial, "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

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

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

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

> We have explained further that the third element of the Mathies formula required that the Secretary establish likelihood that the hazard contributed to will result in an event in which there is an injury. U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the continuation of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1754-75 (July 1984).

I note the presence of stuck rollers, flat spots, and two warm rollers. However, aside from Kopsic's conclusion that there was "a lot of material" on the rollers, belt structures, frames, and under the belt, there is no evidence in the record to make a specific finding of the amount of coal material present. Also, it would appear that in normal operations the belt is not in contact with the rollers. I thus find that the third element in *Mathies* has not been established and that the violation is not significant and substantial.

VII.

Taking into account the presence of extinguishers and hydrants in the area, as well as the fact that the area was wet, and considering the fact that in normal operations the belt does not come in contact with the rollers, I find that the gravity of the violation herein was low. It has been stipulated that the level of Homer City's negligence was low. Considering also the history of violations as well as the good faith efforts expended to abate the violation, I find that a penalty of $20 is appropriate.

ORDER

It is ordered that, within 30 days of this decision, Homer City pay a civil penalty of $20.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FEB 17 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-214
Petitioner	:	A.C. No. 15-03178-03789
v.	:	
	:	Ohio 11 Mine
ISLAND CREEK COAL COMPANY,	:	
Respondent	:	

DECISION ON REMAND

Before: Judge Hodgdon

On January 30, 1998, the Commission issued a decision in this case reversing my conclusion that an escape of methane from a cut-through core drill hole into a crosscut being mined between the No. 5 and 6 entries on the 004 section did not constitute an unplanned inundation of gas requiring the immediate reporting of the accident to the Secretary's Mine Safety and Health Administration (MSHA). *Island Creek Coal Co.*, 20 FMSHRC 14 (January 1998). Finding that Island Creek did violate section 50.10, 30 C.F.R. § 50.10, by not reporting the accident, the case was remanded to me "for assessment of an appropriate civil penalty." *Id.* at 26.

Civil Penalty Assessment

The Secretary has proposed a penalty of $1,000.00 for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated that payment of the proposed penalty would not affect Island Creek's ability to remain in business. (Tr. 33.) The file indicates that while the mine is small to medium sized, its controlling entity is a very large company. The file also indicates that Island Creek's history of prior violations is good. There is no evidence that the company did not abate this violation in good faith, so, to the extent it is relevant for a reporting violation, I find that Island Creek demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

The next criterion to be considered is the gravity of the violation. The inspector found the violation to be a "significant and substantial" one, affecting one person with the reasonable likelihood of suffering an injury that would result in lost workdays or restricted duty. Notwithstanding the inspector's characterization of the violation as "significant and substantial," there has been no finding on that issue in this case. Since resolution of the issue affects a determination on the gravity of the violation, I find the violation to have been "significant and substantial" for the reasons set forth below.

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

The inspector's testimony concerning this issue was as follows:

> THE COURT: Mr. Coburn, how did the failure to immediately report this accident make this violation significant and substantial?
>
> A. Because by the time we arrived at the mine was fourteen hours later. We had no idea what was coming out of the bore holes, what the people were that were exposed and what they were exposed to, what controls had been done on the section and everything . . . .
>
> THE COURT: Well, what would have happened if they had reported it immediately?
>
> A. We would have issued a (k) order and followed the steps about removing the miners or whatever was necessary. They would have to have plans about what they were going to do about removing the miner and other people.
>
> . . . .

> I would not have allowed the miner to be removed under its own power.

(Tr. 111-12.)

The Commission has held in this case, although not in connection with this issue, that "MSHA needs to know immediately about inrushes of methane in order to be able to respond quickly and help prevent explosions and loss of life. Notification is one of the necessary first steps following an accident that enables MSHA to take appropriate action." *Island Creek* at 22. In view of the inspector's testimony and this statement, I conclude that the failure to immediately report the accident made in reasonably likely that a reasonably serious injury would result from the accident. Therefore, I conclude that the violation was "significant and substantial." For the same reasons, I conclude that the gravity of the violation was serious.

The final penalty factor to be considered is negligence. The inspector described the level of negligence as "moderate." The Commission held, albeit not on this issue, that the conditions in the mine "presented a safety hazard that should have alerted Island Creek to the necessity of immediately reporting the incident as an accident to MSHA." *Id.* at 24. It also held that "the actions and stated views of Island Creek representatives support the notion that Island Creek should have been aware that the core drill hole cut-through was not a routine methane release, but rather an incident that needed to be reported under section 50.10." *Id.* at 25. Accordingly, I conclude that Island Creek was moderately negligent in not immediately reporting this incident.

