MARCH AND APRIL 2006

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

MARCH AND APRIL 2006

Review was granted in the following cases during the months of March and April:

Secretary of Labor, MSHA v. San Juan Coal Company, Docket No. CENT 2004-212.
(Judge Hodgdon, January 24, 2006)

Secretary of Labor, MSHA v. Jim Walter Resources, Inc., Docket No. SE 2005-51.
(Judge Weisberger, March 9, 2006)

Secretary of Labor, MSHA v. Imery's Pigments, LLC., Docket No. SE 2005-236-M.
(Judge Melick, March 22, 2006)

No petitions were filed in which Review was denied during the months of March and April:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 6, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. KENT 2006-174
	:	A.C. No. 15-10753-47267
v.	:	
CLEAN ENERGY MINING CO.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On February 17, 2006, the Commission received from Clean Energy Mining Co. ("Clean Energy") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

On October 13, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 7414527 to Clean Energy's Mine No. 1. Mot. at 1. The company timely contested the citation on November 12, 2004, and it is the subject of Docket No. KENT 2005-94-R, which is currently on stay before Commission Administrative Law Judge T. Todd Hodgdon. *Id.* When MSHA subsequently proposed a penalty for Citation No. 7414527, Clean Energy paid it. Mot. at 2. The company now contends that it made the payment inadvertently, and asserts that it had always intended to contest both the validity of the citation and any related penalty. *Id.*; Statement of Steve Endicott. The Secretary states that she does not oppose Clean Energy's request for relief.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the

Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787.

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

March 24, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2006-102-M
v.	:	A.C. No. 16-00357-70579A
CHAD BROUSSARD, Employed by NORTH AMERICAN SALT COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 7, 2006, the Commission received a motion made by counsel on behalf of Chad Broussard, employed by North American Salt Company, to reopen a penalty assessment against Broussard under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). Counsel filed an amended motion on March 8, 2006.

Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

On October 28, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") mailed a proposed penalty assessment to Broussard alleging that he was personally liable under section 110(c) of the Mine Act for two citations (Nos. 6229860 and 6209573) and one order (No. 6229861) issued to his employer, North American Salt Company. Am. Mot. at 2 and Ex A. The citations and order issued to North American Salt Company are the subject of consolidated proceedings before Commission Administrative Law Judge Avram Weisberger. Docket Nos. CENT 2005-97-RM, CENT 2005-98-RM, and CENT 2005-67-M. These

proceedings had been (and currently are) stayed pending the conclusion of the Secretary's related section 110(c) investigation. Although Broussard states that he intended to contest the Secretary's proposed penalties, Am. Mot. at 5, "due to a miscommunication and a filing error or mistake," no contest was filed, *id.* at 3. The Secretary does not oppose Broussard's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

March 30, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. PENN 2006-156
	:	A.C. No. 36-05466-73705
v.	:	
EMERALD COAL RESOURCES LP	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 22, 2006, the Commission received from Emerald Coal Resources LP ("Emerald") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On September 29, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Order Nos. 7083772 and 7083774 to Emerald's No. 1 Mine. Mot. at 1. The company timely contested the orders, which are the subject of Docket Nos. PENN 2006-16-R and PENN 2006-18-R, currently on stay before Commission Administrative Law Judge Gary Melick. MSHA subsequently proposed penalties for both orders, and several other uncontested citations and orders, in the same penalty assessment. Mot. at 1-2; Ex. 1. The company states that although the person responsible for handling the proposed assessment "marked on the assessment sheet that Emerald intended to contest the Orders[, he] mistakenly believed it was not necessary" to separately contest the penalties proposed for the orders since

they "had already been contested." Mot. at 2. The Secretary states that she does not oppose Emerald's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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April 4, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2006-265-M
	:	A.C. No. 10-01937-11058
v.	:	
D. BLOSCH CRUSHING, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 6, 2006, the Commission received a letter from a mine safety consultant to D. Blosch Crushing, Inc. ("Blosch Crushing") requesting that the Commission reopen a penalty assessment that purportedly became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On October 15, 2003, the Department of Labor's Mine Safety and Health Administration ("MSHA") sent to Blosch Crushing the proposed penalty assessment at issue. The company asserts that it attempted to contest the proposed assessment in a letter to MSHA dated November 20, 2003, a copy of which the company included with its request to reopen. This letter is addressed to an MSHA Pittsburgh Post Office Box that is listed on the proposed assessment form used by MSHA as the address to which payments are sent. In a response to Blosch Crushing's request to reopen, the Secretary states: "MSHA has no record of receiving this letter, but does not question that the letter was sent as indicated." The Secretary also states that she does not oppose Blosch Crushing's request for relief.

Although the record contains no indication as to when the company received the proposed penalty assessment at issue, the Commission inadvertently obtained information through its docket office that Blosch may have received the assessment on October 27, 2003. We are unable to evaluate the reliability of this information. However, the Secretary does not dispute Blosch's statement that it mailed a letter contesting the assessment to MSHA on November 20, 2003, nor does the Secretary oppose Blosch's motion to reopen the penalty assessment. Using these dates, the assessment would never have become a final Commission order and further proceedings would be appropriate. *See* 30 U.S.C. § 815(a) ("If, within 30 days from the *receipt* of the [penalty] notification . . . the operator fails to notify the Secretary that he intends to contest . . . the proposed assessment of penalty . . . [it] shall be deemed a final order of the Commission") (emphasis added).

Having reviewed Blosch Crushing's request, in the interests of justice, we remand this matter to the Chief Administrative Law Judge. If it is determined the company filed a timely contest with MSHA, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

April 10, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2006-95-M
v.	:	A.C. No. 13-02285-67945
JEPPESEN GRAVEL	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). In a letter to the Commission dated February 14, 2006, Jeppesen Gravel requested that the Commission reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On March 24, 2006, the Secretary of Labor filed with the Commission an opposition to Jeppesen Gravel's request.

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

On May 19, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 7845177 to Jeppesen Gravel alleging that the company "refused to allow an authorized representative [of the Secretary] to enter the [company's] mine." S. Opp. at 2 and Attach. 1 & 4. In its letter, Jeppesen Gravel acknowledges that it refused to allow MSHA inspectors onto its mine site. Jeppesen Letter at 2. On August 18, 2004, MSHA applied to the United States District Court for the Northern District of Iowa for injunctive relief to obtain access to the Jeppesen Gravel mine site. S. Opp. at 2 and Attach. 2 & 3. Soon thereafter, the court issued an injunction enjoining Jeppesen Gravel from interfering with MSHA inspecting the mine. *Id.*

On September 26, 2005, MSHA issued to Jeppesen Gravel a proposed penalty assessment for Citation No. 7845177. S. Opp. at 3. On October 3, 2005, Jeppesen Gravel refused to accept delivery of the proposed assessment. S. Opp. at 3 and Attach. 5; *see also* Jeppesen Letter at 3 ("Anything that came to our house through the mail from MSHA we would refuse and return."). The assessment became a final Commission order on November 2, 2005. *See* 30 U.S.C. § 815(a) ("If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest . . . the proposed assessment of penalty . . . [it] shall be deemed a final order of the Commission. . . . Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection."). The company now requests that this matter be reopened because "February 13, 2006 is the very first time we laid eyes on this citation. We had no idea it even existed." Jeppesen Letter at 1. In opposing Jeppesen Gravel's request for relief, the Secretary argues that the company "has failed to establish adequate cause why [the] final penalty assessment should be reopened." S. Opp. at 9.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. However, courts have long held that "deliberate or willful conduct on the part of the person seeking relief from the judgment precludes, by its very nature, a finding of 'mistake' or 'inadvertence.'" 12 James Wm. Moore et al., *Moore's Federal Practice* § 60.41[1][c] (3d ed. 1997). Thus, "[t]o obtain relief under the Rule [60(b)(1)], a party must demonstrate *inter alia* that he was not at fault." *Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126, 132 (4th Cir. 1992), *cert. denied*, 506 U.S. 821 (1992). *Cf. Munn Road Sand & Gravel*, 26 FMSHRC 383, 384 (May 2004) ("a party which refuses to accept certified mail from MSHA will most likely be unable to establish good cause" to reopen a proposed penalty assessment that has become a final Commission order).

Jeppesen Gravel was unaware of Citation No. 7845177 and the penalty proposed for the citation only because of the undisputed fact that the company refused to accept delivery of them. This deliberate and willful conduct bars any relief under Rule 60(b)(1). Accordingly, Jeppesen Gravel's request for relief is denied.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

April 25, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2006-266-M A.C. No. 04-02848-33115
v.	:	
CELITE CORPORATION	:	

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

ORDER

BY: Duffy, Chairman; Jordan and Young, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 8, 2006, the Commission received from Celite Corporation ("Celite") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary filed a response to Celite's motion on March 13, 2006, and Celite filed a reply to the Secretary's response on March 14, 2006.

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

On July 28, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment to Celite for Citation No. 6361283, issued to the company by MSHA on March 23, 2004. Mot. at 1-2 & Attach. Celite states in its motion that it had already timely contested the citation. *Id.* at 1. That contest is the subject of Docket No. WEST 2004-258-RM, which is currently before Commission Chief Administrative Law Judge Robert J. Lesnick, who stayed the case on May 14, 2004 pending the assessment of a penalty. Celite states that it contested the proposed penalty assessment at issue on September 28,

2004, which the company concedes was untimely. Mot. at 2; Aff. of B. Coggin.

Celite states in its motion that through counsel, it was subsequently informed that counsel for the Secretary in the contest case "would not oppose the contest of the proposed penalty on the ground that it was not timely." Mot. at 2. In her response, the Secretary asserts that her counsel "did *not* discuss the untimely contest in question," S. Response at 2 (emphasis in original), an assertion Celite disputes in its reply, C. Reply at 2. Celite states that based upon this purported conversation, it "presum[ed] that a petition for assessment of a penalty . . . would follow in due course," and that it thereafter "engaged in informal discovery and settlement negotiations" with the Secretary. Mot. at 2.[1]

The Secretary states in her response that she opposes the Commission granting Celite's motion under Rule 60(b)(1) of the Federal Rules of Civil Procedure on the grounds that it was not filed within one year after the proposed penalty assessment at issue became a final Commission order. S. Response at 2; *see J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004) (denying several requests to reopen filed more than one year after the penalty proposals at issue had become final orders, noting that under Rule 60(b) of the Federal Rules of Civil Procedure, any motion for relief must be made within a reasonable time, and in the case of mistake, inadvertence, or excusable neglect not more than one year after the order was entered). However, the Secretary states that she would not oppose the company's motion being granted under Rule 60(b)(6) of the Federal Rules of Civil Procedure on the basis of "any other reason justifying relief." S. Response at 3.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In *Liljeberg v. Health Services Acquisition Corp.*, the Supreme Court noted that Rule 60(b)(6) "provides courts with authority 'adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice,'" though "also cautioning that it should only be applied in 'extraordinary circumstances.'" 486 U.S. 847, 864 (1988) (citations omitted). In *Johnson v. Lamar Mining Co.*, the Commission held that "in appropriate circumstances the Commission may, in its discretion, reopen one of its proceedings pursuant to Fed. R. Civ. P. 60(b)(6) upon a proper showing that an underlying settlement agreement

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[1] The Secretary also asserts that in a letter dated October 1, 2004 and addressed to Celite, MSHA informed the company that although it had received the company's contest of the penalty assessment at issue, it was untimely and that the penalty assessment had thus become a final order of the Commission. S. Response at 1. In its reply, Celite states that "it has no knowledge of the October 1, 2004 letter," and counsel for Celite states "he never received a copy of MSHA's October 1 letter." C. Reply at 3.

approved by the Commission [had] been materially breached or repudiated." 10 FMSHRC 506, 508 (Apr. 1988). *See also Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615, 618-19 (Apr. 1990) (following *Johnson*).

The Commission has also held that a "Rule 60(b) motion '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.' . . . This one-year time limit is an outside time limit for motions requesting relief under subsections (1) through (3), and may not be circumvented by utilization of subsections (4) through (6) of Rule 60(b), which are subject only to a reasonable time limit, when the real reason for relief falls within subsections (1) through (3)." *Lakeview Rock Products, Inc.*, 19 FMSHRC 26, 28 (Jan. 1997). *See also Klapprott v. United States*, 335 U.S. 601, 613 (1949) ("one year limitation would control if no more than 'neglect' was disclosed by the petition").

Here, we find no extraordinary circumstances that would justify granting the relief requested. Instead, we have been presented with Celite's unexplained failure to timely contest the proposed penalty assessment, followed by a miscommunication between counsel for Celite and the Secretary where both counsel apparently failed to realize that the only remedy available to Celite was for the Commission to reopen the order that had gone final, and then only for good cause and subject to the time limits set forth in Rule 60(b). This misunderstanding of well-established Commission law cannot be grounds for relief under Rule 60(b)(6). Instead, it is an error that falls squarely within the ambit of Rule 60(b)(1).[2]

[2] Even under Rule 60(b)(1), such an error of law is generally not a grounds for reopening as most courts look upon it as inexcusable neglect. *See* 12 James Wm. Moore et al., *Moore's Federal Practice* § 60.41[1][c][iii] (3d ed. 1997).

Because Celite waited well over a year to request relief, its motion is untimely. *J S Sand & Gravel*, 26 FMSHRC at 796. Accordingly, Celite's motion is denied.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Commissioner Suboleski, dissenting:

I would grant relief from the final order in the penalty proceeding that is sought by Celite. It is evident to me that the October 2004 communications, which closely followed the untimely penalty contest that was filed on September 28, between the Secretary's counsel and counsel for Celite led to the confusion that resulted in inaction in the penalty proceeding for nearly one and one-half years. *Compare Jim Walter Res., Inc.*, 15 FMSHRC 782, 790 (May 1993) (Rule 60(b)(6) relief unavailable where operator's decision not to contest penalty was a "deliberate choice[]"). In the meantime, the related litigation on the underlying citation has been on stay for nearly two years, pending assessment of the penalty. In light of the admitted confusion of the parties over their discussion of the penalty and the inaction by the Commission in moving the citation proceeding on its docket, I conclude that the events surrounding the reopening of the penalty assessment constitute "extraordinary circumstances," pursuant to Rule 60(b)(6), that would justify relief. *See Contractors Sand & Gravel, Inc.*, 23 FMSHRC 570, 575 (June 2001).

Stanley C. Suboleski, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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April 25, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2006-322-M
v.	:	A.C. No. 05-00790-76869
CLIMAX MOLYBDENUM COMPANY	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On April 11, 2006, the Commission received from Climax Molybdenum Company ("Climax Molybdenum") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On January 11, 2006, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued to Climax Molybdenum a proposed penalty assessment that included a penalty for Citation No. 6313549 issued to the company by MSHA on May 31, 2005. Mot. at 1. In its motion, Climax Molybdenum states that this citation arose from the same incident involving nine other citations that the company contested and which are set for hearing on May 16, 2006. *Id.* However, the company states that when it received the penalty proposal for Citation No. 6313549, due to an inadvertent error in processing the proposed assessment, it was not timely contested. Mot. at 2. On March 7, 2006, Climax Molybdenum attempted to contest the penalty, but was informed by MSHA that its contest was untimely. *Id.* The Secretary states that she does not oppose Climax Molybdenum's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

March 2, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 2003-196-M
	:	A.C. No. 24-01490-05668
v.	:	
	:	Docket No. WEST 2003-197-M
	:	A.C. No. 24-01490-05669
	:	
	:	Docket No. WEST 2003-198-M
	:	A.C. No. 24-01490-05670
	:	
	:	Docket No. WEST 2003-295-M
	:	A.C. No. 24-01490-05671
	:	
	:	Docket No. WEST 2003-371-M
	:	A.C. No. 24-01490-05681
	:	
	:	Docket No. WEST 2004-140-M
	:	A.C. No. 24-01490-10041
	:	
STILLWATER MINING CO., Respondent.	:	Mine: Stillwater Mine

DECISION

Appearances: Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, for the Petitioner;
Katherine Larkin, Esq., Jackson & Kelly, PLLC, Denver, Colorado for the Respondent,

Before: Judge Weisberger

Statement of the Case

These consolidated cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor alleging violations by Stillwater Mining Company "Stillwater" of various mandatory safety regulations set forth in Title 30 of the Code of Federal Regulations. After numerous pre-hearing conferences, and with the concurrence of the parties

regarding date and location, a hearing was held in Billings, Montana on May 10, 11 and 12, 2005. Subsequent to the hearing, and pursuant to numerous request for extensions, Stillwater filed its Post-Hearing Brief on November 7, 2005 and the Secretary filed her Brief and Proposed Findings of Fact on September 8, 2005. On November 7, 2005 the parties filed a Post-Hearing Stipulation ("Stipulation"). Pursuant to requests for extensions, the Respondent filed a Reply Brief on November 23, 2005 and the Secretary filed her Reply Brief and Objections to Stillwater's Proposed Findings of Fact on November 23, 2005. On December 12, 2005, pursuant to a request by the undersigned, the parties filed Additional Post-Hearing Stipulations.

Introduction

The Stillwater Mine is an underground platinum mine, located near Nye, Montana. In 2002, the mine commenced to use a remote control blasting system, ("PED") to initiate all the end-of-shift blasts in the mine.[1]

The PED system includes a computer located on the surface that is connected to the mine's "leaky feeder" radio communications system. To initiate a blast, the blaster inserts a disc into the computer, and enters an "arm" command followed by a "blast" command. The commands are transmitted via a radio signal that is received by those PED units that are turned on, and within reception of the signals.

Approximately 45 PED receiving units are located throughout the mine. Each PED unit is both a radio receiver and an electric firing device. When a PED receiving unit has been turned on by a manually-operated key switch located on the unit, and the unit receives the appropriate radio signal from the computer on the surface, the PED unit will discharge electricity into its adjacent distribution panel, and into the blast (trunk) lines that are attached to the left side of the distribution panel. Up to six lines may be connected to a distribution panel. Each of these lines extends over a thousand feet to an electric detonator located at a blast site (stope), and constitutes a blasting circuit.[2]

In July 2002, MSHA Inspector, Rodney Gust, and Explosive Specialist, Tom Lobb, inspected Stillwater's PED blasting system for the first time, and issued a number of citations and orders relating to its operation and condition.

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[1]Occasionally on-shift blast are carried out at blast sites using hand-held blasting devices, rather than the PED system.

[2]The trunk (blast) lines are connected to smaller one-use lines, that are connected to electric detonators at the face.

I. Order Nos. 6273734, 6278317, 6278261, 6278263 and Citation Nos. 6269338, 6269360[3] and 6278019[4]

On July 22, 2005, the Secretary filed a motion to approve a settlement agreement regarding these matters. The Respondent agreed to pay the full penalty of **$14,165.00**. I have considered the submitted representations and documentation, and I conclude that the proposed settlement is appropriate under the criteria set forth in Section 110(i) of the Act. Accordingly, the motion is **GRANTED.**

II. Citation Nos. 6269353, 2629358, 6269362, 6269366 and 6269370

According to Gust, he inspected five or six of the 46 PED receiving units. At each of the units that he inspected, he followed six blast lines from the distribution panels to the blast sites where the blast lines ended. These lines extended more than one thousand feet. Gust observed that there were not any open safety switches in any of the blast lines between the distribution panel, and the blast site.

Gust issued five separate citations for five separate locations, alleging that there were not any open safety switches or equivalent provided outside the blast area. The citations also allege that galvanometer testing was not being conducted on blast lines even though they contacted several sources of stray current. Each citation alleges a violation of 30 CFR § 57.6403(b).

A. Section 57.6403(b) supra

Section 57.6403(b), supra, provides as follows: "[a]t least one safety switch or equivalent method of protection shall be located outside the blast area and shall be in the open position until persons are withdrawn." (Emphasis added.) Thus, the clear wording of Section 57.6403(b), supra, requires: 1) either a safety switch or equivalent method of protection; 2) that it be located outside the blast area; and 3) that it be in the open position until persons are withdrawn.

1. Outside the blasting area

It is the Secretary's position that the regulatory language mandating safety switches "outside the blast area", means that switches be located outside "... yet close to, the boundary of the blast area." (Secretary's brief, page 17) In this connection, Gust opined that Section 57.6403 (b) supra, requires the location of switches outside the blast area, but near enough to the boundary of a blast area, so that miners working in the blast area will have some awareness of

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[3] These four orders and two citations are located in Docket No. WEST 2003-196-M.

[4] This citation is located in Docket No. WEST 2003-371-M.

what is going on between the switch and the blast site.

In further support of its interpretation, the Secretary cites the testimony of Gust, that the trunk line extends over a thousand feet from the PED distribution panel to the blast area and touches various sources of stray electricity. Gust opined that the presence of an open safety switch outside, but near the blast area, would break the path of any stray electricity and prevent it from reaching the blast site and causing a premature blast.

The Secretary also argues that an open switch located outside, but close to the blast area, would break an electric circuit, and prevent an unintended explosion.

The regulations do not contain any definition of the word "outside" as used in the phrase "outside the blasting area". As set forth by the Commission in *Island Creek Coal Co.*, 20 FMSHRC 14, 19 (Jan. 1998), "In the absence of an express definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word to be construed. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May, 1996), aff'd 111 F 3d 963 (D.C. Cir. 1997 (table))".

Random House Dictionary of the English Language Unabridged (2nd ed., 1966) defines the word "outside", as pertinent, as follows: "... **18.** in or near an area that is removed from or beyond a given place or region: *The country's inhabitants seldom travel outside. - prep.* ... **20.** beyond the confines or borders of; visitors from outside the country."

In Webster's Third New International Dictionary (1993) the word "outside" as used as a preposition is defined, as pertinent, as follows:

> - 1: on the outer side of <the American flag ~ my building- ... 2: beyond the limits of <do little of their entertaining ~ their homes - ... < reach ~ the narrow intellectual boundaries imposed by a restricted income in a little village- ... <~ the law> 3: to the outside of <ran~ the house> ...".
> The word "outside" used as an adjective is defined in Webster's, supra, as pertinent, as follows: "...2a: situated, belonging, or performed outside a particular place, area, or enclosure... ."

I find that these unabridged dictionaries of the English language,[5] do not contain an explicit definition of outside as meaning close to, in proximity, or near a designated area. Thus the Secretary's position that Section 57.6403(b), supra, is violated if a safety switch is not in

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[5]I take cognizance of the Secretary's citation of the Compact Edition of the Oxford English Dictionary, (1971), as providing one definition of "outside" as "...[t]he position or locality **close to** the outer side or surface of anything." (Secretary's brief, page 12) However, I give more weight to the definitions found in unabridged dictionaries, as set forth above, as more authoritative, rather than one contained in a compact edition.

close proximity to the blasting area, is not clearly supported by the common meaning of the term "outside". I find that if the Secretary's interpretation is upheld, the result would be an amendment of Section 57.6403(b) by the addition of words requiring the location of a safety switch to be outside but near or close to the blasting area.