Taking all of these factors into consideration, I conclude that the $1,000.00 penalty proposed by the Secretary for Citation No. 3859779 is appropriate.

ORDER

Accordingly, Island Creek Coal Company is **ORDERED TO PAY** a civil penalty of **$1,000.00** for the violation of section 50.10 set out in Citation No. 3859779 within 30 days of the date of this decision. On receipt of payment, this proceeding is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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FEB 19 1998

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. KENT 97-257-D
on behalf of RONALD MAXEY,	:	BARB CD 97-07
Complainant	:	
v.	:	
	:	Mine No. 68
LEECO, INCORPORATED,	:	Mine ID No. 15-17497
Respondent	:	

DECISION

Appearances: MaryBeth Bernui, Esq., Office of the Solicitor, U.S. Dept. of Labor, Nashville, Tennessee, on behalf of the Secretary of Labor;
Tony Oppegard, Esq., Mine Safety Project of the Appalachian Research and Defense Fund of Kentucky, Inc., Lexington, Kentucky, on behalf of Ronald Maxey;
Marco Rajkovich, Jr., Esq. and Julie O. McClellan, Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, on behalf of Leeco, Incorporated.

Before: Judge Melick

On January 15, 1998, a decision was issued in this matter finding that Ronald Maxey was discharged by the Respondent, Leeco, Inc., in violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et. seq.*, the "Act." In that decision the Secretary was directed to file a brief addressing each of the criteria set forth under Section 110(i) of the Act in support of her proposed civil penalty of $20,000.00. In addition, the parties were directed to confer with respect to relevant costs and damages.

Section 110(i) of the Act provides that in assessing a civil penalty "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." It has been stipulated that the operator herein is large in size. No evidence has been submitted to show the effect of the proposed penalty on the operator's ability to continue in business but it has been stipulated that a "reasonable penalty" would not affect the operator's ability to continue in business. The Secretary observes that the history of violations at the subject mine for the two years prior to February 10, 1997, consists of 87 violations with a

payment of $20,017.00 in civil penalties. The Secretary also observes that the operator was charged with violating Section 105(c) of the Act on June 26, 1996, and for which the Secretary 's proposed penalty of $8,000.00 was paid in full. The Secretary notes that the violation herein was committed against Mr. Maxey only eight months later.

In the decision in this case issued January 15, 1998, it was determined that Respondent intentionally discharged Maxey on February 11, for making safety complaints to MSHA and for causing inspections to be conducted on February 7 and 9, resulting in several citations and notices-to-provide-safeguards. It was also found in that decision that Respondent had created a fictional account of its discharge of Maxey in an attempt to cover up its unlawful discharge of him. Under these circumstances, it is clear that Maxey's discharge was the result of willfull and intentional conduct and not merely negligence.

With the respect to the issue of gravity the Secretary argues in her brief as follows:

> With regard to the gravity of the violation, the Secretary equates the injury suffered by Maxey to a serious injury received in a mining accident. Maxey simply exercised his right under the Act to report safety violations at Leeco's No. 68 mine to MSHA. In return for exercising his legal right, he was discharged, humiliated, forced to seek work elsewhere, suffered through appeals of his unemployment compensation claims, and has had to endure countless hours of deposition and trial testimony. He was a member of a small community who had to endure the embarrassment and humiliation of being wrongfully discharged from his position from February 1997 and is only now being recognized as the victim of an operator who has been shown to have little regard for the safety of its employees. While Maxey was out looking for work and wondering how he was going to meet his monthly financial obligations, Amon Tracey, Everett Kelly and Talmadge Moseley continued to draw their salary from Leeco, even though it was their decision to disregard the law that caused Maxey to lose his job in the first place.

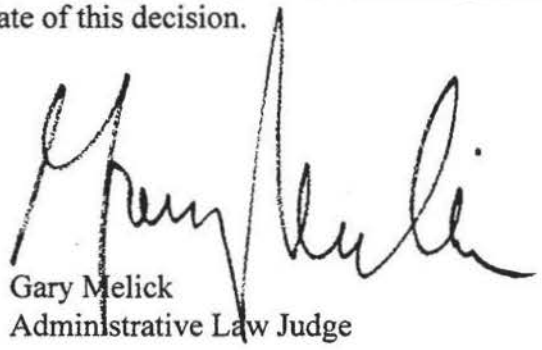
While I do not necessarily agree with the Secretary's contentions and I note that some of her arguments may be based upon matters beyond the record herein, I nevertheless conclude that the violation was serious. It may reasonably be inferred that the actions against Mr. Maxey would have had a grave impact on those miners contemplating the reporting of health and safety hazards.

Finally, the Secretary argues that Respondent showed lack of good faith in attempting to achieve rapid compliance after being notified of the violation herein. She notes that when confronted with the Secretary's complaint of violating Section 105(c), rather than reinstate Maxey, Respondent conspired to create a fictional account to avoid responsibility for his unlawful discharge. The Secretary's position is correct on this issue and under all the circumstances, I find that a civil penalty of $20,000.00 is appropriate. In reaching this

conclusion I have not disregarded the arguments in Respondent's brief. I do not, however, find those arguments to be persuasive.

ORDER

Respondent Leeco, Inc., is hereby directed to pay a civil penalty of $20,000.00, within 30 days of the date of this decision. The Respondent is further directed to permanently reinstate the Complainant, Ronald Maxey, and to pay to Mr. Maxey damages of $16,037.26, plus interest to the date of payment, within 30 days of the date of this decision.



Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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Falls Church, Virginia 22041

FEB 19 1998

TANOMA MINING COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. PENN 97-81-R
	:	Order No. 3692732; 1/16/97
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Tanoma Mine
ADMINISTRATION (MSHA),	:	Mine ID 36-06967
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 97-129
Petitioner	:	A. C. No. 36-06967-03912
v.	:	
	:	Tanoma Mine
TANOMA MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Pamela W. McKee, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Joseph A. Yuhas, Esq., Barnesboro, Pennsylvania, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on a Notice of Contest and a Petition for Assessment of Civil Penalty filed by Tanoma Mining Company against the Secretary of Labor, and by the Secretary, acting through her Mine Safety and Health Administration (MSHA), against Tanoma, respectively, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests the issuance to it of a 107(a) order, 30 U.S.C. § 817(a). The Secretary's petition alleges three violations of the Secretary's mandatory health and safety standards and seeks a penalty of $951.00. For the reasons set forth below, I affirm the order and the citations, as modified, and assess a penalty of $425.00.

A hearing was held on October 7, 1997, in Indiana, Pennsylvania. The parties also submitted posthearing briefs in the cases.

Settled Citation

At the beginning of the hearing, counsel for the Secretary announced that the parties had settled Citation No. 3692439. The agreement provides that the citation be modified by deleting the "significant and substantial" designation and that the penalty be reduced from $147.00 to $75.00. After considering the parties representations, I concluded that the settlement was appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), and informed the parties that I would approve the agreement. (Tr. 12-18) The provisions of the agreement will be carried out in the order at the end of this decision.

Background

The Tanoma Mine is an underground coal mine, owned and operated by Tanoma Mining Company, in Indiana County, Pennsylvania. At about 12:30 p.m. on January 15, 1997, miners in the E-4 section of the mine detected rising levels of methane. The crew was removed from the section, power on the section was turned off and ventilation changes were made in the section in an attempt to correct the problem. By mid-afternoon methane levels had been reduced below 1% and mining was resumed. Nevertheless, William Moyer, the mine foreman, instructed the afternoon shift foreman to check the methane levels at Evaluation Point E1-1 (EP E1-1) periodically during the shift.

That evening, the shift foreman called Moyer to advise him that methane in excess of 4% at been detected at EP E1-1. Moyer told the foreman to remove everyone from the mine and to de-energize everything except the fans. He then called Robert DeBreucq, Vice President of Operations, to inform him of the situation and both men went to the mine. After ascertaining the situation, DeBreucq called the supervisor of the MSHA field office to advise him what was happening. The supervisor told DeBreucq that he would send an inspector out in the morning.

Inspector William Sparvieri was called by his supervisor and told to go to the mine in the morning. Sometime later, the inspector received another call from his supervisor instructing him to go to the mine that night. He arrived at the mine sometime between 11:00 p.m. and midnight. By then, all production personnel had been sent home from the mine by the operator and all power in the mine had been turned off, except for the fans.