As additional support for her argument, the Secretary cites the preamble to the final rule promulgated effective March 1991, amending Parts 56 and 57 of Title 30, Code of Federal Regulations. This preamble states, under the heading "sections 56/57 *Branch Circuits*", as follows:

> [P]ermanent blasting circuits are often used by more than one miner, particularly in underground mines. The safety switch required in the standard is used to protect individuals from unintentional voltage when another miner may be energizing the circuit which could cause an unplanned ignition. This circuit is similar to an electrical lock-out when working on an electrical circuit (56 Fed. Reg. 2083 (Jan. 18, 1991)).

Thus, it is clear that the intent of Section 57.6403, supra, is to protect miners from unintended voltage when another miner may be energizing the circuit. There is nothing in the explicit language of the preamble regarding the location of such protection in relation to a blast area i.e., that it must be near to or in close proximity to the latter. Thus, the Secretary's arguments are not clearly persuasive that her position is a reasonable interpretation of Section 57.6403(b), supra.

Moreover, even if the Secretary's interpretation may be permissible, it is not determinative if Stillwater did not have notice of the Secretary's interpretation. As stated by the Commission in *Island Creek Company*, 20 FMSHRC 14, 24 (January 1998):

> Where an agency imposes a fine based on its interpretation, a separate inquiry may arise concerning whether the respondent has received "fair notice" of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995). "[D]ue process... prevents... deference... from validating the application of a regulation that fails to give fair warning of the conduct that it prohibits or requires..." *Gates & Fox Co. V. OSHRC*, 790 F. 2d 154, 156 (D.C. Cir. 1986). An agency's interpretation may be "permissible" but nevertheless fail to provide the notice required under this principle of administrative law to support imposition of a civil sanction. *General Electric*, 53 F. 3d at 1333-34. The Commission has not required that the operator receive actual notice of the Secretary's interpretation. Instead, the Commission uses an objective test, i.e., "whether a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)."

The preamble, supra, sets forth that the purpose of Section 57.6403, supra, is to protect miners from unintended voltage when another miner may be energizing the circuit. As explained further, (II (A)(2)(3)), this purpose is achieved by a shunting method at the PED distribution panel located outside the blast area. Additionally, the Secretary's interpretation that Section 6403(b), supra, requires a safety switch to be placed outside, but close to, or near the blast area goes beyond the ordinary meaning of the word "outside".

Moreover, the Secretary's interpretation had not been set forth in any policy manual, nor asserted by any of its representatives prior to the issuance of the citations herein. Lastly, as noted above, there is not anything in the explicit wording of the preamble giving notice of the Secretary's interpretation. Therefore, for all of the above reasons, I reject the Secretary's interpretation, and find it is not entitled to deference.

2. Safety switch or equivalent method of protection

All the blast lines cited were connected to PED distribution panels located outside the blast area. In normal operations unless miners are checking the blast lines for continuity or are preparing to blast, the blast lines remain plugged into shunt receptacles on the right side of the distribution panel. While in a shunt receptacle, the ends of the blast line remain shunted which reduces the chance that unintended electric current can flow through the remaining circuit. It is Stillwater's standard operating procedure that blast lines are not removed from the shunt receptacles and inserted into the firing receptacles, on the left side of the PED unit, until all personnel are withdrawn, and the area is barricaded. When a blast line is placed into the firing receptacle, the ends of the blast lines are unshunted, which allows current to flow. Thus, in essence, plugging a trunk line into the left side of the PED unit incorporates that line into the blast circuit allowing power to flow to the trunk line, to a one-use line, and then to a detonator, which allows detonation to occur. On the other hand, when the trunk line is plugged into a plug of the right side of the distribution panel, that line is isolated from the PED receiving unit, and shunted. Accordingly, power will not flow down that line from the power source to a detonator.

The Secretary agrees that in the above operations the PED unit operates as a switch. However, the Secretary argues that the plug receptacles cannot be considered to be a safety switch providing the protection intended by Section 6403(b), supra.

> ...because their very design makes it likely that electric current will erroneously be sent into the wrong blast line and therefore to the wrong blast site. By having six separate trunk lines starting from within inches of each other at plug receptacles in the distribution panel, the panels make it more likely, not less likely, that a miner will mistakenly energize the wrong circuit and thereby "cause an unplanned ignition." 56 Fed. Reg. at 2083. (Secretary's brief, page 17).

Discussion

The term "safety switch" is defined in 30 CFR § 57.6000 as follows: "[a] switch that provides shunt protection in blasting circuits between the blast site and the switch used to connect a power source to the blasting circuit." The Secretary has conceded that the location where the trunk line is plugged into the left side of the distribution panel constitutes a switch (Secretary's brief, page 16). The parties have agreed that shunting means "to connect the two conductors by a short circuit. Shunting is a safety-related practice, because when a shunt is in place, it reduces the chance that unintended electric current can flow through the remaining circuit." (Stipulation, supra, page 7) The parties further stipulated that an example of a method to create a shunt is "... when a trunk line is plugged into the right side of the distribution panel, the trunk line at that location is shunted as a result of the design of the right plug receptacle. Similarly, the PED receiver's output terminals are at times mechanically shunted (to each other) inside the PED receiver unit." (id.)

Hence, based on the parties' stipulations, it is clear that the operation of the PED distribution panel provides shunt protection in a blasting circuit. Further, the operation of the PED unit distribution panel is located between a computer controlled switch connecting the power source to the blasting circuit, and the blast site. (Stipulation, page 5, 8). Thus, I find that the method of plugging a trunk line into the right side of the distribution panel provides shunt protection in the blasting circuit between "... the blast site and the switch used to connect the power source to the blasting circuit...".[6] (Section 57.6000(a), supra). Accordingly, I find that the operation of the PED distribution panel shunting is, at a minimum, the equivalent of a safety switch as defined in Section 57.6000, supra.

3. In the open position until persons are withdrawn

In the operation of the PED system, the blast lines remain plugged into the shunt receptacles on the right side of the distribution board until miners are preparing to blast, all personnel are withdrawn, and the area is barricaded. The ends of the blast lines remain shunted while they are in the receptacles an the right side of the panel, which reduces the chance that unintended electric current can flow through the remaining circuit. Accordingly, it would appear that this procedure produces the same result as a switch being in an open position.

Therefore, for all of the above reasons, I find that the record establishes that shunting i.e., plugging the trunk line onto the right side of the PED distribution panel, is the equivalent of a safety switch and that the shunting keeps the blasting circuits in the "open" position, not allowing current to flow, until mines are withdrawn and blasting is to commence. Also, when shunting is performed, the PED distribution panel is located outside the blast area. I thus find that

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[6]The parties stipulated that, as applied to the use of the receiving unit in the operation of the PED system of blasting, the switch in the receiving unit is the switch "... used to connect a power source to the blasting circuit... ." (Section 57.6000, supra)..

Stillwater's PED system was in compliance with Section 6403(b), supra. It is thus concluded that it has not been established that Stillwater violated Section 6403(b), supra.

III. Citation No. 6269380

On October 6, 2002 the stope at 35 e 6700 was to be blasted during the shift with a hand-held blaster. The miner who was to blast at that site inadvertently unplugged the wrong trunk line from the PED distribution panel, and attached it to the blaster. When it was activated, it detonated a round at stope 35 e 6400 instead. According to Gust, if a safety switch had been located close to the blast site at stope 35 e 6400, it could have been used to disconnect the blast line from the power source, and the possibility of an accidental explosion would have been eliminated.

Gust issued a citation alleging that " the branch circuits at the 35 e 6700 were not equipped with safety switches or equivalent methods to isolated the electric blasting circuits (sic)." It is alleged that this condition constitutes a violation of 30 CFR § 57.6403(a).

The Secretary argues that the miners who had worked at stope 35 e 6400 a short time prior to the detonation did not have the protection of a safety switch in their blast line. As support for her position, the Secretary refers to the preamble, supra, which states that: "the safety switch required in the standard is used to protect individuals from unintentional voltage when another miner may be energizing the circuit, which could cause and unplanned ignition." 56 Fed. Reg. 2083, supra. In this connection, the Secretary argues that the incident on October 6, is the same type of incident intended to be prevented according to the preamble, supra. For the reasons that follows, I find the Secretary's position to be without merit.

A. Discussion

Section 57.6403(a), supra, provides that " [i]f electric blasting includes the use of branch circuits, each branch shall be equipped with a safety switch or equivalent method to isolate the circuits to be used. Thus, to prove a violation the Secretary must establish: 1) that Stillwater's blasting included the use of branch circuits and 2) that each branch had either (a) a safety switch or (b) an equivalent method to isolate the circuits to be used.

1. The PED blasting system includes the use of branch circuits

Based on the Stipulation, supra, filed by the parties subsequent to the hearing, I find that in Stillwater's operation of the PED system, a blasting circuit is created when electricity flows from the power source in the PED receiving unit to the distribution panel, through branch (trunk) lines plugged into the left side of the distribution panel, through one-use lines to an electric detonator and then returns via the same route to the power source. When trunk lines from

additional blast lines are plugged into the left side of the distribution panel those branch circuits (also consisting of trunk lines, one-use lines, and electric detonators) are incorporated into the blasting circuit so that the resulting electrical circuit consists of one long continuous circuit. I conclude that each branch line running from the PED panel to a detonator at the blasting site constituted a branch circuit as it was incorporated into the larger PED blasting circuit.

2. Safety switch or equivalent method to isolate the circuits to be used

Stillwater was in compliance with Section 6403(a), supra, if the record establishes that each branch circuit was equipped with either a safety switch or an equivalent method to isolate the circuits to be used. There does not appear to be any dispute that each branch circuit running from the PED panel to a detonator at the face constituted a separate circuit, and that each branch line was not connected to any other branch circuit. Further, there was not any connection between branch lines as each one was plugged into a different plug at the PED distribution panel. There is not any evidence in the record as to the distance between the plugs. Although a picture of the panel (exhibit P-3) indicates that the plugs are in close proximity to one another, the record does not indicate the scale of this picture, nor does the record indicate the dimensions of the panel. Further, unless and until the branch lines are to be connected to detonators at the face, they are kept on the shunt side of the panel which has the effect of isolating them from other branch circuits.

Within the above framework, I find that it has not been established by a preponderance of evidence that Stillwater did not have an equivalent method to isolate the branch circuits[7] i.e., to set each one apart from the others (See, Webster's, supra, definition of "isolate"). I therefore find that it has not been established that Stillwater violated Section 6403(a), supra.

IV. Citation Nos. 6269361, 6269365, 6269369, 6269373 and 6269357

Gust issued five citations for five[8] PED locations, each one alleging a violation of 30 CFR § 57.6405(c), which provides as follows: "[o]nly the blaster shall have the key or other control to an electrical firing device."

A. Violation of 30 CFR § 57.6405(c)

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[7]In on-shift blasting the blast line is connected to a hand-held firing device rather than the PED system. As such, the circuit from the hand-held firing device to a detonator at the face is not a "branch" circuit, because it is not connected to the PED system, and is not incorporated into the PED blast circuit. Thus, I find that this circuit it is not within the purview Section 6403(a), supra.

[8]Each citation, as amended at the hearing, alleges as follows: "The key and/or other control for the electrical firing device (PED)... was accessible to people other than the blaster."

1. The "blaster" having control over the PED computer disc

Gust and Lobb, testified that on two occasions they observed the operation of the PED system from the room on the surface where its computer was located. A door separated this room from the room where persons visiting the mine sign-in. The top portion of the door was usually open and the bottom was usually closed. The disc that contained the various commands to be sent from the computer to the PED units underground was kept in a locked cabinet. However, the key to open the cabinet was located either on a hook on a nearby wall, or in an adjacent desk drawer. Gust concluded that the disc was accessible to persons other then the blaster.

Stillwater argues that since the computer disc sends commands to the PED units to "arm", and "blast", which result in the transmission of a signal to an electrical detonator to detonate, the disc constitutes the control for the system's electrical firing device. In this connection, Stillwater relies on the testimony of Thomas T. Eaton,[9] that the Shift General Foreman who was Stillwater's designated blaster, had sole possession of the only copy of the computer disc that controlled detonation of a blast. On the other hand, Gust and Lobb testified that they observed that although the disc was locked in a cabinet, the key to the cabinet was either on a wall or in a desk.

I do not place much weight on Eaton's testimony inasmuch as the record does not establish that he had any personal knowledge of the PED operating procedures, and whether the blaster had possession of the disc. I take cognizance of the fact that Stillwater did not have anyone testify to contradict the testimony of Gust and Lobb as to what they observed, nor was their testimony impeached. Also, significantly, Stillwater did not proffer the testimony of any blaster who was responsible for inserting the disc into the computer. Nor did Stillwater impeach or contradict the testimony of the inspectors that on one occasion, in their presence, a person who was operating the computer asked a woman in the office to give him the disc to be inserted into the computer.

Section 6405(c),supra, provides that "[o]nly the blaster shall have the key or control to an electrical firing devices." Webster's Third New International Dictionary, supra, defines "have" as: **1a:** "to hold in possession as property... **b:** to hold, keep, or retain esp. in one's use, **syn**... POSSESS...: HAVE is a very general term indicating any condition or action of control, retaining, keeping... ." Webster's, supra, defines "control" as pertinent as "...4(a)(1) to exercise restraining or directing influence over..."

The computer disc containing the signals to the PED unit was kept in a locked cabinet in the office of the individual responsible for operating the computer. However, the weight of evidence establishes that persons other than the blaster could have obtained the key to open the locked cabinet containing the computer disc. Accordingly, the person responsible for sending the

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[9]At the date of the trial he was the General Mine Foreman. In October 2002, he was a Vision Mission and Value Supervisor.

computer generated blasting signals to the PED units did not have control over the use of the disc. Thus, he did not "have" the disc within the common meaning of that term.

2. The key to the PED receiving unit as a control to an electrical firing device

According to Gust and Lobb, a key or a portion of a key had been left in the PED receiving unit at each of the five units that they examined. Gust concluded that the underground blaster did not have the key to an electrical firing device in violation of Section 6405(c), supra.

Stillwater argues that the PED receiving unit "key" is not a control device for the system because that function is performed by commands in the disc. Also, Stillwater makes reference to the testimony of Mike Foletti that the PED unit located underground needs to be turned on by inserting a key into a switch "... at which time two things occur, the PED unit checks that its battery... is charged and... checks to see that the unit is in reception of the signal provided by the radio communications system." (Tr. 14).[10] It is thus argued by Stillwater that the key is not capable of initiating or performing any other function and thus cannot be the control for the PED device.

In subsequent testimony as part of Stillwater's case, Folletti and Eaton elaborated on the function of the key for the switch in the PED receiving unit. According to their testimony, which was not impeached or contradicted, the PED receiving unit cannot receive the computer generated "arm" and "blast" signals unless the PED unit is turned on by the key. Once the key is turned on, and the PED unit receives a blast signal, power is then transmitted to all trunk lines plugged into the left side of the PED distribution panel, which in turn transmits power to an electric detonator causing detonation.

I find that inasmuch as the PED unit receives and transmits electrical signals, it is clearly an electrical device. Further, since its function is to receive "arm" and "blast" signals, and transmit them to detonators at various blasting areas, I find the unit is a firing device within the scope of Section 6405(c), supra. Moreover, because the unit cannot operate to receive and in effect transmit blast signals unless it has been turned on by its key, I find that the latter is a "key" to an electrical firing device. Accordingly, I find that the PED receiving unit keys are within the purview of Section 6405(c), supra.

The testimony of Lobb and Gust that a key or a portion of the a key was in place in each PED receiving unit at locations 32w 3900, 38w 7000, 40w 4100, 41w 6700 and 29w FWL, was not contracted or impeached. Accordingly, since these keys were in the PED unit, (an electrical firing device) I find that Stillwater was not in compliance with Section 6405(c), supra, which requires that only the blaster "shall have the key". I thus find that Stillwater did violate Section 56.6405(c), supra.

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[10]The parties agreed to be bound by this testimony.

3. Penalty

As set forth above, IV(A), infra, persons other than the blaster could have access to the key to the cabinet containing the computer disc used to transmit "arm" and "blast" signals to the PED units. Accordingly, persons other then the blaster could have sent a signal to a PED unit that was turned on, thus initiating a blast.

I find that the level of gravity was moderate. Considering the remaining factors set forth in 110 (i) of the Act, I find that a penalty of $55.00 is appropriate for each of these violations.

V. Citation No. 6269379

At approximately 2:00 p.m. on October 6, 2002 a miner intended to blast stope at 35 e 6700. He went to the PED distribution panel, removed a blast line, and plugged it into a hand-held blasting device. According to MSHA Inspector, Gust, the device wasn't secured, wasn't locked, and "... was left in the open for anyone to use and anyone to blast on shift." (Tr. 265). Gust issued a violation which alleged the following as a violation of Section 6405(c), supra: "persons other than the blaster had the control over the electrical firing device causing an unplanned explosion of explosives in the 35 e 6400 stope."

There is not any indication in the record that Gust was present when this incident occurred. Also, the record does not establish that Gust had any personal knowledge to support his testimony that the blasting device wasn't secured or locked, and was left in the open. Nor does the record indicate the foundation or basis for this testimony. As such, it cannot be found to be more than speculative, and clearly not of sufficient probative value to establish that someone other than the blaster had control over this device. I thus find that the Secretary has not established a violation of Section 6405(c), supra.

VI. Citation Nos. 6269354 and 6269359

A. The Citations

According to Gust, when he inspected the area he described as 29w FWL, there were not any blaster's galvanometers at either of the two blast headings. Also, there were not any galvanometers at the 32w 3900 blast headings. Gust indicated that miners told him that "[t]hey used the PED to test it after the circuit is altogether." (sic.) (Tr. 244)

According to Lobb, if a galvanometric test is not performed, the result could be a misfire, causing injuries. Lobb indicated that a galvanometer checks for continuity and increased resistence "... that could indicate that they have more detonators wired in the circuit than they thought they did, or it could indicate that the circuit isn't wired in a series the way they thought it was." (Tr. 110)

Gust issued two separate citations, one for 29w FWL and another for 32w 3900 alleging violations of 30 CFR § 57.6407(b)(2) in that "[p]roper testing with a galvanometer of the "blasting lines" was not "conducted prior to the connection of the electric detonator... ."

30 CFR § 57.6407 provides as follows: "A blasting galvanometer or other instrument designed for testing blasting circuits in underground operations shall be used to test the following: "***(b) In underground operations-... (2) Continuity of blasting lines prior to the connection of electric detonators."

The Secretary did not adduce the testimony of any miners regarding actions taken by them, if any, to test for continuity of blasting lines prior to the connection of detonators. Instead, the Secretary relies on the testimony of Lobb and Gust. The only testimony of Lobb regarding his observations was that he found "...two blasters' galvanometers in the whole mine, neither of which had been used recently." (Tr. 104). Also, he indicated that he talked to two blasters who were "...wiring in rounds... hooking up and explosion. ... And neither one was using a galvanometer to do the required testing." (Tr. 104-105). According to Gust, at the 29w FWL site, "... [t]hey were drilling their rounds and I came back later and they had just loaded the rounds." (Tr. 244). Gust agreed, in response to a leading question, that this operation includes hook-up to the electric blasting system. Gust was asked what miners told him about the use of the galvanometer and he testified as follows: "They used the PED to test it after the circuit is altogether."(sic) (Tr. 244). He was asked the basis for his knowledge as to what the miners did relating to galvanometer testing and he testified that a miner showed him the process of tying a round. His testimony is as follows:

> ... [F]irst, what he showed me was the trunk line. In this case -- in this case where he was at was shunted. He unshunted the trunk line – ***
>
> So he would unshunt the trunk line, he would strip the one-use blast line, touch the wires together, which would be a spontaneous shunt, and then he ties each one leg wires to each one of the trunk leads, he spools out the one-use blast line to the loaded round area, the blast area, the loaded round area. At that time he would cut the one-use blast line, strip it, shunt that -- ***
>
> Shunt the one-use blast line. He would unravel his one electric cap, because the wires are taped or spooled together, so he untapes them and just straightens the wire out on the cap. He takes -- there's a shunt on them. Take the shunt off, and he would touch them together -- this is a very experienced hand, good hand --- crosses the wires. Then he would, with the cap away from the loaded round, he would connect it to the trunk line, connect the cap -- excuse me-- to the one-use line. And with the point away from the face, in case there was any stray current, the cap would go off, which is still a hazard, but at least it's not tied to the full round of explosives. Okay. And then once it's -- now we have our circuit all the way back to the distribution panel. Then he's got this hand tying to the det cord, which ties in the whole round, and that's how he ties it in. No galvanometer was used at any point there. (Tr. 247-249)

I find that his testimony is unclear as to whether he was testifying as to what he observed the miner doing, or as to what the miner told him regarding as to what he would usually do.

Eaton testified regarding Stillwater's PED blasting procedures. According to his testimony, Stillwater's operational procedures require that the ends of the blast lines at the blasting area should be twisted together prior to loading the explosives that will be detonated. This procedure shunts the ends of the blast lines.[11] The next step in the procedure is for a miner to walk outby the drilled out face to the PED reception unit, and connect it to the PED distribution panel. Next, the blast line for the area to be blasted is moved from the shunt (right) side of the panel, and is plugged into the firing receptacle (left side of the panel). Once the blast line is plugged into the firing receptacle, the built-in ohmmeter on the PED unit displays a specific resistance reading that indicates whether the circuit is open or closed, i.e., whether there is a continuous circuit in the blast line. Eaton's testimony regarding Stillwater's procedures was not impeached, nor was it explicitly contradicted by Lobb or Gust.

It is the Secretary's interpretation that the requirement in Section 57.6407(b)(2), supra, of continuity testing "prior to the connection of electric detonators" requires such testing be performed immediately before the electric detonator is connected to the blast line. The Secretary argues that this interpretation must be deferred to as it "... is consistent with the regulatory text and it advances the Mine Act's goal of protecting the safety of mines." (Secretary's post-hearing brief, at 27). The Secretary also relies on testimony by Lobb, that it took him 15 to 20 minutes to walk from the loaded round at the blast site to the PED receiving unit, and another 15 to 20 minutes to return. He indicated that "A lot can happen in a mine" during the twenty minutes it takes to then return to the blast area after the miner test for continuity using the PED ohmmeter. (Tr. 196)

B. Discussion

1. Continuity testing "prior to" the connection of detonators

Section 6407(b)(2), supra, provides that testing for continuity of blasting lines be made "... prior to the connection of electric detonators." The word "prior" is defined in Webster, supra, as follows:

> 1A: earlier in time or order: preceding temporally, causally... ." The word "preceding" is defined in Webster's, supra, as pertinent as follows "1: that precedes: going before ... ." "Precede" is defined in Webster's, supra, as pertinent, as follows: "3: to... come before in arrangement or sequence. *** 4: to go before in order of time: ... occur before with relation to something.

---

[11]The parties stipulated that when a shunt is in place, "... it reduces the chance that unintended electric current can flow through the remaining circuit", (Stipulation, page 7).

The above definitions establish that the common meaning of the word prior refers to a sequence or order of time. I thus find, based on the common meaning of the word "prior" as used in Section 6407(b)(2), supra, that the act of testing of continuity of blasting lines must be performed before the connection of electric detonators. There is not any requirement in Section 6407(b)(2), supra, that the act of testing be performed immediately before the connection of electric detonators. To add such a requirement would, in effect, amend the regulations, and go beyond the scope of the common meaning of the term "prior to". Thus, because the standard at issue is unambiguous, the Secretary's interpretation is rejected as not reasonable.

2. Blasting galvanometer or other instrument designed for testing blasting circuits

Although a blasting galvanometer was not used by Stillwater to test for continuity of blasting lines, the record fails to establish that such testing was not done by the use of the PED receiving units' built-in ohmmeter as required by Stillwater's procedures.

A Dictionary of Mining, Mineral and Related Terms, (1968 edition ("DMMRT")) defines an ohmmeter as "a type of galvanometer which directly indicates the number of ohms of the resistence being measured." (Emphasis added). An ohmmeter-galvanometer is defined in the DMMRT as "a special instrument for measuring the resistence of an electric blasting circuit."

The parties agreed to be bound by Foletti's testimony, that the PED unit's ohmmeter contains an LCD display, which indicates whether the blast circuit is open or closed. Hence, it services the function of testing whether there is a continuous circuit in the blast line which is part of that circuit. Thus, since the ohmmeter in the PED unit tests for continuity in the blast lines, I find it is within the purview of Section 6407(b)(2), supra, as it is either considered a "blasting galvanometer or other instrument designed for testing blasting circuits" and is "used to test ... continuity of blasting lines". The Secretary has not adduced any evidence that, when cited Stillwater, was not following its procedures to use the ohmmeter on the PED unit to test for circuit continuity prior to the connection of electric detonators. Hence, I find that the Secretary has not established that there was not such testing for continuity of blasting lines, prior to the connection of electric detonators. Therefore, I find that the Secretary has failed to establish a violation of Section 6407, supra.

VII. Citations Nos. 6269381 and 6269382

On October 6, 2002 the 35 e 6700 stope was to be blasted during the night shift, and the 35 e 6400 stope was to be blasted at the end of the shift at approximately 5:00 a.m. Both of the stopes had already been drilled, loaded and barricaded by 2:10 a.m. As part of the blasting sequence, a miner intended to remove a blast line from a PED distribution and attach it to a hand-held electric firing device . By mistake, he unplugged the blast line leading to stope 35 e 6400, rather than the one leading to stope 35 e 6700. As a result, when he attached this line to the hand-held detonator and activated it, stope 35 e 6400 detonated. According to Brent LaMoure,

Chief Engineer at Stillwater, the miner contacted his supervisor, and the latter began an investigation. This testimony was not impeached or contradicted.

On October 27, 2002, subsequent to an investigation, Gust issued two citations. Citation No. 6269381 alleges a violation of 30 CFR § 50.10 which, as pertinent states, as follows: "[i]f an accident occurs, an operator shall immediately contact the MSHA district office having jurisdiction over its mine .... ." (emphasis added) Section 50.10, supra, goes on to provide that if the operator cannot contact the district office, it shall "immediately" contact MSHA headquarters in Arlington, Virginia by telephone.

Citation No. 6269382 alleges a violation of 30 CFR § 50.20 (a) which, provides, in essence, that the principal officer in charge of health and safety or supervisor of the mine area at a mine in which "an accident" occurs shall mail an accident report, Form 7000-1, to MSHA within ten working days after the accident occurred.

According to Gust, when he issued these citations, the accident report had not been filed, and Stillwater had not immediately notified MSHA after the detonation at stope 35 e 6400 on October 6, 2002.

A. The detonation at stope 35 e 6400 was an "accident"

The recording requirements imposed by Sections 50.10 and 50.20 (a), supra, are required if "an accident" occurs. Section 50.2(h)(7) defines the word "accident" when used in part 50 of the Code of Federal Regulations, relating to notification and accident reports, as follows: "***(7) an unplanned ignition or explosion of a blasting agent or an explosive [.]"

Thus, the initial inquiry herein is whether the explosion at stope 35 e 6400 was an accident, which in turn depends upon whether it was an "unplanned" explosion. The regulations do not define the word unplanned. Accordingly, reliance is placed on the common meaning of that word. Webster's supra, as pertinent, defines the word "unplanned" as 1: not planned, ... 2: unexpected." Planned is defined in Webster's supra, as pertinent, as 1: INTENDED, PROJECTED... 2a: designed or carried out according to a plan: ORDERLY." The word "unexpected", is defined in Webster's, supra, as not expected: UNLOOKED-FOR UNFORESEEN SURPRISING".

Applying the above common meanings it is clear that an event is unplanned if its occurrence is not expected, or intended according to a plan. The record establishes that detonation at 35 e 6400 was planned for the end of the shift, at approximately 5:00 a.m. Hence, I find that its detonation by mistake at 2:10 a.m., was clearly unexpected and unintended, at that time. Thus, the detonation was an unplanned ignition as that term is commonly understood. Accordingly, the ignition by mistake at 35 e 6400 is within the scope of the term "accident". Hence, the reporting requirements of Sections 50.10, supra, and 50.20(a), supra, are applicable.

1. Citation No. 6269381

As set forth above, VII (A), infra, the detonation at 35 e 6400 at 2:10 a.m., on October 6, by mistake was an accident. The detonation was not immediately reported by Stillwater to MSHA as required by Section 50.10, supra. Accordingly, I find that Stillwater violated Section 50.10 supra.

The Secretary argues that the violation herein was the result of Stillwaters high negligence. In this connection, the Secretary alleges that the requirements of Part 50 were explained to Stillwater on many occasions, citing the testimony of Gust as follows:

> Q. However, you did mark it as high negligence. Could you explain why.
> A. Because this was a violation of Part 50, and the mine has had Part 50 audits in the past and been through the Part 50 audit process. If there was any doubt in the operator's mind of knowing Part 50, those questions are answered during these audits. And off of recollection there was a minimal of two Part 50 audits prior to this miscellaneous inspection, and this information of Part 50 has been explained to the company several times.
> Q. Okay.
> ADMINISTRATIVE LAW JUDGE: Were you involved in any of those explanations?
> THE WITNESS: I was not in the Part 50 audits, no, but I have privy to that information in our files at the district office and at the field office.
> ADMINISTRATIVE LAW JUDGE: You mentioned two things. The company had an audit two times, and you've indicated that you were not involved in that audit. Were you involved in any of the explanations to the company?
> THE WITNESS: The explanations, no, just the review --
> ADMINISTRATIVE LAW JUDGE: Okay. You answered the question. Sir. The explanation to the company, explanations prior to the time you issued the what at that time was an audit?
> THE WITNESS: To -- what was that?
> ADMINISTRATIVE LAW JUDGE: I asked you whether you were involved in any explanations to the company about their obligations under the reporting obligations, and you did not. I want to clarify, that my question went to the period prior to the time that you served the company with the petition, Exhibit P-14, 62.69381.
> THE WITNESS: Okay. Prior to, what I explained is on the Part 50 audit.
> ADMINISTRATIVE LAW JUDGE: That's on the same day.
> THE WITNESS: What's that?
> ADMINISTRATIVE LAW JUDGE: No, did you explain to the company any of their obligations --
> THE WITNESS: On the reporting of this incident?

ADMINISTRATIVE LAW JUDGE: Prior to the time you issued the citation, did you --
THE WITNESS: Prior to. In all the -- and I don't know the number of regular inspections that I inspected Stillwater Mine. I do review their Part 50. It's not actually an audit, but I do review the Part 50 and I do explain everything that I'm reviewing when I go through that Part 50, and that would be regular inspections prior to this incident. But the Part 50 audits, no.
ADMINISTRATIVE LAW JUDGE: No, no, how many such inspections did you have prior to October 27, 2002, when you explained to the company Part 50?
THE WITNESS: I would have to take approximate guess on that because it's been a considerable amount of time now. Probably four regular inspections.
***Q. (By Ms. Larkin:) Let me ask you based on your reviews at the end of each inspection, did you ever review 50.2(h)(7) with representatives of the Stillwater Mine?
A. (h)(7)? Not that I recall at this time. (Tr. 237-240, 328).

I find that Gust's testimony at best confusing and not consistent. I find therefore, that it does not establish that the specific reporting requirements of Section 50.10 and 50.20(a) were explained to Stillwater on many occasions.

The Secretary also alleges that Stillwater repeatedly received citations for the same reporting requirements at issue. In this connection, the assessed violation history report for the period from September 4, 1996 through December 31, 1999 indicates that Stillwater was cited for six violations of Section 50.20(a), supra, all relating to an incident that occurred on the same day.[12] Only one citation was issued for allegedly violating Section 57.10, supra.

On the other hand, Stillwater's management testified in essence, as to a good faith belief that the explosion herein at issue did not fall within the purview of Section 50.10, supra, as it was not an accident, i.e. an unplanned explosion, inasmuch as the company intended to detonate a round at that stope later on at the end of the shift.

Within the context of the above evidence, I find that Stillwater's negligence was moderate. Taking into account the history of violations as set forth on exhibit P-1, the good faith abatement of the citation at issue, as well as the lack of any evidence of other factors set forth in Section 110 (i) of the Act that would either cause a penalty to be mitigated or increased, I find that a penalty of $55.00 is appropriate for this violation.

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[12] March 11, 2002.

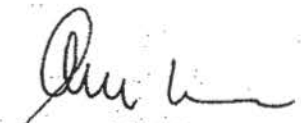
2. Citation No. 6269382

For the reasons set forth above, VII(A), infra, I find that the detonation at 35 e 6400 on October 6, was an accident. On October 27, 2003, when Stillwater was cited, it had not filed an accident report to MSHA as required by Section 50.20(a), supra. Accordingly, I find that Stillwater did violate Section 50.20(a), supra.

The analysis of the penalty factors for this violation is essentially the same as that set forth with regard to Citation No. 6269381 and VII(A)(1), infra, and is incorporated herein. For the reasons set forth above (id.) I find that a penalty of **$55.00** is appropriate for this violation.

ORDER

It is **ORDERED** that Respondent pay a total civil penalty of **$14,550.00** within 30 days of this decision. It is further **ORDERED** that the following citations and orders are **DISMISSED**: **6269353, 6269358, 6269362, 6269366, 6269370, 6269380, 6269379, 6269354 and 6269359**.



Avram Weisberger
Administrative Law Judge
202-434-9964

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601New Jersey Ave., N.W., Suite 9500
Washington, DC 20001-2021

March 9, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2005-51
Petitioner	:	A.C. No. 01-01401-44081
v.	:	
	:	
JIM WALTERS RESOURCES, INC.,	:	
Respondent.	:	No. 7 Mine

DECISION

Appearances: Dana L. Ferguson, Esq., U. S. Department of Labor, Office of the Solicitor, Atlanta, GA for the Secretary;
David Smith, Esq., and John B. Holmes, III, Esq., Birmingham, AL, Maynard, Cooper & Bale P.C., for the Respondent

Before: Judge Weisberger

This case is before me based upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") alleging that Jim Walter Resources ("Jim Walter") violated 30 CFR Section 75.1725(c). A trial was held in Birmingham, Alabama on September 27-28, 2005. Subsequent to the trial, the parties filed Proposed Findings of Fact and a Brief, along with Objections and Replies thereto.

Introduction

Jim Walter operates the No. 7 Mine, an underground coal mine. Coal is conveyed from the working faces to the dumping point outside the mine via electrically operated conveyor belt systems. Coal that is conveyed on the North Main belt goes through a chute at the outby end of the belt where it falls onto the West A belt, and is then conveyed outby to the surface of the mine. Various remote switches control the flow of electricity to these belts[1].

[1]A signal sent from switch (button), B-1 or B-2 (identified in JWR-1), removes the power from the North Main belt. Similarly, power is removed from the West A belt via either buttons R-1, R-2, R-3, R-4, R-5, R-6 or R-7 as identified on JWR-1.

On April 22, 2004 Gary Keeton was employed by the No. 7 Mine as a general inside laborer on the evening shift. On April 22, 2004, Keeton's normal work area included the West A belt and North Main belt head roller. His normal duties included cleaning of coal spillage along the West A belt and North Main belt head roller, and clearing any obstruction from the North Main belt head roller chute at the West A belt.

On April 22, 2004, Keeton was performing his normal duties at his normal work area on the evening shift, and was fatally injured. The last person known to have seen and talked to Keeton was Carlos M. Maynor. At approximately 10:35 p.m., Maynor observed Keeton washing the discharge chute with water at the West A belt head roller.

A television camera that was located underground transmitted pictures of the area in question to a screen and located in an office on the surface. At approximately 10:57 p.m., an individual who was in the office looked at the screen and observed "boots ... that were junked up or got on the, in front of the Discharge Chute, the North Main Discharge Chute on the apron or East Catwalk." (sic) (Tr. 212)

On April 22, 2004 from 10:57:22 p.m. to 11:26 p.m., electric power to the North Main belt was turned off via a remote switch. The computer log, which is the source for these times, based this time record on a signal that was from either switch B-1 or B-2 as identified on JWR-1. The computer log does not distinguish between or identify which one of these two buttons was pressed or pulled.

On April 22, 2004 from 10:57:38 pm. to 10:58:10 p.m., electric power to the West A belt was turned off via a remote switch. The computer log, which is the source for these times, based this time record on a signal from either switch R-1, R-2, R-3, R-4, R-5, R-6 or R-7 as identified on JWR-1. The computer log does not distinguish between or identify which one of these buttons was pressed or pulled.

Ned Jackson Martin worked on the owl shift as an inside laborer performing the same duties and at the same site assigned to Keeton the previous shift. When he arrived at the site in question at the beginning of the owl shift, the West A belt was running, but the North belt was off. When Martin noticed that the North Main belt was not moving, he looked up into the chute and observed a rock "...at the top of it ... [y]ou could just barely see it." (Tr. 159) He did not attempt to dislodge it. He stated that the rock was about three to four inches thick and that the edge "... looked like it'd been - it was kind of rounded off." (sic) (Tr. 160). Martin described the rock in the chute as "...white looking... [s]hiny... [and that] it kind of had a glossy looking. It did have a like it'd been beat up." (sic) (Tr. 159-60) Later that shift after he had turned power on to the North Main belt, he noted that the rock was no longer there.

According to Martin, it is not unusual for material to clog the chutes, and the North Main chute becomes clogged more often then the West A chute.

At approximately, 4:00 a.m., Keeton's body was found on the surface in a pile of rocks that had been scooped out of a rock pile.[2] Additionally, a slate bar[3] was found on the surface in the structure of the preparation plant "... in the duct work between the skip dumping area at the top of the production shaft and the rotary breaker." (Tr. 31) The location of the slate bar was not at the recovery site where Keeton's body had been found. On April 23, a ladder was found in the underground area at issue.

Subsequent to an investigation, the MSHA Inspector, Harry Wilcox issued a citation alleging a violation of 30 CFR Section 75.1725(c) in that "... maintenance was being conducted on April 22, 2004 between 10:57 p.m. and 11:15 p.m. at the North Main Belt Header and West "A" belt conveyor without removing power and blocking the West "A" belt from motion... ."

I. Further Findings and Discussion

Section 75.1725(c), supra, provides as follows: "Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion ... ."

Respondent argues that the Secretary has not established by a preponderance of the evidence that it violated Section 1725(c), supra,. Specifically, Respondent cites the lack of any witnesses as to Keeton's location during the time in question, and his activities at that time. Thus it is argued that there are not witnesses to establish that he was performing maintenance at the cited location during the cited time period. In this connection, Respondent refers to the parties' stipulation that there is not any photographic or videotape evidence that Keeton was involved in maintenance work when he contacted the belt. Also, that it is not known if there was any material jamming the chute when Keeton contacted the belt.

In essence, it is the Secretary's position that on April 22, 2004, between 10:57 p.m. and 11:15 p.m., Keeton was performing maintenance at the North Main belt header and the West A belt conveyor when the belts were not de-energized, and the West A belt was not blocked against a motion. These inferences are based on the following facts stipulated to by the parties or testified to by the Secretary's witnesses:

(1) On April 23, Keeton was the only miner on the evening shift assigned to the North and West Main belts. Among his duties was the clearing of any obstruction from the North Main

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[2]These rocks had originally been deposited at a bunker where coal from the mine underground is deposited, adjacent to the Prep Plant. According to John Aldrich, Safety Director at the mine, these rocks "... came from the preparation plant" and were conveyed on a belt that "...went over the radial stacker ...". (Tr. 251)

[3]This item also is referred to in the transcript by the following terms: bar, steel bar, drill steel bar, and long bar.

belt head roller chute at the West Main belt;

(2) According to Martin's testimony a chute can become clogged. The North Main chute in relation to the West A chute becomes clogged more frequently than the West A chute;

(3) According to Martin on April 23, when he arrived at the North Main chute at the beginning of the owl shift, the North Main belt was not running, and he observed a rock on top of the chute. He described the rock as about three inches thick. He said that a portion of the rock, about the size of a dollar bill, was shiny and was "[k]ind of unusual" as it was "smooth [and] ... kind of rounded off." (Tr. 160) He also indicated that "[i]t did have a like it'd been beat up" (sic.) (Tr. 160);

(4) Martin indicated that one way of removing a rock that is obstructing a chute is to use a steel bar to pry it loose;

(5) Aldrich indicated that on April 23, around the time that Keeton's body was found on the surface, a slate bar, that was recognized by Martin as similar to the one used by him to pry rocks loose from the chute, was also found on the surface;[4]

(6) Martin testified that although miners are not allowed to climb on a belt to clear a chute, one of the ways he has used a bar to dislodge a rock from a chute, is to get on the West Main belt and attempt to pry the rock loose from below while standing on the belt;

(7) In the course of the investigation by MSHA Inspectors, it was determined that on the night shift on April 23, a television camera monitoring the underground area in question transmitted pictures to a screen located in an office above ground. At approximately 10:57 p.m., an individual who was in the office where the screen was located indicated he saw boots on a catwalk in front of the North Main chute. Further, on April 23, a ladder was found in the cited area;

(8) On April 23, starting at 10:57:38 p.m., power was turned off the North Main belt for approximately a half hour; for approximately thirty seconds during that time period, power was turned off at the West A belt; and

(9) At approximately 4:23 a.m., on April 24, Keeton's body was found on the surface in a pile of rocks that had been conveyed from the underground out of the mine.

Respondent attempts to rebut the Secretary's inferences by referring to the lack of any physical evidence that, during the time in question, Keeton was engaged in removing a rock from

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[4]The slate bar was not found at the recovery site; it was found in the structure of the preparation plant. According to Aldrich, Keeton's body was found amidst a pile of rocks that had originated underground and were conveyed out of the mine via the preparation plant.

the North Main chute. Respondent also cites Martin's testimony that on April 22, when he arrived at the area in question, there was not any "mess". (Tr. 163) Respondent argues that the lack of a "mess", would indicate that there was not a blockage of the chute on the prior shift, as it would have caused spillage of material from the North Main belt that feeds onto the chute.

As additional rebuttal of the Secretary's case, Respondent refers to Martin's testimony relating to the rock he observed in the chute at the start of the owl shift. Respondent notes that Martin offered various explanation as to the possible cause of the rock's unusual shiny, "beat up" condition, but did not indicate it might have resulted from having been pried by a bar. Respondent further argues, in essence, that it is not likely that the rock had become lodged in the chute during Keeton's shift as Martin. Later on in the owl shift, after power had been restored to the North Main belt, Martin noticed that the rock was no longer in the chute. Thus, it is argued that it had not been clogging the chute on the evening shift, as it apparently fell out of the chute once power was restored.

Respondent also refers to the fact that although a steel bar was found on the surface, there was not any evidence tending to establish that this bar had been used by Keeton. Moreover, although a ladder was found in the cited area, Respondent relies on the testimony of Aldrich, that he attempted to climb it and experienced difficulties in positioning himself into the 30-inch space between the top of the ladder and the roof.

At best, the factors cited by Respondent might tend to weaken the logical nexus between certain individual facts and inferences the Secretary wishes to be drawn from these facts. However, it is critical to consider the existence of the combination of all the facts relied on by the Secretary. Thus, I note that the record establishes the following: (a) it is not uncommon for rocks to clog the North Main chute; (b) a rock that appeared shiny and beat up was observed at the start of the owl shift, before power had been restored to the North Main belt, (c) power had been shut off from the North and West Main belts at approximately 10:57 pm, April 23; (d) at about the same time the boots of a miner were observed standing on a catwalk in front of the North Main chute; (e) that a steel bar is used to pry rocks that become lodged in a chute; and (f) that a steel bar was found on the surface on April 24, at about the same time as Keeton's body was found.

Based on the existence of all these facts, I find that it is reasonable to infer that during the evening shift, at about 10:57 pm, a miner turned off electric power to the belts in question and then started to use a steel bar to remove a rock or rocks that was/were stuck in the North Main chute. (See, *Garden Creek Pocahantas Co,* 11 FMSHRC 2148, 2152-53, (1989) citing *Mid-Continental Resources* 6 FMSHRC 1132, 1148 (1984). Further, since Keeton was the only miner assigned to work in the area and his duties included clearing obstructions from this chute, it is reasonable to infer that Keeton was the miner performing this task during the time in question. (id) I thus find that the factors relied upon by Respondent are insufficient to rebut the inferences drawn from the Secretary's case-in-chief.

Moreover, Respondent has not set forth any plausible theory based upon any facts in the

record to support a reasonable inference that Keeton was not involved in clearing the chute during the time period in question. Respondent argues that there is not any evidence that Keeton had previously climbed up on a catwalk to dislodge a rock stuck in a chute. Respondent also relies on statements given to the Inspectors that, in general, Keeton was considered a safe worker. Also, Respondent refers to the testimony of Byram, wherein he answered in the affirmative in response to leading questions from counsel as to whether Keeton "had previous slip-and-fall accidents that resulted in minor injuries." (Tr. 306) Additionally, Respondent cites the presence of orphenadrine in Keeton's blood stream at the time an autopsy was performed. However, the record does not contain any evidence of the medical effects of the medication found in his blood stream, its quantity, or the length of time it had been in his blood stream prior to the autopsy.

I find that the arguments and evidence relied on by Respondent to be too speculative to support any reasonable inference that Keeton fell on the belt but not while engaged in clearing the chute.

Thus, for all of the above reasons I find that the Secretary has established by a preponderance of evidence, based on reasonable inferences of a combination of facts, that, at the time in question Keeton was engaged in attempting to move a rock or rocks that was/were lodged inside the North Main chute. Also, although power has been removed from the North Main belt, by way of a remote control button and power had been removed from the West Main belt by way of a remote control button for ten seconds, power was then returned to the West Main belt which was in motion during the time period in question.[5] Thus, it is further concluded that since the West Main belt was in motion, it had not been blocked against hazards.

II. Further Discussion

Respondent argues, in essence, that even if it be found that Keeton was engaged in attempting to remove a rock from the chute, this work does not constitute "maintenance" and therefore Sections 1725(c), supra, is not applicable.