After being advised by mine management about what had occurred and the steps that had been taken to correct the problem, Inspector Sparvieri began an inspection of the mine in the early morning hours of February 16. While traveling the main E left return he detected concentrations of methane ranging from 2.4% to over 5%. Concluding that an imminent danger existed, the inspector verbally issued a 107(a) order for the area between E-1 and C-12 in the mine. The order was reduced to writing as Order No. 3692732 when the inspector exited the mine and served on the company's superintendent at 3:30 a.m. The order stated that: "2.4% to 5.2% of methane was detected in the Main E left return between C-12 and where the E1 bleeder entry enters the return, a distance of 2300 feet. The methane being liberated from the E4 pillar

gob where severe bottom heave has occurred." (Govt. Ex. 2.) The order was modified 4 hours later to include the whole mine as the area closed.

Inspector Sparvieri issued Citation No. 3692733 in conjunction with the 107(a) order. It alleged a violation of section 75.323(e), 30 C.F.R. § 75.323(e), because: "2.4% to 5.2% of methane was detected in the Main E left return between C-12 section and where the E1 bleeder entry enters the Main E left return." (Govt. Ex. 3.)

Although the 107(a) order was subsequently modified several times to permit the company to attempt to solve the problem, it was not terminated until January 23, 1997. While inspecting the mine on that date to determine if the order could be terminated, the inspector issued Citation No. 3692734, also for a violation of section 75.323(e), since: "Methane at the EP 4-2 was measured at 3.4% at a point just before it enters the Main E left return." (Govt. Ex. 6.)

Findings of Fact and Conclusions of Law

The Respondent argues that there was no imminent danger when the inspector issued the order and that, therefore, it should be vacated. This argument is premised on the belief that a methane ignition could not occur because no ignition source was present. The evidence in the case, however, does not support the Respondent's argument. I find that it was reasonable for the inspector to conclude that an imminent danger existed.

Section 107(a) of the Act states:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

Section 3(j) of the Act, 30 U.S.C. § 802(j), defines "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

With regard to what constitutes an imminent danger, the Commission follows the law as set out by the U.S. Courts of Appeals. In *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) the Commission stated:

> In analyzing this definition, the U.S. Courts of Appeals have eschewed a narrow construction and have refused to limit the concept of imminent danger to hazards that pose an immediate danger. *See e.g., Freeman Coal Mining Co. v. Interior Bd. of Mine Op. App.*, 504 F.2d 741 (7th Cir. 1974). Also, the Fourth Circuit has rejected the notion that a danger is imminent only if there is a reasonable likelihood that if will result in an injury before it can be abated. *Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974). The court has adopted the position of the Secretary that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if *normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.*" 491 F.2d at 278 (emphasis in original). The Seventh Circuit adopted this reasoning in *Old Ben Coal Corp. v. Interior Bd. of Mine Op. App.*, 523 F.2d 25, 33 (7th Cir. 1975).

In applying this definition, the Commission has held that: "To support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (October 1991). *Accord Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 858 (June 1996).

Turning to the facts of this case, the Respondent does not dispute that the inspector detected methane at over 5% in the Main E left return. Indeed, the analysis of the bottle samples of the air he took at the time indicates methane of 5.220% and 5.260%, respectively. (Govt. Ex. 4.) Nor does the company dispute that, as testified to by Expert Witness Clete Stephan, methane is explosive in concentrations between 5% and 15%. What it does dispute is whether an explosion was imminent. Although Tanoma presented no evidence on the issue, it argues that an explosion was not imminent because there was no ignition source for such an explosion.

When the inspector issued the imminent danger order, the were no miners in the mine except those permitted by section 104(c) of the Act, 30 U.S.C. § 814(c).[1] Therefore, the order was not issued to withdraw persons from the mine, but to prohibit them from entering the mine "until an authorized representative of the Secretary determine[d] that such imminent danger and the conditions or practices which caused such imminent danger no longer exist." Assuming an

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[1] Section 104(c) provides, in pertinent part: "The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal mine or other mine subject to an order issued under this section: (1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order . . . ."

imminent danger, this was clearly a proper issuance of an imminent danger order. *Eastern Associated Coal Corp. v. Interior Bd. of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974).