In *Walker Stone Co.*, 19 FMSHRC 48 (1997) (*"Walker Stone I"*) the operator was cited for having violated Section 56.14105, which in all material aspects is identical to the language in Section 1725(c), supra. In *Walker Stone I*, supra, a rock had become lodged inside a crusher which stalled the drive motor rendering the crusher inoperable until the rock was removed. The issue before the Commission was whether in these circumstances the removal of the rock constituted maintenance of the crusher to fall within the scope of the cited mandatory standard. The Commission, 19 FMSHRC, supra, at 51 relied on *Webster's Third New International Dictionary Unabridged,* 1362 (1986), which defined the term "maintenance" as "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep..."

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[5]The parties stipulated that these remote controlled buttons where functioning normally, did not have any defects, and that it is unexplained as to why and how power was restored to the West Main belt during the period in question.

and "[p]roper care, repair, and keeping in good order." (See *Walker Stone*, supra, at 51) The Commission also cited *A Dictionary of Mining Common Mineral, and Related Terms*, 675 (1968). In holding that the activities at issue constituted "maintenance" the Commission noted that the obstructing rock caused the crusher to become inoperable until the rock was removed and that the purpose of dislodging the rock was to unclog the malfunctioning crusher and restore it to functioning condition. The Commission held that "[t]he removal of rock was necessary to restore [the crusher] to a sound state or keep [it] in a state of repair or efficiency." (*Walker Stone I*, supra, at 51) The Commission went on to hold as follows: "[i]n our view, the removal of rock to restore the crusher to working condition is clearly covered by the broad phase 'repairs or maintenance of machinery or equipment', and, therefore, the standard adequately expresses the Secretary's intention to reach the activity to which he applied it." (id.) Upon appeal, *Walker Stone Co., v. Secretary of Labor,* 156 F 3rd, 1076 (10th Circuit, 1998), (*"Walker Stone II"*) the Court of Appeals found the standard at issue therein to be ambiguous, deferred to the Commission's interpretation, and affirmed the Commission's decision.

Respondent argues, based on the testimony of Martin, that when he observed the rock in the chute he did not attempt to remove it; that when the North Main belt was turned on in the owl shift, there was not any evidence that it was blocked and was not functioning normally, and that, the rock in question fell out on its own after the belts had started up. Respondent also refers to the testimony of Martin that there was not any mess in the area when he arrived at the beginning of the owl shift. Respondent argues that this would indicate the lack of spillage caused by any blockage.

As set forth above, I infra, the facts in the case at bar establish, by way of inferences, that the chute had ceased to function because of the presence of a rock or rocks, and that their removal of these obstructions was necessary to unclog the chute (c.f., *Walker Stone I*, supra, at 52). Thus, their removal falls within the meaning of maintenance as set forth in *Walker I and II*, supra.

Therefore, for all the above reasons I find that it has been established that Respondent violated Section 1725(c), supra.

III. Significant and Substantial

A " significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal of other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonable 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 by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

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

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

As set forth above it has been found that the Respondent violated Section 1725(c), supra, and that this violation contributed to a discrete safety hazard i.e. a miner coming in contact with a moving belt. Further, since the hazard herein did result in a fatality, it is clear that the third factor set forth in Mathies, supra, the reasonable likelihood that the hazard will result in injury, and the fourth factor, a reasonable likelihood that the injury will be serious, has been met. For these reasons I find that it has been established that the violation was significant and substantial.

IV. Penalty

The parties stipulated that a penalty will not impair Respondents ability to remain in business and that Respondent demonstrated good faith abatement.

The level of Respondent's negligence is to be mitigated because Respondent provided a camera at the area in question which transmitted the use of that area to the control room on the surface. Further, it was Respondent's policy for miners to call a control room supervisor before shutting down the belts. The record indicates that Keeton was an experienced worker, and was considered to be a safe worker. Respondent seeks to further mitigate the level of negligence by arguing that it "very deliberately trained its miners" not to straddle a moving belt while attempting to dislodge a rock from a chute. (Respondent's Reply to Petitioner's Post Trial Brief, at 20) However, there is not any evidence in the record to indicate specifically that Keeton received this training. For all these reasons I find that the level of the Respondent's negligence

was moderate.

Because the violation herein resulted in a fatality, I find that the level of gravity of the violation was high. The record does not establish any bases for increasing or decreasing a penalty based on the remaining factors set forth in Section 110 (i) of the Act. Therefore, in evaluating the factors set forth in Section 110 (i) of the Act and placing the most weight on the high level of gravity which resulted in a fatality, I find that a penalty of $32,500 is appropriate for this violation.

ORDER

It is **ORDERED** that the Respondent pay a civil penalty of $32,500, within 30 days of this decision.

Avram Weisberger
Administrative Law Judge

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/lp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001-2021

March 15, 2006

HIBBING TACONITE COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. LAKE 2005-50-RM
v.	:	Citation No. 6159916; 12/15/2004
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 2005-51-RM Citation No. 6159917; 12/15/2004
	:	Docket No. LAKE 2005-52-RM Citation No. 6159918; 12/15/2004
	:	Docket No. LAKE 2005-53-RM Citation no. 6159919; 12/15/2004
	:	Hibbing Mine Mine ID: 21-01600

DECISION

Appearances: Christine M. Kassak Smith, Esq.; Wayne Lundquist, CLR, U.S. Department of Labor, Chicago, Illinois, on behalf of the Respondent; R. Henry Moore, Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, on behalf of the Contestant

Before: Judge Barbour

In these contest proceedings, brought pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the "Mine Act" or "Act"), Hibbing Taconite Company ("Hibbing" or "the company") challenges the validity of three citations issued on December 15, 2004, at its Hibbing Mine.[1] The citations allege violations of 30 C.F.R. §50.20(a), a mandatory standard requiring reporting to the Secretary's Mine Safety and Health

[1] Initially, the company challenged a fourth citation (Docket No. Lake 2005-50-RM), but at the hearing Hibbing withdrew the contest. Tr. 13; *see also* Jnt. Exh. 7 at 2. I will dismiss Docket No. LAKE 2005-50-RM at the close of this decision.

Administration ("MSHA") any mine-sited accident, occupational injury or occupational illness.[2] The citations charge the company violated the standard when it failed to complete and submit Forms 7000-1 for three injury-causing incidents that occurred at the mine.[3] The company asserts the citations do not set forth violations of section 50.20(a). The Secretary, on behalf of MSHA, responds that the citations were properly issued. A hearing was conducted in Duluth, Minnesota, at which both parties offered testimony and documentary evidence. Both also submitted briefs.

At the beginning of the hearing counses sumarized their positions. Counsel for the company acknowledged the three incidents resulted in injuries, but maintained the injuries were the results of "long-standing [physical] problems[,]" problems the company "treated as

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[2] In pertinent part section 50.20(a) states:

> Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1 . . . . Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in §§ 50.20-1 through 50.20-7. . . . The operator shall mail completed forms to MSHA within ten working days after an accident or an occupational injury occurs or an occupational illness is diagnosed.

[3] Citation No. 6159917 (Docket No. Lake 2005-51-RM) involves an April 27, 2004 incident that occurred to miner Don Classen. Exh. G-2. (Although the citation gives April 29 as the incident date, Inspector Michael Anderson testified the actual date was April 27, 2004. Tr. 34. Counsel for the Secretary moved without objection to modify the citation to that date, and the motion was granted. Tr. 35.) Citation No. 6159918 (Docket No. Lake 2005-52-RM) involves an April 28, 2004, incident that occurred to miner Ron Wirkkula. Exh. G-4. Citation No. 6159919 (Docket No. Lake 2005-53-RM) involves an August 16, 2004, incident that occurred to miner Tim Duffney. Exh. G-6.

The citations also state the company was aware of the Part 50 reporting procedures, the alleged violations were unlikely to cause lost work days, and the company was moderately negligent. If the citations are affirmed the parties agree a $60 civil penalty is appropriate for each violation. Tr. 14.

recurrences that did not have to be reported." Tr. 24. Counsel also asserted there was "some inconsistency" on MSHA's part regarding the reporting of recurrent injuries. He described the issue of whether or not to report such injuries as "long festering." *Tr.* 26-27. Counsel argued the Secretary should engage in rulemaking to make clear exactly what is required when a miner experiences a recurring injury. Tr. 29. In counsel's opinion, because none of the cited injuries was "contemplated by the regulations[,]" the citations do not allege violations of section 50.20(a). Tr. 29-30.

Counsel for the Secretary stated that her case was "very simple." Tr. 19. Each of the three miners experienced an injury-causing incident at work. The incidents were required to be reported. The company failed to report them and, therefore, violated section 50.20(a). *Id.* The fact that the injuries might have been the result of "preexisting condition[s]" or the "recurrence of . . . past injur[ies]" did not matter. Tr. 22. Counsel stated, "[A]s long as there was a new occurrence or a new incident . . . and it resulted in an injury[,] . . . then it needed to be reported." *Id.*

THE INSPECTOR, THE COMPANY'S INJURY REPORTER AND THE CITATIONS

Inspector Anderson testified that in late fall 2004, he was told there "was a possible problem with the [Part 50] reporting procedures" at the Hibbing Mine. Tr. 35. In December, Allen Caligiuri, the chairman of the union local safety, health and environmental committee, gave Anderson a list of 17 miners and asked if alleged injuries and/or accidents involving the miners had been reported by Hibbing. Tr. 46; *see also* Tr. 119, 127.

On December 15, Anderson traveled to the mine. He met Caligiuri and they went to the mine office. There, Anderson and Caliguiri spoke with Lena Haltvick, Hibbing's workers' compensation administrator. Haltvick is the person in charge of reporting accidents, injuries and illnesses to MSHA. Anderson, Caligiuri and Haltvick reviewed information pertaining to the individuals. Anderson concluded the three subject miners suffered reportable injuries and Haltvick did not file the required reports. Tr. 120-121.

Haltvick explained to Anderson that she regarded the miners' injuries as recurrent and that she did not believe they had to be reported. Tr. 46-47, 121, 173. For example, although miner Don Classen suffered a hernia, Haltvick noted that Classen's doctor diagnosed it as a recurrence of a previous hernia. Tr. 48. In fact, Haltvick testified that Classen experienced "four or five different hernias" over five or six years. Tr. 162-163.

Anderson disagreed with Haltvick's interpretation of what was and was not reportable. He believed even if an injury was recurrent, it was a "medical reportable incident." Tr. 37. With regard to Classen, Anderson stated because he "was on the job at the time" and the injury was caused by the job, it should have been reported. Tr. 37.

Anderson also pointed out that Classen's injury required subsequent medical treatment and that MSHA's "Yellow Jacket[,]" a publication in which MSHA set forth its interpretation of certain mandatory safety and health standards, including section 50.20(a), indicated "a hernia is always considered reportable." Tr. 37, *see* Exh. G-9; *see also* Tr. 27-29. Anderson specifically noted question and answer 39 in the Yellow Jacket:

> Q. I have an employee who has suffered a hernia at work. He went to a doctor who diagnosed the hernia condition, but did not treat it. The employee returned to his regular job the next day. How should it be reported?
>
> A. A Form 7000-1 should be completed showing the date of injury or date of diagnosis. . . .
>
> Exh. G-9 at 30; *see* Tr. 38.

Anderson also testified that he was guided by question and answer 40:

> Q. An employee who suffered a hernia at work but received no treatment initially and returned to work at full capacity the next day. A month later the employee had the hernia surgically repaired. The employee subsequently missed ten days of work. How do I report this?
>
> A. Form 7000-1 should be completed within ten days of injury.
>
> Exh. G-9 at 30, *see* Tr. 39.

In addition to the Yellow Jacket, Anderson noted guidelines subsequently published in an MSHA Program Information Bulletin (PIB):

> An injury may be considered a recurrence [and not be reportable] only if there is no new event, occurrence or accident which contributed to the recurrence and there is sufficient medical documentation to substantiate that the injury is, in fact, only a recurrence.

PIB No.: 88-05 (September 28, 1988) at 3; Exh. G-10 at 3. *See also Tr. 50-51, 54.*[4]

Anderson believed that under the Yellow Jacket and the PIB an incident was reportable if it was the result of a new event contributing to a recurrent injury. Tr. 60-62. In Anderson's view, there was no difference between an employee who was injured for the first time and an employee who had a prior injury and was re-injured, provided in each instance the injury was "tied to an event at the mine." Tr. 51-52; *see also* Tr. 54. For these reasons, Anderson issued Citation No. 6159917 to Haltvick for failing to report Classen's injury. Exh. G-2; Tr. 40.

With regard to Ron Wirkkula, Haltvick explained that although he suffered an on-the-job back injury, a doctor who reported his condition noted previous back injuries "go[ing] back to . . . [a]1994 incident[,]" (Tr. 146), and another doctor described Wirkkula's April 2004 injury as "[a] re-injury." Tr. 148; *see* Exh. H-5. Because, she viewed Wirkkula's April injury as a recurrence, Haltvick did not report it. Tr. 150.

While Anderson agreed that Wirkkula had a "fairly long history of [back] problems[,]" for the same reasons he gave regarding Classen, he believed the injury to Wirkkula was reportable, and he issued Citation No. 6159918 to Haltvick. Exh. G-4; Tr. 43, 49.

As for Tim Duffney, Haltvick explained that although he also suffered an on-the-job back injury, he, too, had an "active history" of back problems, and she did not believe it was necessary to file a Form 7000-1for his re-injury. Tr. 163.; *see* Jnt. Exh. 7 at 7.[5]

Anderson reached the opposite conclusion. He understood that Duffney had a history of back problems, but he also understood Duffney had "over-exerted himself while pulling a hose."

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[4] The guidelines also state:

> All other instances must be reported as separate cases. It is sufficient to be a new reportable case if work exposure was a contributing factor. Aggravation of a previous injury due to the work environment will not be considered a recurrence, but will be considered a separate case.

Exh. G. 10 at 3-4; *see* S. Br. 39.

[5] Haltvick recalled Duffney's doctor stating that Duffney was "having more and more frequent low back strains." Tr. 151; Exh. H-10 at 2.

Tr. 44, 49, 52. Therefore, he viewed the injury as reportable, and he issued Citation No. 6159919 to Haltvick. Exh. G-6, Tr. 44.

After the citations were issued, company representatives, including Haltvick, conferred with MSHA officials regarding the citations and the reporting of recurrent injuries. Haltvick stated that when she told about the number of reports the company would have to file if such injuries were reportable, someone representing MSHA stated the agency didn't "want to be flood[ed] . . . with paperwork." Tr. 152. Following the meeting, Haltvick was "still unclear" about what should be reported. Tr. 153.

THE MINERS AND THEIR INJURIES

The miners explained their prior injuries, what happened on the day they were re-injured, and the treatment they received. Classen testified although he had experienced a previous hernia, when he went to work on April 27, he did not have one; nor was he on restricted duty. Tr. 69, 72. Upon arriving at the mine, he was assigned to remove an electrical outlet box from a beam. The box was held in place by four screws. The screws were rusty, and the box resisted his attempts to loosen it. Classen appplied "Liquid Wrench[,]" but could not turn the screws. He applied more "Liquid Wrench" and used a pipe wrench to try to twist the box. When this procedure failed, Classen inserted a "cheater bar" (a short pipe) onto the handle of the wrench to get more leverage. Tr. 77, 196. After several unsuccessful attempts to wrench the box from the beam, he "start[ed] to feel belly pain." Tr. 71. When he still was unable to remove the box, he gave up. Later in the day, he experienced more pain. Tr. 72.

That night, Classen pulled up his shirt and saw a "good size bulge in [his] stomach." Tr. 74. The next day he visited a doctor, who told him he had a hernia, but who allowed him to return to work. Tr. 80. The doctor suggested Classen see a surgeon. Tr. 74. However, Classen went to his personal doctor, who recommended Classen wear a "belly binder" while at work. Tr. 75. The doctor gave Classen a note stating that Classen had suffered a recurrence of a ventral hernia. Tr. 75-76. In July, Classen had surgery to repair the hernia. *Id.; see* Jnt. Exh. 7 at 3.

Wirkkula testified that on April 28, 2004, he drove his haulage truck to one of the mine's electric shovels so the truck could be loaded. The shovel operator swung the shovel bucket toward the truck. The bucket struck the rear of the truck. Tr. 105; *see* Jnt. Exh. 7 at 5. Wirkkula described the impact as "pretty violent" and as a "jarring type hit." Tr. 100. Shortly thereafter, Wirkkula noticed numbness in his right foot. *Id.*

Wirkkula reported the incident and the numbness to his supervisor, who sent Wirkkula to a clinic where Wirkkula's doctor was on duty. She examined him and scheduled an X ray and an MRI. Wirkkula returned to work on his next scheduled shift. He worked a full day. Tr. 101-102. Subsequently, Wirkkula experienced increased back pain for which he underwent physical therapy and traction. Tr. 104; *see also* Tr. 160. He did not return to his duties as a full-time driver until mid-summer. Tr. 103.

Wirkkula confirmed he first experienced back problems in 1980. Tr. 104. Then, on February 6, 1994, Wirkkula injured a disk.[6] In 1996, Wirkkula suffered another back injury, and yet another one in 1999, when he herniated a disk while working at the mine. Jnt. Exh. 7 at 6. Prior to the April 2004, incident, he underwent two back surgeries and a number of steroid injections. Tr. 108-109; *see* Jnt. Exh. 7 at 6. Because of his back condition, Wirkkula was rated as having a 13-percent restriction of his back, but he still performed all of his duties as a truck driver. Tr. 153, 156.

Duffney, testified that on August 16, 2004, he was told by his foreman to roll up a fire hose. The hose consisted of two or three coupled sections. It was located in the mine's pellet plant and extended from the level of the plant where Duffney was working up and into the level above Duffney. Tr. 88-89. To wind the hose, Duffney pulled it toward the hose reel, wound the accumulated lengths on the reel and repeated the process. Tr. 88-89. As he pulled, he strained his lower back. He reported the injury to his foreman, and the following day, August 17, he saw a doctor, who stated Duffney had experienced a "back spasm." Tr. 91. The doctor scheduled an X ray. The X ray revealed Duffney was suffering from degenerative disk disease. Tr. 91. In addition to the X ray, Duffney was prescribed physical therapy and pain killing medication. Tr. 91-92. Later, an MRI was ordered. Tr. 91, 95. Duffney returned to work on September 7, 2004. Tr. 92; Jnt. Exh. 7 at 7.

THE COMPANY'S REPORTING PROCESS

Hibbing's reporting process was described by Haltvick:

> To begin with, we get the initial report which is filled out by the super[visor] or the foreman regarding the incident . . . . If it says report only, then it just gets put in the file. If it says first aid, or medical treatment, or reoccurrence, then we request medical [records] from the clinic . . . . We have a group meeting which consists of three or four people . . . [who] go over the medical records, and rely on the information we have to see if it's a reportable [injury] or not.

Tr. 138-139.

According to Haltvick, those usually involved in the group meeting are the supervisor in charge of the department in which the subject employee works; John Kannas, the senior section manager for safety and loss control at the mine; Brian Moody, a management employee working

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[6] Wirkkula's doctor reported the 1994 date as the onset date of his April 28, 2004, injury. Tr. 107-108, Hibbing Exh. 5 at 4; *see* Jnt. Exh. 7 at 5.

in human resources; and Mike Milnar, the company's general manager. Tr. 139. Moody held the job before Haltvick, and she frequently asks him for a "second opinion" about whether an injury is reportable. Tr. 140.

In Haltvick's view, the most important things when determining whether or not to report an injury are the records generated when an employee seeks medical attention. Tr. 141, 168. If a doctor states an injury is recurrent, she does not report it to MSHA. Tr. 141-142. The company regarded recurrent injuries as non-reportable before she assumed the reporting responsibilities, and she has continued the practice. Tr. 142.

Kannas stated that Hibbing has kept track of recurring injuries for a number of years, and that the average number is 20 a year. Tr. 178, 181. Like Haltvick, Kannas emphasized the importance of medical records in the company's decisional process. Tr. 202, 205.

For example, with regard to Classen's injury, Kannas felt:

> It was very evident from reading the medical [records] that . . . [the injury] was a recurrence . . . . [L]ooking back through the records you could see where he had a hernia, he had a repair, he had a reinjury or rehernia in the same area[,] and I think this was the third. And the doctor defined it as an incisional hernia where it actually took place on the scar of a previous hernia.

Tr. 189; *see* Exh. H-1 at 3.

With regard to Wirkkula, Kannas noted a reference in Wirkkula's medical records to a 1994 back injury and an indication the 2004 injury was a recurrence. Tr. 192, Exh. H-5 at 3. Similarly, Kannas noticed in Duffney's medical records a "mention of . . . more and more frequent low back pain syndromes[.]" Tr. 195. Kannas did not think a person with "a good strong healthy back" would be injured pulling a fire hose. Tr. 199. In Kannas's opinion, if all recurring injuries were reported to MSHA, the reports would "overload" MSHA, and the statistical information MSHA compiled would be "watered down." Tr. 200.

THE ISSUE

Did Hibbing violate section 50.20(a) when it failed to file Forms 7000-1 for the injuries to Classen, Wirkkula and Duffney? If so, the citations must be affirmed.

THE PARTIES' ARGUMENTS

Counsel for Hibbing asserts that the reporting of recurrent injuries poses a continuing dilemma for operators. Section 50.20(a) does not specifically address the issue; nor does the

regulatory definition of "occupation injury." H. Br. 10.[7] Counsel maintains that a recurrence is simply a continuation of an original injury and that the language and context of the regulations indicates their intent is not to have multiple reports on the same injury. *Id.* The focus of section 50.20(a) and section 50.2(e) is on the nature of the injury, not on the event that caused it. For this reason, the Secretary's regulations define reportable injuries not by how an injury happened, but on the basis of whether it required medical treatment or whether it resulted in lost time or work restriction. *Id.*; *see also Id.*12.

Counsel also argues that the Secretary's interpretation is unreasonable and due no deference. In counsel's view, the Secretary has effectively created a "whole new reporting requirement" by including recurrences within the definition of "occupational injury." This new requirement should have been the subject of APA rulemaking. H. Br. 14-21.

Quoting the regulation, counsel for the Secretary counters that section 50.20(a) requires, "[e]ach operator [to] report each accident, occupational injury or occupational illness at the mine." She also notes the definition of "occupation injury" in section 50.2(e), and asserts that the language of the regulations must be enforced as written. It is unnecessary to interpret the regulations beyond their plain meanings. S. Br. 3; *see* Tr. 219

Paraphrasing the words of the regulations, counsel argues the elements of proof are that:

1.) an injury must have occurred;
2.) to a miner;
3.) at a mine; and
4.) the injury must have:
    a.) required medical treatment; or
    b.) resulted in:
        i) death; or
        ii) loss of consciousness; or
        iii) an inability to perform all job duties any day after the injury; or
        iv) temporary assignment to another job; and

---

[7] Section 50.2(e) defines an "occupational injury" as:

> [A]ny injury to a miner which occurs at a mine for which medical treatment is administered . . . or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

5) the operator must not have reported the injury.