Mr. Stephan testified as an expert in fires and explosions in underground mining. He testified that under normal mining conditions in the Tanoma Mine at the time that the inspector issued his order, the following potential ignition sources were present: (1) frictional heating developed during a roof fall, (2) electrical discharges associated with a roof fall, (3) lightening, (4) defective flame safety lamps, (5) pin holes in compressed air lines, (6) roof bolts broken in a roof fall, (7) non-permissible electrical equipment, and (8) improperly maintained permissible electrical equipment. (Tr. 202-03.)

Tanoma argues that these ignition sources are not pertinent because "normal mining conditions," *i.e.*, production of coal, was not going on at the time the order was issued. This is the same argument Eastern Associated Coal made in the case cited above. The court rejected this argument when it held:

> Eastern asserted that a danger is imminent only if there is a reasonable likelihood that it will result in injury before it can be abated, and that the admittedly dangerous conditions here did not constitute an "imminent danger" because Eastern had voluntarily withdrawn miners from the affected area prior to issuance of the order. The Secretary determined, and we think correctly, that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner *if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.*" (Emphasis added).

Id. Accordingly, I also reject the argument and conclude that Inspector Sparvieri did not abuse his discretion in finding that an imminent danger existed in this situation necessitating the issuance of an imminent danger order. *See VP-5 Mining Co.*, 15 FMSHRC 1531, 1536-37 (August 1993). In reaching this conclusion, I give great weight to the unrebutted testimony of Mr. Stephan and William Francart, an MSHA ventilation expert, who corroborated the inspector's judgment.

I affirm Order No. 3692732. In doing this, I understand the feeling of management in this case, as expressed by Mr. DeBreucq, that they did everything that they were supposed to do, by evacuating the mine and shutting off the power, and yet they still have an imminent danger order on their record. They did do everything that they were supposed to do and the company should be commended for it. Tanoma was obviously looking out for the safety of its miners. On the other hand, the inspector was faced with what was clearly an imminent danger under the law. He would have been remiss in his duties if he had not issued the order. While I am not aware of any particular stigma that attaches to an imminent danger order, it appears that both the company

and MSHA acted as they should have, and by affirming the order I am certainly not concluding that the Respondent was in the "wrong" in this instance.

Citation Nos. 3692733 and 3692734

In its brief, the company has conceded that the conditions in these two citations violated section 75.323(e).[2] It contests, however, the inspector's finding that both violations were "significant and substantial" and the level of negligence he attributed to the violations. I agree that the level of negligence in the citations should be reduced, but I find that both violations were "significant and substantial."

Significant and Substantial

The Inspector found both violations to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

Relying on its arguments that in this case "normal mining operations" were that the mine was evacuated and de-energized and for that reason there was no ignition source, Tanoma asserts that the third element of the *Mathies* test[3] was not met by either cited violation and, therefore,

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[2] Section 75.323(e) states: "*Bleeders and other return air courses.* The concentration of methane in a bleeder split of air immediately before the air in the split joins another split of air, or in a return air course other than as described in paragraphs (c) and (d) of this section, shall not exceed 2.0 percent."

[3] The third element is "a reasonable likelihood that the hazard contributed to will result in an injury." *Mathies* at 3-4.

they were not S&S. This argument is rejected in the S&S context for the same reason it was rejected when discussing the imminent danger order. "Normal mining operations" means operations during which coal is being produced, not periods during which, for whatever reason, the mine is idle. In this case it is unrebutted that numerous ignition sources were present during normal mining operations and that this mine liberated in excess of 800,000 cubic feet of methane a day. Thus, there was a reasonable likelihood that the high concentrations of methane would result in an explosion causing serious injuries or death. Accordingly, I conclude that both of these violations were "significant and substantial." *United States Steel Mining Co.*, 7 FMSHRC 1125, 1130-31 (August 1985).

Negligence

The inspector found the level of negligence involved in Citation No. 3692733 to be "low." His testimony, however, indicates that there was no operator negligence connected with this violation. When asked why he marked the negligence as "low," he stated:

> I come [*sic*] to the conclusion of low negligence due to the fact that this condition occurred through no fault of the operator. It was a condition that occurred in the [g]ob area. He had no control over the hea[ve] of the bottom and the release of methane. However, low is checked due to the fact that this is an ongoing problem since approximately 12:30 p.m. on the 15th, therefore, we couldn't say that there was no negligence involved. That's how the evaluation of low was determined.