S. Br. 25-26.

Alternatively, counsel argues if the regulation and/or the meaning of "occupational injury" is not clear regarding the obligations of an operator in the face of a recurring injury, the Secretary's reasonable interpretation as explained in the Yellow Jacket – an interpretation requiring reporting of a recurring injury if the recurrence is caused by a new event – is entitled to deference. S. Br. 38-39. Also entitled to deference is the "clarification" contained in the PIB, which specifically relieves an operator of the duty to report if a renewal of a prior injury is not caused by a new event or if "work exposure was [not] a contributing factor." S. Br. 35, 39 *citing* Exh. G 10 at 3-4. Counsel argues that the Secretary's interpretation is valid because it is "reasonably related to the statutory provision under which it was promulgated." S. Br. 40 (*quoting Freeman United Coal Mining Company*, 6 FMSHRC 1577, 1579-89 (June 1984)) and that "MSHA would abdicate its responsibilities under the Act were it to rely solely on the mine operator's determination that an injury need not be reported." S. Br. 44. Because in the three instances at issue the medically treated injuries were caused by "new events," they had to be reported. S. Br. 39.

RESOLUTION OF THE ISSUE

The meanings of sections 50.20(a) and 50.2(e) and the application of the meanings to the facts are at the heart of the parties' dispute. When an issue of regulatory meaning arises, the Commission has directed its judges to follow a specific analytical roadmap. They must look at the "plain language of the regulation," which, "[a]bsent a clearly expressed legislative or regulatory intent to the contrary ordinarily is conclusive." *Freeman United Coal Mining Company*, 6 FMSHRC 1577, 1578 (July 1984). Only if the language is ambiguous should they consider the Secretary's interpretation, to which they must defer if it is reasonable and not plainly erroneous or inconsistent with the regulation. *See Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (January 1998).

Following the roadmap, I arrive at the conclusion the citations should be sustained. I agree with the Secretary that the plain meaning of the regulations resolves the issue. Like the Commission in *Freeman,* I find no legislative or regulatory intent requiring me to go beyond the regulations' words, and I fully concur with the Secretary that to meet her burden of proof she must show nothing more than that the evidence tracts the definition of "occupation injury" and that the injury was not reported. *See* S. Br. 25-26. Here, I find that the Secretary has made the necessary showings. She has correctly parsed the wording of the regulations to specify what she must prove, and in each of the three instances at issue, she has met her burden by establishing an injury to a miner at the mine that required medical treatment and that was not reported.

As the Commission noted in *Freeman*, in section 50.2(a) the word "injury" is used in its ordinary sense, which means that there must have been "an act that damages, harms or hurts." 6 FMSHRC at 1578-79, *citing Webster's Third New International Dictionary (Unabridged)* 1164 (1977). On April 27, 2004, Classen "damaged" or "hurt" himself when he tried to remove the electrical outlet box from the beam. The "belly pain" he experienced was caused by a hernia which in turn was caused by pulling on the wrench. This was an injury within the meaning of section 50.2(a). Tr. 71, 75-76, 77. Wirkkula also experienced "damage" or "hurt" when his truck was hit by the shovel's bucket. The resulting numbness in his foot, which was caused by his disk problems, was triggered by the jarring he received. This was an injury. Tr. 100, 103-104, 107-109. Duffney was "damaged" or "hurt" when he pulled on the fire hose. The back pain he experienced, which was the result of a back spasm and related to his degenerative disk disease, was caused by pulling on the hose. This, too, was an injury. Tr. 88-89, 91.

In each instance, medical treatment was required. Classen was initially prescribed and used a "belly binder." Tr. 75. Wirkkula was prescribed an X ray, as well as an MRI. Tr. 103-104. Duffney was prescribed an X ray, physical therapy, painkillers and, ultimately, an MRI. Tr. 91-92. Because each miner while working at the mine suffered an injury that required medical treatment, I find that each miner suffered an "occupational injury" as defined by section 50.2(e), and because Hibbing did not report any of the three injuries, I conclude the violations existed as alleged.

In reaching this conclusion, I note the Commission's determination that section 50.20(a) is "consistent with and reasonably related to the statutory provisions under which it was promulgated." *Freeman* at 1580. I also note my full agreement with the Secretary that her interpretation of the regulations as requiring the reporting of a recurrent injury if there is a new event or occurrence that causes or contributes to the recurrence is reasonably related to the purpose of the statute, a purpose that broadly authorizes the Secretary to gather accident and injury information to facilitate a reduction in accidents and injuries. Therefore, were I not deciding this case for the Secretary on the basis of the plain meaning of the standards, I would do so on the basis of deference to her interpretation.

This does not gainsay that Hibbing may have a point when it questions the usefulness to MSHA of data on recurrent injuries. However, as long as the Secretary acts within the letter and intent of her regulations – as she has done here – the desirability of amending the regulations to take account of changing conditions, such as an increasing number of recurrent injuries among an aging work force, is a matter for the Secretary and the industry, not for the Commission, to consider. *See* S. Br. 30.

ORDER

For the reasons stated above, the three contested citations are **AFFIRMED,** and the contests are **DISMISSED.** Docket No. LAKE 2005-50-RM also is **DISMISSED.** *See* n.1 *infra.*

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

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/ej

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 16, 2006

WABASH MINE HOLDING CO., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. LAKE 2005-83-R
	:	Citation No. 7580994; 03/28/05
v.	:	Docket No. LAKE 2005-93-R
	:	Order No. 7598049; 5/16/05
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Wabash Mine
	:	Mine ID 11-00877

DECISION

Appearances: Christine Kassak Smith, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner; R. Henry Moore, Esq., Julia K. Shreve, Esq., (on brief), Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondent;

Before: Judge Feldman

These contest proceedings arise from a 104(a) citation and a related 104(b) withdrawal order issued to Wabash Mine Holding Company (Wabash). The citation and order concern the fitness for purpose of five ventilation control seals constructed of cementatious foam material rather than traditional concrete block. The hearing was conducted from August 30 through September 1, 2005, in Evansville, Indiana. The parties' post-hearing briefs and replies have been considered.

I. Statement of the Case

At issue are five seals located at the 2 West South area of the Wabash Mine that separate an abandoned area from the active mine. Seals, as a ventilation control, have two objectives. First, seals separate unventilated, contaminated air in an abandoned area from active areas of a mine. The Secretary does not assert the cited seals failed to perform this function in that the Secretary admits the seals were not leaking methane into the active workings. (*Sec'y br.* at p.36, n.8). Second, seals must continue to maintain their structural integrity so that they can withstand convergent pressure from the mine roof and floor, as well as lateral pressure from an explosion, to prevent the escape or propagation of gases from the abandoned area into the active area. Section 75.333(h), 30 C.F.R. § 75.333(h), the cited mandatory safety standard, requires that

"[a]ll ventilation controls, including seals, shall be maintained to serve the purpose for which they were built." It is the cited seals' ability to withstand lateral pressure, also referred to as static horizontal pressure, in the event of an explosion, that is the focus of this proceeding.

II. Findings of Fact

Both the Mine Safety and Health Administration (MSHA) and the State of Illinois require abandoned mine areas to be either sealed or ventilated. Sealing an abandoned area eliminates the necessity for ventilation or examination of the area. After an area has been sealed, the atmosphere behind the seals stabilizes over time. Methane levels rise above the explosive limit of 15 percent as oxygen levels decrease below the amount necessary for ignition. However, leakage of concentrated methane from behind a seal into the active mine results in dilution of the methane with fresh air that could create an explosive range of 5 to 15 percent methane in the active workings.

Section 75.335, 30 C.F.R. § 75.335, of the Secretary's regulations governs the construction of seals. Section 75.335(a)(1)(i) specifies that seals constructed after November 15, 1992, shall be "[c]onstructed of solid concrete blocks at least 6 by 8 by 16 inches, laid in a transverse pattern with mortar between all joints." However, section 75.335(a)(2) permits "[a]lternative methods or materials to be used to create a seal if they can withstand a static horizontal pressure of 20 pounds per square inch [(20 psi)] provided the method of installation and the material used are approved in the ventilation plan."

The approved Wabash Mine ventilation plan allowed several alternatives to solid concrete block seal construction. (Joint Stip. 15; Joint Ex. 1). Among them was pumpable material seals. The ventilation plan provided:

> Pumpable Material Seals - Will be constructed using cementatious foam with a compressive strength of at least 200 psi and will have a minimum thickness of four (4) feet. All formwork [sic] and framing will be left in place on both sides of the seal if deemed necessary by mine supervisory personnel. Hitches and footings are not required for this type of seal.

(Joint Ex. 1).

The 2 West South seals (the south seals) were installed in 1993 by Alminco, Inc., (Alminco). Consistent with the ventilation plan, the seals were constructed using a cementatious foam material that is pumped between wood forms that are constructed to mine specifications. The seals in issue were poured into the forms to dimensions of 4 feet thick, 6 to 7 feet high, and 18 to 19¾ feet wide, depending on the width and height of each entry. (Tr. 33, 92-93, 122; Joint Ex. 1).

The cementatious foam material for the south seals was poured into the wood forms constructed in each of the five entries. The material was pumped into the forms in a wet mix that

forms a slurry which undergoes a curing process whereby the seals harden and acquire their compressive strength. The seal remains in the entry for the life of the seal.

During the pouring of the seals, Alminco obtained a total of nine representative samples taken in cylinders 3 inches in diameter by 6 inches tall from nine standard pre-determined locations from the top, middle and bottom of each seal. The cylinders were allowed to cure for 28 days at which time they were tested for vertical strength. This was accomplished by exposing the cylinder samples to vertical forces to determine the amount of pressure each sample could withstand. The Secretary does not contend that Alminco's sampling process was flawed or otherwise contrary to industry standards. The average compressive strengths for the nine cylindrical samples taken from each of the five south seals were:

South Seal # 1 - 600 psi
South Seal # 2 - 322 psi
South Seal # 3 - 238 psi
South Seal # 4 - 340 psi
South Seal # 5 - 460 psi

(Resp. Ex. 11). The average compressive strength for each of the five seals at installation was 392 psi. These results do not reflect any curing problems with the sampled material.

A compressive strength (vertical strength) of 200 psi is very important in determining the stability of a seal and ensuring its ability to withstand at least 20 psi horizontal force. (Tr. 314, 320). Increasing the vertical strength of a seal will increase its horizontal strength, although not in linear proportion. (Tr. 314).

Cementatious foam seals are designed for use in mine areas where convergence of the roof and floor is expected. (Tr. 123-24, 537). There is approximately 800 feet of overburden at the Wabash Mine causing coal pillars to compress into the floor. (Tr. 60, 236; Gov. Ex. 3). Roof sagging and floor heaving in the 2 West South area began within months of installation of the seals, causing destruction of the wooden forms used to construct the seals. Wooden forms are installed to control the dimensions of the poured seal. The wooden framing does not affect the structural strength of the seal.

Wooden cribs and posts in the area have also compressed over the past 12 years. Pressure from the roof and from the seals increased the floor heaving at the base of the seals. Thus, although the seals were originally 6 to 7 feet high, they now also are compressed to approximately 3½ to 4½ feet. Precise measurement is difficult, if not impossible, because of the significant floor heaving that surrounds the base of the seals.

Illinois law requires the examination of seals prior to every shift. MSHA requires only weekly examinations. Tests for methane are taken at the south seals during these examinations. (Tr. 546). Seals are not intended to be leak-proof. (Tr. 360). Virtually all seals leak in either direction, towards or away from the active mine, depending on barometric pressure. On days when barometric pressure is low, leakage would be in the direction of the active mine.

Conversely, high barometric pressure would cause the mine atmosphere to leak through the seals in the direction of the abandoned area.

Bottle samples and readings from hand-held detectors are taken from the accessible active mine side of a seal to determine if a seal is structurally compromised with respect to leakage. Obviously, the abandoned mine side of a seal is inaccessible. Aside from the effects of normal barometric changes, the evidence reflects both State and MSHA mine inspectors determined that the subject seals were not leaking.

The Wabash Mine is a large mine. There is a constant presence of MSHA inspectors at this mine in that the statutorily mandated quarterly mine inspections can take the entire quarter to complete. (Tr. 54-55). Illinois state mine inspectors are also frequently performing their duties at the mine. The Secretary concedes that the subject seals were designed and installed in accordance with the approved ventilation plan at the time of their installation in 1993. (Tr. 212).

a. MSHA Witnesses

MSHA mine inspector Steven Miller, the issuing inspector, testified that "[t]here is a long history behind these seals."[1] (Tr. 102-03). Prior to beginning his quarterly inspection, Miller discussed the condition of the seals with Michael Renny, an MSHA inspector who had conducted the previous quarterly inspection at the mine. Renny expressed concern about whether the seals were being adequately maintained. A seal that is not structurally sound cannot be repaired and must be replaced. (Tr. 231-32). Dave Whitcomb, Miller's supervisor, instructed Miller to take a closer look at the seals. (Tr. 103-04, 375-76).

Miller inspected the south seals on or about March 28, 2005. Approaching the seals required crawling or stooping uncomfortably because of the significant compression of the roof and heaving of the mine floor.

The faces of the seals had been sprayed with a polyurethane material several years before. Wabash maintains the spray was applied to minimize exposure of the faces to the mine atmosphere to retard further deterioration. (Tr. 774). Although the polyurethane spray can obscure the condition of faces, an Illinois mine inspector testified spraying seals is neither prohibited nor unusual. (Tr. 489). On the other hand, Miller testified that while spraying foam material on the top or side of a seal to fill gaps is common, he had never seen a spray applied to the face of a seal. (Tr. 111). In any event, the evidence does not support an inference that Wabash applied the spray material to obscure observation of the subject seals.

[1] MSHA inspector Steven Miller and union safety committeeman James Miller testified in this matter. All references to "Miller" refer to inspector Steven Miller unless otherwise noted.

As noted, the seals were compressed to heights varying from approximately 3½ to 4½ feet. The faces of the five seals were somewhat buckled and the faces generally were granular to the touch. As noted, the wood framing material had become dislodged.

Specifically, the No. 1 seal exhibited the most facial deterioration. (Tr. 84). There was a 3 inch diameter hole in the center of the seal that was approximately 6 inches deep. (Gov. Exs. 4, 5). The hole was just big enough to stick the tips of the fingers in. (Tr. 493). Miller also observed facial cracks in the No. 1 seal. Methane readings taken by Miller and Illinois mine inspectors were negative reflecting that neither the 6 inch hole nor the facial cracks in the No. 1 seal penetrated the seal or otherwise caused leakage. (Tr. 84, 96-97, 472). The No. 2 seal's center exhibited powdered material to an approximate depth of 4 inches. (Tr. 308; Gov. Ex. 6, 7). The No. 3 seal's wood frame was broken, and there were surface cracks on the face of the seal. (Tr. 81, 83; Gov. Ex. 8). The No. 4 seal had facial cracks. (Tr. 90, Gov. Ex. 9, 10). The No. 5 seal contained a sampling pipe that was used to sample the atmosphere on the abandoned side. (Tr. 118, 258). The exterior was granular to the touch, although the No. 5 seal appeared to be the best of the south seals with respect to structural integrity. (Tr. 119-20). In short, even Wabash's expert witness conceded the faces of the seals were "unsightly." (Tr. 535).

Immediately prior to issuance of the subject citation, Miller took methane readings at all five of the south seals. Despite the surface cracks and powdery exterior described by Miller, all sampling revealed an absence of methane at the seals. (Tr. 96-97). As noted, there were no methane readings taken by federal, state or mine personnel at the cited seals that evidenced any abnormal leakage. Significantly, the presence or lack of leakage is the criterion MSHA uses to pass or fail seals of various designs after they are exposed to 20 psi explosions in laboratory test settings. (Tr. 359).

Although Miller maintained that the deterioration of the seals was excessive, Miller agreed that facial deterioration of cementatious foam material is a natural consequence of compression. In this regard, Miller acknowledged that deterioration in a mine environment is a fact of life, and that, without drilling a sample from the seals, he had "no way of knowing what's behind that buckling." (Tr. 120-21).

As a result of his observations on March 28, 2005, Miller issued 104(a) Citation No. 7580994 citing a violation of the mandatory safety standard in section 75.333(h) because the south seals allegedly no longer served the purpose for which they were built. Specifically, the citation stated:

> The 2 West South Seals have not been maintained to serve the purpose for which they were built. They are found in an area that experienced squeezing and convergence and show signs of stress. The seals show signs of buckling as well as fracturing of the outer portion of the seal material. New seals must be built in an area where overburden pressures will not affect the structural integrity of the seals.

(Gov. Ex 1).

Miller explained that he designated the cited violation as non-S&S in nature because there was no methane present and there were no conditions that created potential ignition sources. (Tr. 58). Generally speaking, a violation is properly designated as non-S&S if it is unlikely that the hazard contributed to by the violation will result in a serious injury. *Nat'l. Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

The abatement period was initially established as April 28, 2005. The abatement date subsequently was extended until May 16, 2005, to provide an opportunity for MSHA's Technical Support personnel to examine the seals. (Gov. Ex. 1).

MSHA technical personnel and Wabash representatives observed the south seals on May 9, 2005. MSHA was represented by Clete Stephan, MSHA's technical support seal expert, inspector Miller and Mark Eslinger, MSHA's supervisory mining engineer. Wabash's principal representative was by Jack Trackemas who is the Director of Technical Services for Foundation Coal Company, Wabash's parent company.

Mark Eslinger is a registered professional engineer in the State of Indiana. He has been employed by MSHA and its predecessor agencies since 1971. Miller enlisted Eslinger to accompany him and Stephan during their May 9, 2005, inspection of the seals. (Tr. 207). Eslinger opined there is no way to test a seal for horizontal strength once it is installed. (Tr. 218).

Eslinger testified about the industry standard testing (ASTM) procedures for ensuring the compressive strength of cementatious seals that were utilized by Alminco with respect to sampling and 28 day curing. In this regard, Eslinger stated:

> Question:. So how do you tell if a seal is good or bad?
>
> Eslinger: Well, it has to be built like I said in accordance with what's approved, okay. And in a case like the pumpable seals, to assure that there is a minimum compressive strength to the concrete or I'm calling it concrete because its very similar to concrete, it's low-strength concrete . . . . There is a standard test for testing concrete cylinders, and it's the same test that's used there to determine the compressive strength of the material.

(Tr. 215-16).

Eslinger further testified that based on his May 9 observation of the powdery consistency and surface cracks on the faces of the south seals, he concluded:

> I think [the seals] had enough vertical pressure of the roof and floor such that the seals have cracked and that they would no longer withstand the 20 psi if we subjected it to the 20-pounds-per-square-inch pressure weight.

(Tr. 218).

Clete Stephan is a registered professional engineer in the State of Pennsylvania and a nationally Certified Fire and Explosion Investigator (CFEI). (Gov. Ex 12). He has been employed by MSHA in supervisory and engineering positions since 1977. During his tenure at MSHA, Stephan has investigated numerous underground coal mine explosions. He currently serves as a General Engineer in MSHA's Ventilation Division. Stephan testified that, while solid concrete block is generally stronger than cementatious foam seals, it is unforgiving under stress. Thus, cementatious foam is the material of choice in applications where convergent roof and mine floor forces cause squeezing. (Tr. 302-03).

Stephan explained that curing problems arise in seals when moisture leaves the slurry mix prematurely before the cementatious material hardens and acquires its compressive strength. (Tr. 297-98). Based on his May 9, 2005, observations of the south seals, Stephan concluded that the granular surface and facial cracks, that he estimated were 4 to 5 inches in depth, were attributable to improper curing. (Tr. 306, 309). Stephan opined ". . . that the powdered material that was there would really give an indication that those seals didn't really have the compressive strength that they needed throughout the body of the seal to survive that kind [20 psi] of an explosion." (Tr. 311).

Stephan ultimately opined that the south seals could only withstand 5 psi horizontal pressure. (Tr. 337). Stephan's opinion was not based on any quantitative analysis. Rather, he concluded the south seals were not significantly structurally stronger than standard ventilation controls such as stoppings, regulators and overcasts, that can withstand approximately 2 to 4 psi lateral pressure. (Tr. 337).

Stephan also expressed concern over the degree of convergence of the south seals. Stephan opined that while convergence tightens the center area of the seal where convergence occurs, it weakens the outer perimeter. (Tr. 336-37). Thus, Stephan initially opined that MSHA would accept "around 20 percent convergence." (Tr. 355). Whether he initially mis-spoke is unclear because he immediately changed the maximum acceptable convergence to 30 percent. *Id.* Thus, Stephan opined convergence of 1.8 feet in a 6 foot entry and 2.1 feet in a 7 foot entry was the maximum vertical pressure the south seals could withstand and still maintain structural rigidity at 20 psi horizontal force. (Tr. 355-57).

The exact magnitude of convergence for each of the 5 south seals is unclear. While the entries have converged from 6 to 7 feet high to 3½ to 4½ feet high, it is doubtful that the seals have compressed to 3½ to 4½ feet high because the seals have been driven into the floor causing the floor to heave around the seals. For example, the mine floor has heaved around the sampling pipe in the No. 5 south seal although the pipe originally protruded from the seal approximately one foot above the mine floor. (Tr. 551, 562-63, 606-07; Gov. Ex. 17).

Despite Stephan's concern about the extent of convergence, Stephan also testified that he believed the south seals never had the ability to withstand more than 5 psi since they were installed in 1993 because of improper curing. (Tr. 395-96). However, Stephan was unable to explain satisfactorily why he concluded the south seals were capable of withstanding only 5 psi explosive force, initially relying on laboratory observations of similar seals at the National

Institute of Occupational Safety and Health (NIOSH) Lake Lynn testing facility[2] that failed when exposed to explosive forces, and later relying on his observations at mine explosion accident sites where seals failed. (Tr. 390-397).

b. 104(b) Order

On May 16, 2005, MSHA representatives met with Wabash mine management. Wabash informed MSHA that it intended to contest the citation and that it did not plan to replace the seals until the matter was litigated. On that day, following the meeting, MSHA inspector Elzia Napier was directed by his supervisor to issue 104(b) Order No. 7598049 with respect to the south seals.[3] The Order stated:

> No effort has been made by the mine operator to replace or rehabilitate the 2nd West south seals, citation #7580994, dated 3/28/2005. All persons are to be withdrawn from the 2nd West Cut Thru area from 1W3 belt underpass to the doors at crosscut #4 on 2nd West.
>
> No one is to enter this affected area except those persons designated by the operator or an authorized representative of the Secretary necessary to correct the condition or any public official whose official duties require him to enter the area and any representative of the miners who in the judgment of the operator or an authorized representative of the Secretary whose presence in such area is necessary for the investigation of these conditions and any consultant to any of the foregoing.

(Joint Stip 12; Gov. Ex. 2).

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[2] Lake Lynn is an experimental coal mine facility where tests have been performed and documented in various publications by NIOSH, the Bureau of Mines, MSHA and seal manufacturers, concerning a variety of seal designs including cementatious foam seals. (Tr. 213-14, 297-99).

[3] Section 104(a) of the Mine Act provides that a citation issued by the Secretary ". . . shall fix a reasonable time for the abatement of the [cited] violation." 30 U.S.C. § 814(a). Section 104(b) provides that if on follow-up inspection the Secretary finds:

> (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, [she] shall . . . promptly issue an order requiring the operator . . . to immediately cause all persons [affected] . . . to be withdrawn . . . until . . . the Secretary determines that such violation has been abated.