(Tr. 87.) He later explained: "I would say for me to make that no negligence, they would have had to show me a little more effort than saying that we're going to idle that section, we're not going to send people in there to load." (Tr. 125.)

I agree with the inspector that the operator had no control over the bottom heave in the gob and the release of methane. I do not agree that the mere passage of time is evidence of negligence. Nor do I agree that the only thing that the Respondent did when the problem was discovered was to evacuate the section. The company also made ventilation adjustments, which reduced the level of methane below 1%. Further, no evidence was presented to suggest what else Tanoma should have done.

I find that when confronted with the methane problem, the company properly evacuated the section and made ventilation adjustments which appeared to have solved the problem. When greater concentrations of methane were detected, it became apparent to management that more than minor ventilation adjustments would be necessary and they began taking steps to confront that problem. The entire mine was evacuated, MSHA was notified, and steps were being taken to identify the extent of the problem when the inspector arrived. Under these circumstances, I

cannot conclude that Tanoma acted negligently. Consequently, I will reduce the level of negligence for this violation from "low" to "none."

With respect to Citation No. 3692734, the inspector found the level of negligence to be "moderate." He testified that he made this finding because:

> During the source of this entire situation back to January 15th, there was [*sic*] ventilation changes made throughout this entire area. And at this particular location, initially when the air was changed we experienced methane as high as ten, 12, 14 percent the night of the original change. . . .
>
> . . . .
>
> And the operator had certified people who were agents of the operator, the mine foreman himself, the superintendents were in here daily and sometimes as much as two shifts a day. They were patrolling this area, examining this area, walking this area. *And the fact that methane was present or going to be present at this location, you know, just moderate --- they knew it was going to be there. It's obvious it's not going to disappear all at once over night, and just about everybody that was there was aware that this problem would probably arise at that location.*
>
> . . . .
>
> [The ventilation] was working properly, it just wasn't adequate in the E4 gob area to rid that of the methane in that area.

(Tr. 102-03.) (Emphasis added.)

When he issued the citation, the inspector directed that: "This area shall be monitored by a certified person until the methane is less than 2.0%." (Govt. Ex. 6.) The citation and the above testimony constitute all of the evidence on this issue. I find the emphasized testimony revealing on the issue of negligence. There was an unknown concentration of methane in the gob caused by the bottom heave. Significant ventilation changes, approved by MSHA, reversed the flow of air in the mine. It was expected that the level of methane would increase at this evaluation point until the methane was diluted in the gob. Everyone knew this would occur. But that does not mean that the operator was negligent when it did happen, any more than the company was negligent when the change was first made and the level was 14%.

Significantly, the inspector did not state what the operator should have done about this situation. It appears from the fact that he directed that the area be monitored, that the only thing

that could be done was to wait for the problem to abate by itself. It apparently did so on January 26 when the citation was terminated because methane concentrations were below 2%. (Govt. Ex. 6.) Just as the operator had no control over the cause of the heavy methane concentrations, it apparently had no control over the length of time it would take to reduce the level of methane going into the return to workable levels. Accordingly, I conclude that the company was not negligent in this instance and will modify the citation to reduce the level of negligence from "moderate" to "none."

Civil Penalty Assessment

The Secretary has proposed penalties of $442.00 and $362.00, respectively, for the contested citations and the parties have agreed on a penalty of $75.00 for the settled citation. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties stipulated that the Tanoma Mine produces approximately 506,620 tons of coal per year and the company 622,000, that imposition of the proposed civil penalties will not affect the operator's ability to remain in business and that the operator demonstrated good faith in abating the citations. (Tr. 19.) The company's history of violations indicates a low number of prior violations. (Govt. Ex. 1.) Therefore, I find that the Respondent's history of prior violations is good. I find that the gravity of Citation Nos. 3692733 and 3692734 was serious, but that the company was not negligent in either instance.

Taking all of this into consideration, I conclude that a penalty of $225.00 is appropriate for Citation No. 3692733 and a penalty of $125.00 is condign for Citation No. 3692734. As I have already indicated, I conclude that the agreed upon penalty of $75.00 for Citation No. 3692439, as modified, is appropriate.

ORDER

Accordingly, Order No. 3692732 in Docket No. PENN 97-81-R is **AFFIRMED** and Citation Nos. 3692733, 3692734 and 3692439 in Docket No. PENN 97-129 are **MODIFIED** by reducing the level of negligence from "low" to "none" for Citation No. 3692733 and from "moderate" to "none" for Citation No. 3692734 and by deleting the "significant and substantial" designation for Citation No. 3692439, and are **AFFIRMED** as modified.