The 104(b) order prevented inspection of the south seals by Wabash's preshift examiners as well as examination of a second set of seals known as the north seals, which were on a separate split of air. Since the order precluded regular preshift examinations, the State of Illinois directed its mine inspectors to inspect the seals on a weekly basis. (Tr. 438-39). During those inspections, Illinois personnel took bottle samples both in front of the seals and from the sample pipe in the No. 5 seal that draws air from the sealed area. These samples did not reveal any leakage. (Tr. 443).

At the hearing, the record was left open for MSHA to modify the 104(b) order to relieve the Illinois inspectors of performing the functions of Wabash's preshift examiners. (Tr. 833-35). 104(b) Order No. 7598049 was modified by MSHA on September 16, 2005. The modification specified:

> Order #7598049 is hereby modified to allow preshift and weekly examinations along the normal examination routes through the area now covered by this order. No other work or travel through the 2nd West entries is allowed except for correcting hazards identified during the examinations.

Letter from R. Henry Moore, Esq., to Judge Feldman (Sept. 9, 2005).

c. Wabash Witnesses

Jerry Odle is a State of Illinois inspector who has been inspecting the Wabash Mine since 1993. In May 2005 Odle began performing frequent inspections of the south seals in lieu of preshift examinations after the 104 (b) order was issued. Odle's bottle samples did not reveal any leakage.

Donald McBride is Odle's supervisor. McBride has been employed by Illinois for 16 years. McBride did not believe the south seals needed to be replaced. McBride testified:

> Question:. Did you come to a conclusion as to whether or not those seals needed to be replaced?
>
> McBride: Not just from looking, no. The seals are – the wood, the cribbing, the timbers on the approaches to the seals, the walking height, is no cakewalk. In fact, it's what we call a duck walk or a monkey walk from in between each seal.
>
> Now, the approaches to the seals was [sic] no problem, once you got to the sealed area, the heaving that's been talked about, had caused the walking height to be uncomfortable at best. But we didn't see anything top-wise that I would consider a hazardous condition.
>
> Question: Okay, in terms of the seals themselves, did you come to a conclusion that they were doing what they were supposed to?

McBride: They separate the two atmospheres. We have very bad air behind the seals because there hasn't been any fresh air ventilation there since 1993. Methane goes up, oxygen goes down, and you want to make sure that stuff stays contained behind the seal.

(Tr. 442-43).

McBride further testified that he "[had] no way of knowing" whether a seal with surface cracks that was not leaking could withstand an explosive force. (Tr. 492). Thus, both Odle and McBride believed the south seals were performing their function.

James Miller is a United Mine Workers Union safety committeeman who has worked at the Wabash Mine since 1974. Miller believed, based on normal methane readings, that the south seals separated the sealed area from the active area of the mine. (Tr. 645).

Alan Campoli has a Ph.d. in Mine Engineering and Master's degrees in Mining and Industrial Engineering. Campoli's Ph.d. dissertation was on high stress failure of coal pillars in underground mines. Campoli's dissertation is applicable to the issues in this case that concern the structural sufficiency of seals that are exposed to convergent underground mine stresses.

Campoli was employed as a research engineer by the United States Bureau of Mines in Pittsburgh, Pennsylvania from 1979 to 1995. Campoli specialized in ground control and methane drainage system design. As a consequence of his employment, Campoli was familiar with the testing procedures and results for seals at NIOSH's Lake Lynn facility.

Since 1997, Campoli has been the Business Development Manager for Minova, USA, a leading supplier of seals that performs services related to the design and installation of cementatious seals. (Tr. 528; Resp. Ex. 12). In fact, some of the seals evaluated at Lake Lynn were designed by the Minova company. Campoli's duties include consulting with mine operators with regard to the suitability of a particular type and size of cemetatious seal for a particular mine.

Campoli examined the south seals at the Wabash Mine in April 2005. (Tr. 533). After viewing the seals Campoli concluded:

> And I believe after - - after a view of the seal faces and looking at the - - they are unsightly, as everyone has said, but they - - they - - they- - my inspection revealed them to be basically solid. And I believe that in their condition, considering the test results from the grab samples that were taken when they were placed, combined with the amount of deformation that they had experienced in the mine, that they meet or exceed the [20 psi] standard that was set at Lake Lynn.

(Tr. 535).

Campoli stated that the weakest area of a mine that is exposed to stress will experience the most deformity. In the vicinity of the south seals, Campoli concluded the weakest area was the mine floor. In this regard, Campoli opined that the primary convergent force was from the roof through the coal pillars and seals transferring weight to the bottom causing heaving of the mine floor. (Tr. 535-36). Campoli testified that it was significant that the south seals were strong enough to deform the mine floor, yet maintain their integrity at the bottom of the seal. In other words, it was the seal that was pushing on the mine floor causing it to heave. (Tr. 542-43). He stated, "[a] granular material that runs like sand cannot do that." (Tr. 544).

Campoli attributed the facial cracking to the dilation (expansion) of the face of the seal. Thus, he concluded a four inch deep facial crack does not reflect a four inch loss of width of the seal because of the expansion at the face due to vertical stress. (Tr. 545-46). He explained that, since the seal is not pliable enough to bow at the center, surface cracks are created. (Tr. 545).

Campoli disagreed with Stephan's conclusion that the granular consistency at the faces of the seals was evidence of improper curing. Rather, Campoli opined that the sand-like particles were a result of the long-term exposure of the faces to the mine atmosphere. (Tr. 548). To support his opinion, Campoli explained:

> . . . if the material was poorly cured throughout the entire seal, under this - - under this heavy loading and under this dramatic deformation, it would be rolling out. But its not rolling out. If you look at your pictures, your Honor, the crack is still vertical. How can sand stay vertical in that situation? The material must have set properly to - - to be able to react to this - - to this abuse in this manner.

(Tr. 550).

Finally, Campoli addressed Stephan's concern regarding the degree of convergence. Campoli explained:

> Also I want to address the fact about the shortening. I believe that the shortening of the entry cannot be - - cannot be viewed as a one-to-one correlation with the shortening of the seal. I believe in this case the seal has pushed into the bottom and measuring - - when you measure the convergence of the entry, I think only a portion of that has actually been experienced by the center of the seal, because the center of the seal had been strong enough to push down and extrude the bottom [of the mine floor] into the front of it.

(Tr. 551).

In the final analysis, Campoli agreed with State inspectors McBride and Odle that the only way to determine if a seal has lost its structural ability to withstand the force of an explosion is to test for leakage (Tr. 551-52). Based on his observations of the south seals, given no evidence of leakage reflecting cracks penetrating the width of a seal, Campoli concluded that the south seals continued to accomplish their intended purposes of separating the mine from the

sealed atmosphere, as well as providing an explosion resistant barrier that is capable of withstanding at least 20 psi horizontal force. (Tr. 534).

As noted, Jack Trackemas is the Director of Technical Services for Foundation Coal Company, Wabash's parent corporation. Trackemas is the Director of a group that is responsible for all aspects of mine engineering with respect to such areas as ventilation, roof control and geology. On May 9, 2005, Trackemas tested the south seals for leakage in the presence of Miller, Eslinger and Stephan. The south seals were performing their intended function of separating the abandoned mine atmosphere from the active workings as there was no evidence of leakage.

Trackemas has participated in the design and testing of seals at the Lake Lynn site. (Tr. 678-81; Resp. Ex 10). Although Campoli believed the seal width was not compromised significantly by surface cracks that were caused by dilation at the face, Trackemas concluded the only way to address MSHA's concerns that the facial deterioration caused a functional reduction in the width of the seals was to perform a computerized model finite element analysis. (Tr. 695-96).

Trackemas conducted a finite analysis model (model) of seals and incorporated his findings in a report entitled "Comparison of 4-ft Converged Seal with 8-ft Standard Seal." (Resp. Ex. 9; Tr. 694-95). The model is a computer program that is used for design applications in the aviation, automotive, structural engineering industries, as well as underground mining. Computer models are particularly useful in addressing roof control issues at mine sites. (Tr. 727-28). Trackemas created a computerized model to determine the stress on, and within, two seals, one 8 feet high by 4 feet wide, and the other 4½ feet high by 3 feet wide. (Tr. 695, 715, 727). The latter computer model represented a compressed seal. The models revealed that reducing a seal's height as a consequence of vertical compression increases its resistance to horizontal forces. (Tr. 715). Specifically, the models demonstrated that 20 psi exerted on the shorter seal had less effect than 20 psi exerted on the taller seal. (Tr. 717-18). Put another way, the shorter compressed seal had a greater density of molecular structure, and it was more stable and less prone to movement when subjected to 20 psi horizontal force. (Tr. 719-20; Resp. Ex. 9, fig. 4, 6). Trackemas' model was conservative in that it assumed a compressive strength of 200 psi while the Alminco test samples reflect that the south seals' compressive strength was considerably greater. (Tr. 769; Resp. Ex. 11).

III. Discussion and Evaluation

Section 75.333(h), the cited mandatory safety standard, requires that "[a]ll ventilation controls, including seals, shall be maintained to serve the purpose for which they were built." The purpose of a seal is twofold: (1) to maintain separation of the air between abandoned and active areas of a mine; and (2) to provide an explosion-resistant barrier between the two atmospheres so that the seals prevent an ignition or explosion on either side of the seal from penetrating through the seal. As the evidence does not reflect leakage, the focus shifts to whether the south seals retain the requisite horizontal structural integrity to survive an explosion.

Although section 75.333(h) does not contain the minimum horizontal strength requirements for a cementatious foam seal, section 75.335(a)(2) requires that alternatives to solid concrete block seals must be capable of withstanding at least 20 psi static horizontal pressure. Wabash does not dispute that the minimum 20 psi standard must be satisfied in this case. Moreover, the Secretary's incorporation of the 20 psi standard into the fitness for purpose provisions of section 75.333(h) is reasonable and entitled to deference. *See, eg., Energy West Mining Co. V. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994).

The criteria for ensuring that cementatious seals are capable of withstanding a minimum horizontal force of 20 psi were developed at Lake Lynn. Namely, seals must be at least 4 feet thick, and they must have a compressive (vertical) strength of at least 200 psi. MSHA accepts a sampling methodology of nine cylindrical samples taken from standardized locations from each seal during the installation process. The samples, after curing for 28 days, are subjected to laboratory compressive forces to ensure a 200 psi convergent force tolerance. The evidence reflects that, when installed in 1993, the subject seals satisfied the 4 feet width requirement and significantly exceeded the 200 psi compressive strength requirement based on Alminco's sampling results. Although Wabash asserts the seals may have been poured to widths of as much as 4½ feet, the claim is self-serving and based on a purported general company policy without any documentation or company knowledge of the specific widths of the south seals. (Tr. 772-73).

The Secretary argues that a violation of section 75.333(h) exists because the seals do not currently have the requisite 20 psi horizontal strength because of either improper curing at the time of their installation, or, deterioration caused by compression from exposure to convergent forces. It is axiomatic that the Mine Act imposes on the Secretary the burden of proving the fact of occurrence of the cited violation by a preponderance of the evidence. *Garden Creek Poccahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). The Commission has articulated that the Secretary satisfies her preponderance of the evidence burden by demonstrating "that it was more likely than not" that the cited violation occurred. *Enlow Fork Mining Company*, 19 FMSHRC 5, 13 (January 1997). The Secretary has not offered an objective quantitative test for determining the residual horizontal structural strength of an existing cementatious foam seal exposed to many years of underground stress. Thus, the Secretary has not presented direct evidence to support her case.

While the Secretary may satisfy her burden of proof by relying on reasonable inferences drawn from indirect (circumstantial) evidence, such inferences must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact to be inferred. *Garden Creek Pocahontas,* 11 FMSHRC at 2153 *citing Mid-Continent Resources, Inc.*, 6 FMSHRC at 1132, 1138. Here, the Secretary seeks to prevail on the ultimate fact to be inferred, *i.e.*, inadequate horizontal structural strength, based on inferences drawn from observations of the faces of the seals from the active side of the mine. The faces on the abandoned side of the seals are not accessible.

The parties draw conflicting inferences from the condition of the south seals. It is for the trier of fact to determine the more reasonable inferences and conclusions. *Sec'y of Labor on*

behalf of Jackson v. Mountain Top Trucking Co., 23 FMSHRC 1230, 1236 (Nov. 2001). Before addressing the inferences to be drawn, inspector Miller conceded that fundamental engineering principals dictate that structures must be designed with a margin of safety. (Tr. 121-24). Thus, when seal specifications require a minimum of four feet in width and at least 200 psi vertical strength to assure horizontal strength of at least 20 psi, reasonable departures from those specifications due to construction variations or deterioration are contemplated. In this regard, as Stephan explained, unlike concrete block, cementatious seals are "forgiving" in that they are designed to deform when subjected to convergent stress. Virtually all witnesses, including Miller, Stephan and Campoli, agree that as a general proposition, facial deterioration is an anticipated result of exposure to convergent stress, and that such deterioration does not necessarily establish a lack of structural integrity.

Alminco's sample results, not challenged by the Secretary, reflect the average compressive strength of the five south seals at installation was 392 psi. Stephan conceded increasing the vertical strength of a seal will increase its horizontal strength, although not in linear proportion. (Tr. 314). Thus, we begin with seals that significantly exceeded the minimum requirements for structural strength at the time they were installed in 1993, notwithstanding the margin of safety.

Turning to the Secretary's case, it is noteworthy that the "long history behind these seals" related by Miller evidences a history of indecision with respect to the functionality issue. (Tr. 102-03). The culmination of this "long history" resulted in Miller's issuance of Citation No. 7580994 on March 28, 2005, despite: no evidence of leakage to warrant the conclusion that the seals had been structurally compromised; Miller's admission that facial deterioration is a natural consequence of convergent stress; Miller's acknowledgment that he had "no way of knowing what's behind" the face of the seal; and the fact that the seals have retained there vertical tolerance despite being subjected to the weight of approximately 800 feet of overburden since 1993.

Significantly, Miller designated the cited violation in Citation No. 7580994 as non-S&S, purportedly because an explosion was unlikely because of a lack of methane and a lack of ignition sources. (Tr. 58). However, the likelihood of explosion and propagation, which are constant hazards in an underground mine, must be viewed in the context of continued mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *see also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986). Yet the non-S&S designation represents the Secretary's contention that it was not reasonably likely that the alleged structurally compromised seals will result in an event; *i.e.*, an explosion and rupture of the seals, that will cause serious injury. *See U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). Rather, a more plausible explanation for the non-S&S characterization is MSHA's inability to determine the likelihood of failure (the residual horizontal strength) of the south seals in the event they were subjected to an explosion.

It is noteworthy that Miller's issuance of Citation No. 7580994 on March 28, 2005, occurred six weeks before technical support personnel visited the mine. Thus, Miller did not have the benefit of technical support's opinions when the citation was issued. Consequently, the

observations and opinions of Eslinger and Stephan serve only to support MSHA's after-the-fact issuance of the citation rather than as a basis for Miller's action on March 28, 2005. This is the context in which Eslinger and Stephan's testimony must be viewed.

Miller's citation alleging that the seals no longer serve their intended purpose is not adequately supported by Eslinger or Stephan's testimony. Eslinger testified the primary way of knowing whether pumpable seals are sound is if proper sampling is performed during the installation process. As noted, proper sampling of the south seals was performed. It reflected an average compressive strength of 392 psi. Moreover, there is no evidence that the samples revealed any curing problems. Eslinger's testimony that "he thinks" the seals can no longer withstand 20 psi horizontal force based on his observations of facial deterioration fails to approach the Secretary's preponderance of evidence burden. (Tr. 218).

Stephan's testimony concerning the underlying basis for his assertion that the seals no longer serve their intended purpose is contradictory. Stephan contends the south seals had "no compressive strength" since they were installed in 1993 because of improper curing. (Tr. 315). Stephan also testified the seals are defective because of the degree of compression. Yet, Stephan concedes the purportedly improperly cured south seals, that allegedly lack compressive strength, do not leak despite their exposure to significant compressive forces for 12 years. (Tr. 363-64).

Moreover, Stephan's curing theory was challenged by Campoli who questioned how vertical surface cracks subjected to enormous convergent stress can maintain their integrity if the surrounding material was flawed due to improper curing. In addition, Stephan's opinion that the seals were structurally unsound is not supported by state inspectors Odle and McBride, as well as UMWA safety committeeman James Miller, who all opined that the seals were functional. As inspector Miller testified, without taking a drilling sample from the center of the seals, he had no way of determining structural integrity. (Tr. 120-21). Miller's testimony was echoed by state inspector McBride. (Tr. 492). In the final analysis, Stephan's belief that the south seals were improperly cured based on the degree of powdering he observed on the faces is based on conjecture.

With regard to compression, the evidentiary value of the degree of convergence described by Stephan is outweighed by the significant mine floor heaving that encapsulated the seals making it difficult to accurately determine the actual degree of compression. Stephan's testimony is further undermined by Trackemas' computer model that reflected that compression strengthens the horizontal resistance of a cementatious seal. In fact, Stephan admitted, consistent with Trackemas' findings, that convergence tightens the center of a seal while weakening the outer perimeter. (Tr. 336-37). The weakening of the outer perimeter occurs because cementatious seals are designed to "give" as a result of horizontal expansion due to vertical compression. As Campoli explained, while the effect of vertical compression alters the original dimensions of the seal with respect to height, it does not necessarily reduce the width of the seal because it causes expansion at the perimeter. Thus, surface deterioration does not establish that a seal no longer retains the required width. In this regard, Miller, Stephan and Campoli all agreed

that surface cracking and granular material are natural consequences of compression which, unlike concrete block, the cementatious seal was designed to withstand.

Thus, the evidence reflects that facial deterioration is not a reliable predictor of inadequate structural integrity. In this regard, at Lake Lynn, the continuing viability of seals that are exposed to a 20 psi explosive force is determined by whether there is leakage rather than the appearance of the exterior of the seal. (Tr. 359-60). In other words, testing for leakage after a seal is exposed to significant stress is the method of determining the seal's continuing effectiveness. It is the absence of leakage that is the central rub in the Secretary's case.

Moreover, Eslinger and Miller were considerably less sanguine than Stephan concerning their ability to predict the condition of the core of the seals based on limited exterior facial observations. Eslinger only "thought" the seals lacked the requisite horizontal strength and Miller conceded "he had no way of knowing what's behind" the facial deterioration. (Tr. 120-21, 218). State inspector McBride also testified that he did not believe the degree of resistance to explosive forces could be determined based solely on observations. (Tr. 486-87).

The futility of MSHA's attempt to evaluate the residual horizontal force tolerance of an existing seal based on observation is illustrated by Stephan's testimony. Stephan testified that, based on his observations, he concluded the south seals could not withstand more than 5 psi horizontal force. Stephan's opinion was based on comparing the condition of the seals to the post- explosion condition of failed seals he had seen during the course of his many years of investigating mine explosions. Stephan also testified that he compared the condition of the south seals to the condition of cementatious seals he had seen at the Lake Lynn testing facility that could only withstand 5 psi force. (Tr. 391-95). Stephan's asserted ability to confidently assess the residual horizontal strength of the south seals by comparing them to other seals he had previously observed that were constructed with different materials, and that were exposed to different conditions, is unpersuasive. Similarly, Stephan's vague assertion that he had observed similar curing problems at Lake Lynn on other cementatious seals that convinced him that the south seals had cured improperly is likewise entitled to little weight. (Tr. 296-97, 315).

While MSHA witnesses contend it is a matter of degree, their opinions are subjective and not amenable to objective quantitative analysis. Although subjective opinions can provide a basis for satisfying the burden of proof, in this case, in the absence of leakage, the opinions relied on by the Secretary are less convincing than the contrary opinions of Campoli, Trackemas and the State of Illinois mine inspectors.

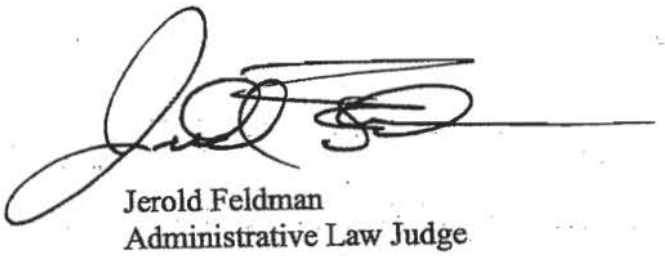
As noted above, the Secretary has the burden of demonstrating that "it is more likely than not" that the south seals can no longer withstand a static horizontal force of 20 psi. *Enlow Fork Mining Company, supra.* The equivocal nature of the conditions observed at the south seals, and the absence of leakage despite longstanding exposure to significant stress, do not support the Secretary's inference that the seals' residual horizontal strength is inadequate. Thus, the Secretary has failed to satisfy her burden of proof. Consequently, 104(a) Citation No. 7580994 and 104(b) Order No. 7598049 issued as a result of Wabash's failure to abate the cited condition shall be vacated.

As a final matter, this decision should not be construed as trivializing the significant hazard posed by seals that no longer perform their intended functions. While I have considered the alternative of erring on the side of caution and affirming the citation, I decline to do so because it would alter the burden of proof and violate due process.

ORDER

In view of the above, **IT IS ORDERED** that Wabash Mine Holding Company's contest **IS GRANTED**.

IT IS FURTHER ORDERED that 104(a) Citation No. 7580994 and 104(b) Order No. 7598049 **ARE VACATED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 21, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, ON BEHALF OF DOYLE DAVIS,	:	TEMPORARY REINSTATEMENT PROCEEDING
Complainant	:	Docket No. CENT 2006-98-DM
v.	:	SC-MD 2006-04
SMASAL AGGREGATES & ASPHALT, LLC,	:	Portable Plant No. 1
Respondent	:	Mine ID 23-02197

DECISION AND ORDER OF TEMPORARY REINSTATEMENT

Appearances: Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant,
Robert C. Johnson, Esq., Husch & Eppenberger, LLC, Kansas City, Missouri, for Respondent.

Before: Judge Zielinski

This matter is before me on an Application for Temporary Reinstatement filed by the Secretary of Labor ("Secretary") on behalf of Doyle Davis pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(2). The application seeks an order requiring Respondent, Smasal Aggegates & Asphalt, LLC ("SA&A"), to reinstate Davis as an employee, pending completion of a formal investigation and final order on the complaint of discrimination he has filed with the Secretary's Mine Safety and Health Administration ("MSHA"). A hearing on the application was held in Kansas City, Missouri, on March 14, 2006. For the reasons set forth below, I grant the application and order Davis' temporary reinstatement.