Tanoma Mining Company is **ORDERED TO PAY** a civil penalty of **$425.00** within 30 days of the date of this decision. On receipt of payment, these cases are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

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

January 30, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 97-243-M A.C. No. 48-01497-05506 JVU
v.	:	
RAIL LINK INCORPORATED, Respondent	: :	General Chemical Mill

ORDER DENYING SECRETARY'S MOTION FOR A PROTECTIVE ORDER

Counsel for the Secretary filed a motion seeking a protective order to prevent Rail Link from taking depositions of Robert M. Friend, District Manager of MSHA's Rocky Mountain District for Metal/Nonmetal, and Jake H. DeHerrera, the Assistant District Manager. As grounds for the motion, the Secretary argues that: (1) these individuals have no first-hand knowledge of the facts in this case; (2) the depositions will, at the most, yield cumulative information; (3) it is "annoying, oppressive, and unduly burdensome" to require these officials to answer questions that will be asked and answered by other MSHA officials; (4) these individuals are high level MSHA officials who do not have the time to give depositions in each of the many cases filed in the Rocky Mountain District; and (5) it is likely that these individuals will be asked questions involving agency deliberations that are not relevant and are protected by the deliberative process privilege. Rail Link opposes the Secretary's motion and the parties briefed the issues.

This case, along with other Rail Link cases that are pending before me, raises issues of MSHA jurisdiction. Rail Link contends that MSHA does not have jurisdiction over its operations and employees. Although the penalties are not high, the legal and factual issues are important to Rail Link.

Commission Procedural Rule 56(b) provides that parties "may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." 29 C.F.R. § 2700.56(b). Rule 56(c) provides that "a judge may, for good cause shown, limit discovery to prevent undue delay or to protect a party or person from oppressive or undue burden or expense." Inquiry into the facts that led MSHA to conclude that it has jurisdiction over the cited facility may produce information that is admissible at the hearing or that is likely to lead to the discovery of admissible evidence. As a general matter, I

hold that deposition questions about MSHA jurisdiction is an appropriate subject for discovery in this case.

As a general matter, high level executive department officials should not, except in extraordinary circumstances, be called to testify regarding their reasons for taking official actions. *Simplex Time Recorder Co. V. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985). High level officials are protected from compulsory testimony because they must be free to conduct their jobs without the constant interference of the discovery process. *Church of Scientology of Boston v. I.R.S.*, 138 F.R.D. 9, 12 (D. Mass. 1990).

I find that Messrs. Friend and DeHerrera are not the type of high level officials that require such protection. Rail Link's facility is within MSHA's Rocky Mountain District. Messrs. Friend and DeHerrera, directly or indirectly, supervise the MSHA inspector who issued the citations. They may have direct information about the issues in this case that would not be available from other individuals. Although they have important positions within MSHA, they are not of such a high level that they require special protection from compulsory testimony that higher level officials require. *See Newmont Gold Co.*, 18 FMSHRC 1304, 1306-07 (July 1996)(ALJ Manning).

The fact that these individuals may not actually have knowledge of facts that will shed light on the issues raised in this case is not sufficient justification to issue a protective order. They may have such knowledge and counsel's statement to the contrary cannot be the basis for a protective order. The Secretary has not shown that the proposed depositions will be oppressive or will expose these individuals or MSHA to "undue burden or expense."

The Secretary's argument that much of the requested information will be subject to the deliberative process privilege is not well taken. The fact that objections may be raised to specific questions in a deposition does not provide a sufficient basis to bar the deposition altogether. It is not clear at this juncture whether and to what extent the deliberative process privilege will apply. In an order issued in *Newmont Gold Co.*, 18 FMSHRC 1532 (August 1996), I set forth my understanding of the application of the deliberative process privilege which may be of use to the parties in the present case.

Part of the Secretary's concern appears to be that the depositions will get into broad issues of MSHA policy governing independent contractor liability and the definition of the term "coal or other mine" in section 3(h)(1) of the Mine Act. The proposed deponents may not be in the position to describe the outer limits of MSHA jurisdiction. I agree with the Secretary that a series of broadly worded hypothetical questions can be burdensome and will often produce meaningless answers. A discussion of this issue can be found in my order in *Newmont Gold Co.*, 18 FMSHRC 1709, 1713-14 (September 1996), which I incorporate herein.

In the alternative, the Secretary requests that I set time and scope limitations for the depositions. I deny the Secretary's request. Nevertheless, Rail Link should understand that the

purpose of the depositions is to gather facts concerning the issuance of the citations at issue, including the reasons for MSHA's assertion of jurisdiction. The depositions need not be lengthy or burdensome.

For the reasons set forth above, the Secretary's motion for a protective order is **DENIED**. If Rail Link still wishes to take the depositions of Messrs. Friend and DeHerrera, the depositions shall be scheduled at a mutually satisfactory time and place.

Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 5, 1998

LOCAL 1702, DISTRICT 31, UMWA	:	COMPENSATION PROCEEDING
on behalf of miners,	:	
Applicants	:	Docket No. WEVA 98-10-C
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	Blacksville No. 2 Mine
Respondent	:	Mine ID No. 46-01968

ORDER DENYING MOTION TO DISMISS COMPLAINT

In a motion to dismiss filed by Consolidation Coal Company (Consol) it is represented that this Commission received what purports to be a complaint for compensation on July 2, 1997. Consol maintains that it was not served a copy of said complaint until December 2, 1997, 153 days later.

Commission Rule 7, 29 C.F.R. § 2700.7 governs service of complaints for compensation but is silent with respect to the time limits for the service of such a complaint. Where a procedural question is not governed by the Federal Mine Safety and Health Act of 1977, the Commission rules or the Administrative Procedure Act , the Commission is guided by the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. Commission Rule 1(b), 29 C.F.R. § 2700.1(b). Accordingly, the time for the service of a complaint following its filing is governed by Rule 4(m), Federal Rules of Civil Procedure. That rule provides as follows:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the Court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the Court shall extend the time for service for an appropriate period.

Courts have broad discretion on whether to dismiss an action because of inadequate service or require that service be made properly. *Montalbano v. Easco Hand Tools Inc.*, 766 F.2d 737 (2nd Circuit 1985), 2 A J. Moore and J. Lucas, Moore's Federal Practice, ¶ 12.07 [2.-4] (2nd Ed. 1996). As a general matter the action will be preserved in those cases in which there is a reasonable prospect that the service can be accomplished properly. *Novak v. WorldBank*, 703 F.2d 1305 (D.C. Circuit 1983), Moore's Federal Practice *supra*. In the instant case, Consol was

served with a copy of the Complaint on December 2, 1997. It has not claimed prejudice by the untimely service and the non-lawyer representative of the applicants was apparently unfamiliar with the service requirements. Under the circumstances, Consol's motion to dismiss is DENIED.

Gary Melick
Administrative Law Judge
703 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 18, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 97-29-M
Petitioner	:	A. C. No. 19-00370-05515
v.	:	
	:	Webster Plant
WEBSTER DUDLEY SAND AND	:	
GRAVEL, INC.,	:	
Respondent	:	

ORDER DENYING MOTION TO APPROVE SETTLEMENT AND NOTICE OF HEARING

In this civil penalty case, counsel for the Secretary has filed a motion to approve a proposed settlement. The motion is inadequate, and it is **DENIED.**

The motion states the parties believe payment by the Respondent of half the penalty originally proposed is "in the public interest and will further the intent and purpose of the ... Act." The motion asks that I accept on faith the representation that "counsel for the Secretary reviewed the violations cited and the data which formed the basis for the proposed assessment and ... determined the [settlement amount] is fair and equitable."

While it is reassuring to know counsel has concluded the settlement "is fair and equitable," under the Act, the ultimate judgement on the validity of this conclusion rests with me. This means that I too must review the violations cited and the data which form the basis for the proposed settlement. To do so I must know the facts that support the proposed penalties agreed to by the parties. This is why the Commission's regulations contemplate the moving party explain the reasons for the proposed settlement (20 C.F.R. § 2700.31), and why, when no reasons are given and there is no basis upon which to judge the proposed settlement, the motion must be denied.

Unless, an acceptable motion to approve the settlement is filed and approved within the next 10 days, the parties are advised the matter will be heard at 8:30 a.m., Friday, March 13, 1998, in Worcester, Massachusetts. A specific hearing site will be designated later. The requirements of the previously issued notice of hearing are reinstated.

David Barbour

David Barbour
Administrative Law Judge

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