Summary of the Evidence

SA&A produces aggregate at a crushing and screening facility known as Portable Plant # 1, near Lincoln, Missouri. The immediate supervisor of the facility is Leo Michael Smasal. As its name implies, SA&A operated the quarry and also had an asphalt paving operation. From 2001 through 2004, SA&A was owned by Smasal. Davis began working in the asphalt operation in 2001 as a roller operator and general laborer. His work history was good, and there was no disciplinary or other adverse action taken against him. Tr. 18. In 2004, Smasal terminated the entire asphalt crew. Davis then worked at other jobs, but also worked at the

SA&A quarry because Smasal had told him that he would like him to stay and return to the asphalt operation when he hired another crew. Tr. 21. Smasal later sold SA&A to Kevin Fahey, who also apparently owned another aggregate operation, Beyer Crushed Rock Company. Rick Miller managed both facilities, and Smasal became the on-site supervisor at SA&A. In May of 2005, Miller hired Davis to work at the SA&A quarry, after talking to Smasal. Davis was initially assigned to set up newly purchased conveyors. After a few weeks, he was assigned to drive a haul truck, which he continued to do for the remainder of the year. On December 21, 2005, the workers at the plant were laid off for the holidays, and were told to come back on December 29, 2005, to pick up their checks. On that date, Miller told Davis that he would not be needed for the coming year, i.e., that his employment was terminated. Davis filed a complaint of discrimination with MSHA on January 23, 2006, alleging that he had been discharged because he had participated in investigations of two other discrimination complaints made by miners at the facility, and because he had made safety complaints.

Davis described several actions that he contends were activities protected by the Act. In August 2005, Jay Heetland, an SA&A employee, was fired. According to Davis, the termination was an outgrowth of a heated exchange between Smasal and Heetland, the excavator operator, over Heetland's safety concerns about how the haul trucks approached the excavator. Tr. 63-65. Davis was present during the discussion, and told Smasal that he believed that Heetland's concerns were valid and that the practice being followed was unsafe. Tr. 65. Heetland filed a complaint of discrimination with MSHA, and an investigation commenced. The investigator appeared at the mine site and presented Smasal with a list of approximately four employees that he wanted to interview. Smasal arranged for someone to temporarily take over the subject employee's duties, took him to the investigator, returned him to his job site after the interview, and then took the next person on the list to be interviewed. In late November 2005, MSHA conducted an investigation of another discrimination complaint that had been filed by a SA&A employee, Jason Powell. The investigator followed the same procedure in that case. Davis was interviewed during both of those investigations. The interviews were conducted in the MSHA investigator's private vehicle, and Davis' lasted about 20 minutes.

Davis also brought work-related issues to management's attention. Certain pieces of equipment at SA&A were equipped with radios. Davis felt that the haul truck drivers should also have the ability to communicate with each other and with other staff. He and at least one other haul truck operator had radios that they had acquired with personal funds. They brought the radios in and used them in the course of their duties. Davis raised the topic of radios with Miller, who initially expressed some concern that they would be used for chit-chat. However, Miller relented, and told Davis that SA&A would reimburse the miners for the cost of their radios, and that they should present a receipt for the purchases. Davis testified that not all of the operators had radios, and some were reluctant to expend personal funds for them. SA&A's scalehouse operator suggested that he would order radios. However, he later reported that he had been instructed not to order them. Davis interpreted that response as an indication that SA&A had withdrawn the offer to reimburse miners who had purchased radios. He never presented a receipt for his radio, or otherwise requested reimbursement. Davis and the other miners used their

radios, and there is no evidence that SA&A sought to interfere with that use.

Davis experienced problems with the tires on his haul truck. In his opinion, they showed considerable wear, which led to problems such as blowouts when he encountered rocks or other obstructions. When performing his preshift examinations, he frequently recorded "bad tire" on the examination report. He also had a problem with tire leaks, often discovering that a tire was underinflated during his preshift examination, or in the middle of his shift. These problems were brought to Smasal's attention, both verbally and by the notations on the preshift examination forms, which Smasal reviewed every day. Davis felt that those problems, and others, such as worn tires, lingered for weeks or months, and he called them to Smasal's attention on numerous occasions.

Respondent, through Smasal and Miller, contradicted much of Davis' testimony. Records of repairs performed on tires on the haul truck driven by Davis were produced, and it was explained that problems with haul truck tires, particularly valve stems, were relatively common because of the environment, where they encountered rocks and mud. Tire issues were approached in a graduated fashion, and tires were eventually replaced on Davis' truck. Smasal also testified that Davis was at least partially responsible for the problems, because he struck rocks that should have been avoided. He also drove in dumping areas where he was not supposed to have gone, and encountered mud, which can get compressed between the tandem tires and create problems with the valve stems. Miller also explained that the offer to reimburse miners for the purchase of radios had never been retracted, and confirmed that no one had requested, or been denied, reimbursement.

Findings of Fact and Conclusions of Law

Section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), provides, in pertinent part, that the Secretary shall investigate a discrimination complaint "and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint." The Commission has established a procedure for making this determination. Commission Procedural Rule 45(d), 29 C.F.R. § 2700.45(d), states:

> The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner's complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

"The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Sec'y of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought, if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). The "not frivolously brought" standard has been equated to the "reasonable cause to believe" standard applicable in other contexts. *Jim Walter Resources, Inc.*, 920 F.2d at 747; *Sec'y of Labor on behalf of Bussanich v. Centralia Mining Company,* 22 FMSHRC 153, 157 (Feb. 2000).

While an applicant for temporary reinstatement need not prove a *prima facie* case of discrimination, it is useful to review the elements of a discrimination claim in order to assess whether the evidence at this stage of the proceedings meets the non-frivolous test. In order to establish a *prima facie* case of discrimination under Section 105(c) of the Act, a complaining miner bears the burden of establishing (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842 (Aug. 1984); *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

A miner's ability to complain about safety issues and to participate in investigations of discrimination complaints are fundamental rights afforded and protected by the Act. Complaints made to an operator or its agent of "an alleged danger or safety or health violation," and participation in discrimination proceedings are specifically described as protected activity in section 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1). Even on this limited record, the Secretary has presented ample evidence that Davis engaged in activity protected under the Act. He participated in the investigation of two discrimination complaints, and raised issues that pertained to the safe operation of the haul truck.

SA&A argues that Davis' concerns about radios, tires, and other issues were routine non-safety related work discussions that are now being transformed into something they were not. Aside from the discussion about backing haul trucks down to the excavator, Davis agreed that he did not identify his concerns specifically as safety issues, and did not raise them at weekly safety meetings. He felt that he had repeatedly raised his concerns with Smasal and Miller, and that they were well aware of them. Tr. 216-17. Regardless of the label Davis put on his concerns, the issue of the integrity of the tires on his haul truck was very much related to safety. The loaded haul truck weighed approximately 180,000 pounds. It had a total of six tires, including four in

dual tandems on the single rear axle. An underinflated or blown rear tire would very likely affect handling of the truck and, possibly, braking performance. Since the truck was required to operate on occasionally steep grades and rough pit roads, and in close proximity to other equipment, any problems caused by poor tires could pose safety concerns.[1]

As to Davis' participation in the MSHA investigations, SA&A argues that there is no evidence that it knew anything of the substance of Davis' participation, and that the mere knowledge that Davis spoke to an MSHA investigator cannot support an inference that that somehow led to his termination. However, SA&A knew how long Davis had spoken to the investigator, as compared with other miners, and also knew that the second investigation concerned a complaint by Davis' nephew, who Davis most likely would support.

The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999). Consequently, the Commission has held that "(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action" are all circumstantial indications of discriminatory intent. *Id.*

Respondent had knowledge of Davis' protected activity. His concerns about tire problems were raised directly with management. Moreover, the manner in which the MSHA discrimination investigations were conducted assured that his participation, as well as an indication of its extent, was known to management. Miller, who along with Fahey, made the decision to terminate Davis, testified that he was not informed of the identities of miners who participated in the MSHA interviews. Tr. 194. However, he acknowledged that he may have known the identity of one of the miners involved. Tr. 204-05. Smasal also was required to record items of interest and forward copies of his notes to Miller at the end of each day. Miller agreed that if the miners' identities had been reflected in Smasal's notes, he would have seen them. Tr. 204-05.

Some of Davis' activities, notably, his participation in the second MSHA investigation, occurred in relatively close proximity to the adverse action, which could give rise to an inference that it was motivated, in part, by the protected activity.

While there is no direct evidence of overt hostility toward protected activity by SA&A, there are indications that such information might be developed in the investigation of the

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[1] I agree with Respondent that the radio issue appears to be of limited significance. While Smasal agreed that effective communication can enhance safety, and that SA&A's major pieces of equipment are equipped with radios, there is no evidence that SA&A did anything to discourage the use of radios, or that it retracted the offer to reimburse miners who had purchased their own radios.

complaint. SA&A argues that other miners who spoke to the MSHA investigator are still employed. However, in addition to Davis, some miners who the MSHA investigator sought to interview are no longer employed by SA&A. Tr. 132. The extent of their participation in the investigation and the circumstances surrounding their departures were not explored at the hearing. The limited evidence regarding the incident that apparently led to Heetland's termination suggests that it may have been related to hostility toward safety concerns. It also appears unusual, considering the size of SA&A's workforce, that three miners would be subjected to adverse action within a few months, all of whom lodged complaints of discrimination with MSHA.

The strength of an inference of improper motivation may be countered by the plausibility of an operator's explanation for the adverse action, including any evidence of consistent treatment of other similarly situated employees. These issues are normally addressed in analyzing an operator's affirmative defense to an allegation of discrimination.[2] Respondent introduced evidence that Davis was not a model employee. He was repeatedly counseled about shortcomings, e.g., failure to wear his hard hat when he exited his truck, leaving a fuel nozzle in the "on" position, and driving errors that may have contributed to the tire problems and caused interruptions in production. Miller testified that he and Fahey made the decision to terminate Davis during what amounted to a year-end review, a process that they also followed with respect to the Beyer operation.

However, other evidence calls into question this seemingly plausible explanation. Aside from Smasal's daily notes, which may not have included references to some of the incidents, it is unclear exactly what information the decision was based upon. Smasal, Davis' day-to-day supervisor, typically had input into hiring and firing decisions made by Miller. Tr. 106. However, he was "not involved" in the decision to terminate Davis. Tr. 189. Copies of Smasal's notes show that the fuel nozzle incident occurred on October 27, 2005, and that Davis was confronted and told to watch closer, a response that was later approved by Miller. Ex. R-17. This incident occurred earlier than the second MSHA investigation, which Respondent argues was too far removed from the termination to support an inference of improper motivation. Aside from a failure to check a portion of a preshift examination form, the only other incident appearing in the copies of notes introduced at the hearing was that, on December 16, Davis had failed to wear his hard hat for the third time in thirty days. Ex. R-20. This rapid escalation of management's disciplinary response, from verbal reminders – to termination, particularly in the absence of some other documented business justification for the action, is difficult to understand.

Moreover, there is evidence that suggests that other employees may have committed similar transgressions and suffered no discipline at all. Smasal testified that tire issues were common and that the tire problems with Davis' truck were "about the same" as with the other trucks and vehicles, rebutting the suggestion that he was a poor driver who caused excessive

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[2] *See Ankrom v. Wolcottville Sand & Gravel Corp.*, 22 FMSHRC 137, 141-42 (Feb. 2000).

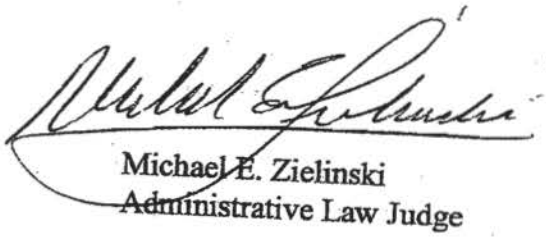
damage to tires. Tr. 180. Davis testified that many other employees had to be reminded about wearing hard hats, some took as much or more time off from work, and other vehicles often became stuck in mud. Tr. 31-32, 69, 217-25.

The investigation of Davis' discrimination complaint has not yet been concluded and no formal complaint of discrimination has been filed on his behalf. As noted above, there are many issues that should be thoroughly explored before any decision is made by the Secretary whether or not to pursue the complaint. The purpose of a temporary reinstatement proceeding is to determine whether the evidence presented by the Secretary establishes that the complaint is not frivolous, not to determine "whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources, Inc.*, 920 F.2d at 744. Congress intended that the benefit of the doubt be with the employee, rather than the employer, because the employer stands to suffer a lesser loss in the event of an erroneous decision, since he retains the services of the employee until a final decision on the merits is rendered. *Id.*, 920 F.2d at 748, n.11.

I find that there is reasonable cause to believe that Davis was discriminated against as alleged in his complaint, and conclude that the complaint of discrimination has not been frivolously brought.[3]

ORDER

The Application for Temporary Reinstatement is **GRANTED**. Smasal Aggregates & Asphalt, LLC, is **ORDERED to reinstate** Davis to the position that he held prior to December 29, 2005, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION**.



Michael E. Zielinski
Administrative Law Judge

[3] Respondent has requested that an adverse inference be drawn based upon the Secretary's failure to call the MSHA investigator as a witness. No authority has been cited in support of the request, which is denied. As noted above, the Commission's Procedural Rules specifically provide that the Secretary may limit presentation of the case to the testimony of the complainant. Moreover, the inference that Respondent requests be drawn does not logically flow from the concerns expressed about investigative techniques. In addition, it is doubtful that the investigator was peculiarly available to the Secretary.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

March 22 , 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2005-236-M
Petitioner	:	A. C. No. 01-00011-55330
v.	:	
	:	
IMERYS PIGMENTS, LLC,	:	Sylacauga Operation
Respondent	:	

DECISION

Appearances: Dane L. Steffenson, Esq., Office of the Solicitor, U.S. Dept. of Labor, Atlanta, Georgia, 30303, for the Petitioner;
Craig Stickley, Sylacauga, Alabama, 35150, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 801 *et. seq.*, the "Act", charging Imerys Pigments, LLC (Imerys) with violations of mandatory standards and proposing civil penalties for those violations. The general issue before me is whether Imerys violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110 (i) of the Act. Additional specific issues are addressed as noted.

Citation No. 6095190

Citation No. 6095190 alleges two "significant and substantial" violations of the standard at 30 C.F.R. § 56.20003 (b) and charges as follows:

> The 1st level floor of the Ultra Fine Blending Building has water being drained from lines in several different locations which do not discharge directly into a drainage ditch. The water is 1/8 inch deep and in places deeper and practically covering the entire ground level floor. Also hoses and other debri [sic] have accumulated in and near work areas and travel ways. Also on the upper levels old crates, valves, hoses and used parts are lying in work areas and travel ways. The condition is stated not be a norm for this location, and workers state they and their supervisor just now returned from holiday vacation and this is not a normal condition. People were traveling over and through the travel ways today.

The cited standard, 30 C.F.R § 56.20003 (b), provides in relevant part as follows:

> The floor of every workplace shall be maintained in a clean and, so far as possible, dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable....

Inspector Billy Randolph of the Department of Labor's Mine Safety and Health Administration (MSHA) commenced his inspection of Imerys' Sylacauga mine on January 3, 2005. At the Ultra Fine Blending Building, a multi level complex with a concrete ground level floor and elevated metal walkways, Randolph found water 1/8 inch to two inches deep on the ground level floor. The stairways and walkways were also wet. Randolph testified that he found in one area what he believed was oil mixed with the water making that area particularly slippery (See Exhibit G-3, pp. 1-3). These photographic exhibits corroborate Randolph's testimony in significant respects. In particular, they show an area where a container or bin was located from which Randolph determined that there was leakage of a substance mixing with the water and making the floor slick (Exhibit G-3, p. 1). Randolph also identified in this photograph footprints on the floor in the liquid. Other photographs show a liquid, which Randolph described as water running across the floor and, in particular, water pouring out of a drain onto the building floor (Exhibit G-4, pp. 2-3).

I find Randolph's testimony, corroborated by the photographic evidence, to be credible and sufficient to establish the first violation alleged in the citation. In this regard, I also observe Respondent's own photographic evidence showing a hose from which a liquid is pouring onto the building floor (Exhibit R-1) and note that the cited standard requires that "the floor of every workplace shall be maintained in a clean and, so far as possible, dry condition." Clearly the drain shown in Exhibit 3, page 3 and the hose shown in Exhibit R-1 could have been extended to the drainage ditches to remediate the wet conditions. Indeed, Plant Supervisor Michael Dewberry acknowledged at hearing that the hose seen in Exhibit R-1 could have been extended to the drainage ditch.

In reaching my findings, herein, I have not disregarded Respondent's claim that the cited plant had been operating for an "extended period", had been inspected by MSHA twice annually and had never been cited for the conditions now at issue. Respondent thus claims that it had not been given fair notice of MSHA's interpretation of the regulation in that MSHA had not been consistent in its enforcement, citing the case of *Alan Lee Good dba Good Construction*, 23 FMSHRC 995 (September 2001).

In order to prevail in this argument Respondent has the burden of proving that the cited condition had previously been inspected by MSHA and had not been cited or otherwise identified as violative. There is, however, no evidence in this record that an MSHA inspector had ever previously conducted an inspection at a time when similar conditions existed. Respondent's claims in this regard are based solely on speculation. Under the circumstances, Respondent has failed to prove that it lacked notice based on inconsistent enforcement. Clearly, a reasonably prudent person

familiar with the mining industry and the protective purposes of the standard would not have allowed the amount of water observed herein to pour across a work area as found herein. See *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990); *BHP Minerals Int'l Inc.*, 18 FMSHRC 1342, 1345 (August 1996).

I also agree with the inspectors' assessment that the violation was "significant and substantial" and of high gravity. A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonably 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:

> In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard - that is, a measure of danger to safety - - contributed to by the violation, (3) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> See also *Austin Power Co. v. Secretary,* 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.,* 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574 (July 1984); See also *Halfway, Inc.,* 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

In this regard Inspector Randolph testified in the following colloquy at hearing:

Q. [By Mr. Steffenson] Let's start with the water. Did you consider the water on the first floor to be an S&S violation.
A. Yes, I did. I mentioned that to Charles when we came through the door.
Q. Who is Charles?
A. Charles Sanders, the safety director. He was the company representative representing Imerys on the inspection. And Charles, if I remember right, had a camera with him that night.

ADMIN. JUDGE MELICK: Well, the question was why did you label that significant and substantial?

THE WITNESS: Because I could see that people had traveled in it. I turned to the miner's rep and Charles both and asked them had they ever had an accident out there from people sliding in this water. I think Charles said that he couldn't remember, but the miner's rep said, Yes, I have slipped in it and fell myself.

ADMIN. JUDGE MELICK: That's your testimony on S&S?
BY MR. STEFFENSON:

Q. Do you know the water on the floor, did that make the floor more slippery than otherwise?
A. Yes, it did. And then you had to step up on metal stairs, leaving that floor going up to the other levels. Water and the metal is very slippery to your feet.
Q. And what type of injury did you envision might occur?
A. Lost work days and restricted duty at the least.
Q. From what type of injury or accident?
A. From sliding down, broken arm, twisted knees, ligament damage to your knees, lacerations, bruising.

(Tr. 36-37)

While this testimony is not, in itself, very elucidating, reasonable inferences may also be made from the record to establish that reasonably serious injuries could likely result from the cited conditions and that the violation was of high gravity.

I also find that the violation was a result of significant negligence. It may reasonably be inferred that the slippery conditions were obvious and that Respondent could easily have remedied the conditions by extending a hose to the drainage ditches.

The second violation charged in the citation at bar relates to debris found on the upper level of the facility. In relevant part, the cited standard provides that "the floor of every work place shall be maintained in a clean... condition." While acknowledging the existence of the trash and debris as cited, the Respondent maintains that the debris (trash) was only recently placed where it was found and that the area was not a "workplace" as required by the standard at bar. However, since the trash was admittedly placed for temporary storage, I find that the cited area was, indeed, a "workplace". In this regard Plant Operator Robert McDaniel acknowledged that the trash was intentionally placed where it was found.

I also find that the violation was "significant and substantial" and of high gravity. In this regard Randolph credibly testified in the following colloquy at hearing:

Q. [BY MR. STEFFENSON] Let's go to the second floor material and you considered the debris and material laying on the walkway to result in an S&S violation:
A. Yes, I did.
Q. Why?
A. If you trip and fell, you're falling into other machinery, electrical boxes, all kind of machinery along those floors. You're falling on other debris, they had wooden crates that you could trip and fall into. These would cause lacerations and bruising enough to cause lost work days or restricted duty.
Q. And did you believe that an accident of that nature was reasonably likely?

A. Yes, I did, due to the fact of the number of people that's traveling it and the frequency they were traveling it, and when I interviewed them and asked them how often, that's how I determined it.

(Tr. 37-38)

Respondent also acknowledged that two miners were working when the citation was issued. While exposure to the hazards to two miners is significant, consideration must be given to the exposure to miners during continued operations.

Inspector Randolph found the operator chargeable with "moderate" negligence. According to Randolph the cited material had "a lot of dust on it" thereby suggesting that it had existed "a pretty good while". In addition, it is undisputed that there were no records at the mine to verify that the required workplace examinations had been conducted in the cited area. I find Randolph's testimony to be credible in this regard and conclude that the Secretary's negligence findings are proven.

Citation No. 6095193

Citation 6095193 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.11012 and charges as follows:

> Two openings from which a person or material could fall were found on the tops of the Blending tanks in the Ultra fines building. The openings were not marked or barricaded or covered or provided with railings. The plant operators state they have been collecting samples from these 2 and ½ feet in diameter (approximate) openings and leaning into openings to get samples and not wearing fall protection. Also a hazard to any clean up or maintenance person of falling into the openings are [sic] possible since the openings were in walkways. Lids were readily available to cover the openings but were not in use. The two plant operators state that they have been on vacation during past several days and that they normally cover the holes, but they think people filling in during their absence have left the lids off. Termination was agreed that railings will be installed to also provide protection while persons are getting samples of material from the holes. This is the third time in two years this standard has been cited at this mine site.
>
> The cited standard provides as follows:
>
> Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

It is undisputed that the cited openings existed as charged and that they were not marked with warning signals, barricaded or covered (See Exhibits G-4, pp 1-4). I accept the testimony of supervisor Michael Dewberry that the openings were 28 to 30 inches and 22 to 24 inches in diameter respectively. Plant Operator Robert McDaniel also acknowledged at hearings that persons could fall

through these openings. Accordingly, they were purportedly directed to wear fall protection when working around the openings. Clearly, however, the violation is proven as charged.

I also find that the violation was "significant and substantial" and of high gravity. As noted by Inspector Randolph, if the tank into which one would fall was empty, the drop off would be sufficient to cause fatal injuries. He testified that on the other hand, if the tank had liquid within, there was the risk of drowning. Although he incorrectly determined the depth of the drop-off, I find Randolph's testimony, adjusted to reflect the lesser distance of a fall, to be sufficient to support findings of a reasonable likelihood of serious injuries.

I also find that the Secretary has established that the violation was the result of high negligence. Inspector Randolph credibly testified in this regard, that the required workplace examinations had not been recorded and that there were other uncovered holes at the plant. I note that Plant Operator McDaniel testified that he had removed the cited covers earlier on the shift. Respondent notes that the covers had therefore been removed for no more than two hours and 55 minutes thereby suggesting lower gravity and negligence. I find, however, that leaving such conditions for that period of time rather amplifies the gravity and negligence. Respondent also suggests that no one would have been exposed to the open holes. He fails, however, to consider that the inspection party itself was exposed to the hazard.

In reaching my conclusions herein, I have not disregarded the evidence that Plant Operator McDaniel claimed that he had removed the covers earlier the same day they were cited. However, because they were left uncovered for at least two hours and 55 minutes and because of the number of other uncovered holes found at the plant, I find the operator chargeable with at least moderate negligence.

Citation No. 6095226

Citation No. 6095226, as amended, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.15005 and charges as follows:

> The contract miner, laying out the drill pattern had stepped off the drill pattern within 4 feet of the highwall face. He had traveled parallel to the drop off for approximately 35 feet. A fall of 25 feet to a water pond below which is stated to be 10 feet deep was likely. Tracks were measured and were 4 feet from the edge. Loose rocks were on the highwall edge increasing a chance of falling. The employee states he was told to stay 6 feet back from the edge and wear fall protection if needed. He also was told to mark off drill pattern which is closer than 6 feet to the edge. He had a safety harness in his truck and a 6 foot lanyard. A longer lanyard would be needed and a system to anchor to also is needed if, to work this close to a fall hazard. This company has been cited before within the past year for this same standard.

The cited standard provides in relevant part, that "[s]afety belts and lines shall be worn when persons work where there is danger of falling".

The credible and essentially undisputed evidence shows that an employee of a contractor engaged by Respondent was laying out a drill pattern above the highwall as close as four feet from the highwall face. The drop off from the top of the highwall was about 25 feet to a pond which was about 10 feet deep. The contractor's employee was not then wearing his six-foot safety harness nor any other safety belt or line. The ground where he was working was also rocky and unstable. I find that this evidence supports a violation of the cited standard.

Respondent maintains however, that even assuming, *arguendo*, that there was a violation since the cited miner was employed by an independent contractor it was not responsible for the violation.[1] The Commission in *Twenty mile Coal Co.*, 27 FMSHRC 260 (March 2005) *(appeal docketed No. 05-1124 D.C. Cir., argued February 14, 2006)*, set forth four factors to consider in determining whether a mine operator should be held liable for a violation committed by its contractor i.e. (1) which entity was in the best position to prevent the violation; (2) the extent of the operator's involvement in relevant activities; (3) whether the operator contributed to the violations; and (4) whether any criteria in the Secretary's enforcement guidelines were satisfied. The Secretary's guidelines include (a) whether the operator contributed to the violation or its continued existence; (b) whether the operator's employees were threatened by the violation; and (c) whether the operator had significant control over the condition requiring abatement.

In the instant case, I find that the Respondent was in the best position to have prevented the violation. The contractor's employee was admittedly working at the mine without the presence of direct supervision by his employer. The Respondent, on the other hand, had both hourly and supervisory personnel at the mine site in the general vicinity of the highwall. At the same time, however, it was the contractor's responsibility to properly train, supervise and discipline its employee - - matters relevant to the prevention of a violation.

I also find that Respondent was involved in initially establishing the drill pattern to be followed by the contractor's employee. The evidence shows that Respondent's personnel marked the back line to initially locate where drill holes should be placed. It is apparent however, that once the back line was established, Respondent's employees left the area and the contractor's employee was then left alone to actually mark the drill holes. At that point, the Respondent was no longer directly involved in the activities of the contractor's employee.

I find, however, that the Respondent did not significantly contribute to the violation. Indeed,

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[1] While not essential to proving the violation, the allegation in the second to last sentence of this citation is in fact disputed and the credible evidence indeed shows that a six foot lanyard would be adequate to provide fall protection. The credible evidence also shows that a person could stand in a safe area (acknowledged to be at least six feet from the edge of the highwall), and drop or toss a colored rock to mark drill holes closer than six feet to the edge of the highwall.

I find that it did not contribute at all. The driller cited herein was a trusted and experienced professional who performed his tasks without supervision. He was trained by both his employer and the Respondent in the need to wear fall protection when working closer than six feet to the edge of the highwall. The credible evidence also shows that the use of such fall protection was feasible and

that alternative safe methods of marking drill holes located within six feet of the edge of the highwall were both feasible and common practice in the industry.

Finally, the Secretary acknowledges that the cited contractor's employee did not place any of the Respondent's personnel in danger. Following the Commission's criteria and on balance then, I do not find that Imerys should be held responsible for the violation at bar.[2] Imerys was not appropriately charged for its contractor's violation and the citation must accordingly be vacated.

Citation No. 6095227

Citation No. 6095227, as amended, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14107(a) and charges as follows:

> The Caterpillar D-10 dozer had 4 V belts and sheaves not guard [sic] against contact. There are four belts on the fan water pump drive and one on the alternator, and one air conditioner drive belt. The operator of the dozer states he enters the cab in the mornings with the engine running and the belts turning, he also exits the cab with the cab running, taking breaks occasionally. A hazard of the operator slipping on the metal stairs is likely and contacting the v belts through the approximate 2 and ½ foot high and 4 ½ foot opening is possible. Injuries would likely result in serious cuts to the hands.

The cited standard provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

Respondent again appears to claim lack of fair notice regarding application of this standard to the facts herein. It again appears to rely upon a claim of inconsistent enforcement practices by MSHA (i.e. that MSHA had previously inspected and approved of the dozer operating without a guard) but argues only on the basis of speculation, unreliable hearsay and off-the-record "evidence".

This less than credible argument is countered by the first-hand observations of Chief Union Shop Steward Larry Smith. Smith credibly testified that during an MSHA inspection two or three years before the instant citation was issued, MSHA required that this operator install guarding over the same area now cited (Tr. 198-201). I find Smith's testimony credible and therefore conclude that the Respondent had actual notice of the requirements of the cited standard. I also note that the

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[2] It is noted that the contractor for whom the cited employee was employed was separately cited and assessed a penalty on these facts for the same violation.

Respondent was provided interpretive notice through a picture in the guarding guidebook showing, according to the undisputed testimony of Inspector Randolph, that "that type of component has to be guarded" (Tr. 115). Under the circumstances, I find Respondent's claimed lack of fair notice to be without credible support.

There is clearly a dispute regarding the level of guarding provided in the cited area. According to Inspector Randolph the cited V-belt and sheaves were unguarded to such an extent that they presented a hazard of burnt fingers and amputation of fingers. In particular, he noted that the bulldozer operators would relieve themselves while standing on the track adjacent to the alleged unguarded V-belts and sheaves thereby placing them within close proximity of the moving belts. On the other hand, according to Mine Manager David Jarvis, the cited belts and sheaves were protected from exposure by their location some two feet inside the engine compartment and by a water pipe (See Exhibits G-5 and R-6). In addition, the direction of rotation of the cited sheave (See Exhibits G-5 and R-6) would preclude the existence of a pinch point at the location where the belts rounded the sheave.[3]

I find that this dispute can be resolved by reference to the photographs in evidence (See Exhibits G-5 and R-4, 5 and 6). These photographs show that the cited belts were indeed not guarded as required by the cited standard. However, because of the partial protection afforded by the noted water pipe and the fact that the alleged pinch points were remotely located, I do not find that reasonably serious injuries were likely to result from the cited condition. I therefore find that the violation was neither "significant or substantial" nor of high gravity. However, because I find that Respondent was previously required by MSHA to have guarded the area cited herein, it thereby had clear notice of the requirement of the standard and is therefore chargeable with significant negligence.

Civil Penalties

In assessing a civil penalty under Section 110 (i) of the Act, the Commission and its judges must consider the operator's history of previous violations, the appropriateness of such penalties to the size 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 compliance after notification of the violation. According to the documents attached to the pleadings, Imerys does not have a serious history of violations and is a medium size business. There is no dispute that it achieved appropriate compliance after notification of the violations herein. Gravity and negligence have been previously discussed. There is no evidence that the penalties herein would effect the operators ability to continue in business. I have considered the above statutory factors and conclude that the civil penalties assessed herein are appropriate.

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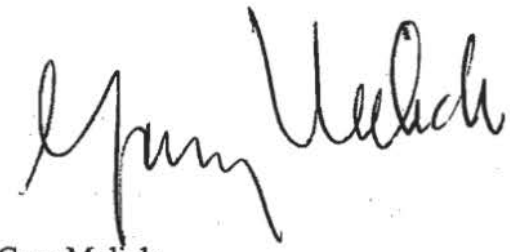
[3] Inspector Randolph could not recall which direction the sheave rotated but claimed there would, in any event, be a pinch point below the area depicted in the photographs. I find that such area to be so remote as to indeed be protected by its location.

ORDER

Citation No. 6093470 was vacated by the Secretary prior to hearings. Citation No. 6095226 is hereby vacated. Citations No. 6095190, 6095193, and 6095227 are hereby affirmed and Imerys Pigments LLC is directed to pay civil penalties of $500.00, $1,200.00 and $800.00, respectively for the violations charged therein within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge
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/lh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
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March 22, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2003-149
Petitioner	:	A.C. No. 46-08553-03569
v.	:	
ELK RUN COAL COMPANY, INC.,	:	
Respondent.	:	Black King I North Portal

DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Secretary
David J. Hardy, Esq., Spilman, Thomas & Battle, Charleston, WV, for the Respondent

Before: Judge Weisberger

On December 12, 2005, the Commission issued a decision in this matter vacating the initial decision in *Elk Run Coal Co., Inc.*, (*"Elk Run I"*), 26 FMSHRC 761 (Sept. 2004), that the violation of 30 CFR § 75.220(a)(1), as a result of Elk Run's failure to comply with its roof control plan, was not significant and substantial. *Elk Run I*, 26 FMSHRC, supra, at 762-769 In addition to vacating the initial decision, the Commission remanded the proceeding "... for further consideration." *Elk Run Coal Co., Inc.* (*"Elk Run II"*) 27 FMSHRC 899 (December 2005).

I. Elk Run, II, supra

In *Elk Run II*, supra, 27 FMSHRC, supra, the Commission reiterated Commission precedent established in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984) as follows:

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

The Commission took cognizance of the finding in the initial decision that the first two elements of *Mathies* had been met. With regard to the third element, the Commission cited the notation in the initial decision of the inspector's testimony regarding the dangers associated with

retreat mining in that numerous people have been killed as a result of that process. The Commission also referred to the finding in the initial decision that the presence of three incomplete rows without supporting timbers increases the risk of exposing miners to a roof fall. The Commission then went on to quote the initial decision which had found "...that there was not any evidence adduced that the roof was undergoing any specific type of stress that could lead to a roof fall. Nor does the record contain evidence that the roof had ever fallen in this particular section of the mine." *Elk Run I,* 26 FMSHRC, supra at 768-769.

The Commission noted the conclusion in the initial decision that the Secretary had failed to establish by a preponderance of the evidence that there was a reasonable likelihood of a roof fall. The Commission, relying on *Bellefont Lime Co. Inc.* 20 FMSHRC 1250, 1254-55 found error in the conclusion in the initial decision that the Secretary had failed to meet her burden by not presenting evidence of roof falls or stress on the roof in that the analysis was "... based solely on mine conditions prior to the violation." *Elk Run II,* 27 FMSHRC, supra, at 906. The Commission in *Elk Run II*, also took cognizance of the conclusions in *Elk Run 1*, supra, that the violation contributed to the hazard of a roof fall, which could have caused serious injury to miners, and that the gravity of the violation was relatively high.

The Commission explained its conclusion as follows:

> This is not to say that a history of roof falls in a mine is not pertinent to the consideration of the reasonable likelihood of an injury. [footnote omitted] The commission has long held that whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.,* 10 FMSHRC 498, 501 (Apr. 1988). [footnote omitted] However, conditions in the mine prior to the citation are not *dispositive* of the S&S designation.[footnote omitted] *See also Buffalo Crushed Stone, Inc.,* 10 FMSHRC 2043, 2046 (Oct. 1994) (in considering whether the failure to provide a berm at a stockpile was S&S, the fact that the stockpiles flat and that there were no equipment problems does not establish that an incident was not reasonably likely to occur).
>
> We thus agree with the Secretary, Sup'l Br. At 1-2, that the absence of an injury-producing event when a cited practice has occurred does not preclude an S&S determination. *See Arch of Kentucky*, 20 FMSHRC 1321, 1330 (Dec. 1998) (the Secretary does not have to show that a violation caused an accident in order to prove that a violation was S&S); *Buffalo Crushed Stone*, 10 FMSHRC at 2046 (the absence of previous instances of overtravel does not establish that an accident would not be reasonably likely to occur, given the nature of hazards presented). It follows then, as the Secretary argues, that the absence of evidence of stress or prior roof falls cannot be determinative of whether the cited condition is reasonably likely to cause an injury. See also *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 857 (June 1996) (operator's assertions that it had no history of accidents and that equipment had been driven for many months in cited condition

is not dispositive of S&S determination).

> In the instant proceeding, the presence of adverse roof conditions may increase the likelihood of a roof fall but the absence of such adverse conditions does not necessarily eliminate the possibility that a roof fall might occur when an operator fails to follow its roof control plan. Moreover, requiring the Secretary to prove an S&S violation by establishing that the mine roof is under "any specific type of stress that could lead to a roof fall," 26 FMSHRC at 768-69, places an onerous burden of proof on the Secretary. Similarly, any implication that the Secretary needs to show that there had been a roof fall in this section of the mine before a violation can be designated S&S wold unreasonably restrict the ability of the Secretary to prove that a roof control violation is S&S. None of these evidentiary points detracts from the existing core requirement that a roof control plan take into account the specific conditions of the mine in seeking to prevent roof fall accidents [footnote omitted] and the Congressional intent to provide comprehensive protection against roof falls through adherence to MSHA-approved safety measures tailored to the individual mine. (Elk Run, II, supra, at 906-907).

The Commission went on to hold that, "[o]n remand, ... the judge must weigh the record evidence and, assuming that normal mining were to continue, determine whether any miner on any shift would have been exposed to the hazard arising out of the violation, so as to create a reasonable likelihood of injury." *Elk Run II* at 907.

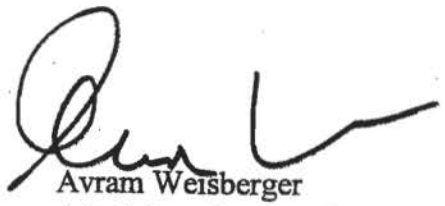
II. Discussion

Based upon the Commission's holding, I find that prior to the violation, the lack of specific stress in the roof that could lead to a roof fall is not *dispositive* of the significant and substantial designation. Further, taking cognizance of the emphasis placed by the Commission in *Elk Run II*, supra, on the need to assume the continuation of normal mining work, I reiterate my previous finding that in Elk Run's operation of retreat mining, generally roof support is weakened due to this type of mining. Further, Elk Run's retreat mining had left three rows of **incomplete** blocks which exacerbated the hazard of stress on the roof. Also, I note that the fact that breaker post had not been installed to prevent any roof fall continuing outby, further contributed to the hazard. I thus reiterate the initial finding that the gravity of the violation was relatively high. Considering the above facts, along with the analysis set forth by the Commission above, in *Elk Run II*, supra, and the continuation of normal mining, I find that the violation herein created a reasonable likelihood of injury by exposure of miners in the area in question to the hazards of a roof fall.

Therefore, upon reconsideration, for all of the above reasons, and following the holding and analysis of the Commission in *Elk Run II*, supra, I am constrained to find the violation herein was significant and substantial.

III. Penalty

The conclusion that the violation herein was significant and substantial, is consistent with the initial finding that the gravity of the violation was relatively high. The Commission in its remand, *Elk Run II*, supra, did not order a reconsideration of the additional factors set forth in 110 (i) of the Act. I thus find that it is not necessary to reassess the penalty set forth in the initial decision, and thus reiterate my initial finding that a penalty of $1,000 is appropriate for the violation found therein.



Avram Weisberger
Administrative Law Judge

Distribution: (Certified)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
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March 24, 2006

WILLIAM ARTHUR BOWEN, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 2005-249-D
v.	:	PIKE CD 2005-03 and PIKE CD 2005-04
	:	Mine ID: 15-09724
SIDNEY COAL COMPANY, INC, Respondent	:	#1 Prep Plant

DECISION

Appearances: Wes Addington, Esq., and George Sanders, Esq., Appalachian Citizens Law Center, Inc., Prestonsburg, Kentucky, on behalf of the Complainant; Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon two complaints of discrimination filed by William Arthur Bowen pursuant to Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act." The complaints were consolidated into the captioned case. Mr. Bowen alleged in his initial complaint to the Department of Labor's Mine Safety and Health Administration (MSHA), filed February 2, 2005, that Sidney Coal Company Inc. (Sidney) violated Section 105(c)(1) of the Act when he was suspended on January 31, 2005, "because [he] complained about unsafe conditions at the mine." [1] Mr. Bowen stated in his second complaint

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[1] Section 105 (c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under

filed with MSHA on February 7, 2005, that "[a]fter filing a discrimination complaint at the Mine Safety and Health Administration on February 2, 2005, I received a letter from the company on February 3, 2005, stating that I was terminated."

This Commission has long held that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on grounds, *sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner's unprotected activity alone. *Pasula, supra; Robinette, supra.* See also *Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6th Cir. 1983) (specifically approving the Commissions' Pasula-Robinette test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

Mr. Bowen began his employment with Sidney in 2001 or 2002 as a beltman and continued in that position until his departure. As a beltman he ordinarily worked a 12 hour shift, cleaning, maintaining and repairing the beltline. During the last three months of his employment with Sidney, he had been working on the belt in the area known as the R-2 cut-through. This was an area about 2,000 feet long and included a road about 40 feet wide and a 48 inch belt (the R-2 belt) passing beneath a highwall 180 to 200 feet in height. The highwall was nearly vertical and was composed of sandstone, slate and coal. It was not benched and it appears undisputed that it presented a hazard to exposed personnel. Indeed, a notice had been posted by Sidney sometime during 2003, warning employees not to walk through this area and to request a ride because of the dangers presented. Some eight days before Bowen's separation from employment on January 31, 2005, a truck the beltmen had been using was removed and the beltmen were directed to obtain rides and not to walk the cut-through.

According to Bowen, during this eight day period when he would call his foreman, Tony Adkins to request a ride, Adkins would refuse the request and tell Bowen to walk the R-2 cut-through. Bowen testified that he first complained to Adkins about his failure to transport him through the R-2 cut-through area about five or six days before his separation. He purportedly informed Adkins that it was unsafe because a lot of material was falling off the highwall. "[T]here was a lot of ice, large pillars of ice falling from the highwall as well as rocks and other

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or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

materials sliding off the highwall (Tr. 49). Plant mechanic Tommy Varney and bulldozer operator Jeff Brock confirmed that there was evidence of materials falling off the highwall (Tr. 188 and 250). Bowen claims that he continued for approximately six days asking for rides through this area and Adkins continued to refuse the requests (Tr. 56).

Bowen testified that he also complained in safety meetings about the condition of the highwall and, more particularly, he complained to Adkins in a safety meeting and asked if they were going to do anything about the condition of the highwall (Tr. 57). Adkins purportedly responded that the company was working on it (Tr. 58).

In response to these claims of protected activity, Respondent Sidney notes that Mr. Adkins denied that he ever refused Complainant's request for a ride (Tr. 276). Indeed, Adkins testified that each time Bowen called and asked him for a ride off the hill, he always picked Bowen up (Tr. 276). Sidney also challenges the credibility of the Complainant's allegations based upon his apparent inconsistent testimony. In this regard Respondent Sidney notes that the Complainant testified during his deposition that there were 30 to 40 times he requested a ride from Adkins and was denied (Tr. 112). During his testimony at hearing however, Complainant first stated that he asked for a ride close to 18 times during the last eight days of his employment and was denied each time by Adkins (Tr. 108). The Complainant later again changed his testimony and stated it was actually only four days in which he asked for a ride three times a day and did not receive a ride (Tr. 111). Bowen testified that, on all 12 occasions when he requested a ride, Adkins refused and told him to go ahead and walk the cut-through (Tr. 111).

Respondent Sidney also notes that the Complainant claimed that each time Adkins denied him a ride, he (Bowen) spent 10 to 15 minutes describing in detail the dangerous conditions of the highwall in the cut-through (Tr. 157). Complainant testified that, in response to this 10-to-15 minute description, Adkins would tell him to "just walk it" (Tr. 157). Complainant claims he had conversations with Adkins about the condition of highwall "several times" during the eight-day time period (Tr. 157). Respondent Sidney notes that Bowen failed to present any corroboration for any such conversations.

Indeed, Sidney notes that the Complainant claims that he made these requests over the radio, which would have been heard by six to eight people who were also on his channel (Tr. 111-112). It also notes that the Complainant further asserted that he told co-workers Tommy Varney, Terry Ratliff, Doug Rutherford, and Joey Scott, and Plant Superintendent Billy McCoy about Adkins not giving him rides through the R-2 cut-through (Tr. 48). Respondent argues that in spite of these assertions by the Complainant there was no testimony to support either that claim or Complainant's allegation that he was refused rides by Adkins.

In addition, Tommy Varney, the plant mechanic, heard the Complainant ask for rides "many times" over the radio prior to January 31, 2004, (Tr. 197). According to Varney, Adkins "always came over to get him, far as what I know" (Tr. 198). Electrician Douglas Rutherford testified that he heard the Complainant ask Adkins for a ride through the cut-through, and had

never heard Adkins refuse him a ride (Tr. 201). Wayne Grimmet was the dozer operator who worked on the same shift as the Complainant during the time in question. Grimmet testified that he never heard Mr. Adkins refuse to give the Complainant a ride (Tr. 208). According to Grimmet, when Bowen called for a ride, Adkins would typically respond that he would be there within a few minutes (Tr. 209).

In a somewhat related complaint, Bowen testified that he also spoke with, foreman, Rocky Fitzpatrick, and Plant Superintendent Billy McCoy about the conditions of the highwall and also spoke out during safety meetings, which were held once a week (Tr. 38 and 42). Adkins denies ever receiving any complaints from Bowen about the highwall (Tr. 310-311). Fitzpatrick denies receiving any written complaints from the Complainant and did not recall any specific conversations about the highwall or cut-through, other than general conversation in the lunchroom (Tr. 266-268). McCoy testified that he did not recall any safety complaints or discussions with Complainant about the highwall (Tr. 333-334).

Joey Scott, who runs the thickener at the mine, recalled Bowen discussing the highwall but that "[e]verybody talked about" the conditions (Tr. 176-177). Scott testified that the condition of cut-through was addressed during safety meetings which were conducted by foremen (Tr. 174-175). Indeed, according to Scott, Tony Adkins was the foreman who discussed the condition of the highwall during the safety meetings, "and everyone else started talking about it" (Tr. 175-176).

Tommy Varney testified that the condition of highwall and the R-2 cut-through were discussed at safety meetings, and "the foremen had told us of any changes or what to look for, any new condition" (Tr. 190). Varney recalled one occasion when Bowen complained over the radio that ice fell and came close to hitting him (Tr. 191). According to Varney, other miners talked about the condition of the wall and that the condition of the wall "was common knowledge" (Tr. 192-194).

Within the above framework of evidence, I find that indeed safety complaints were made by Bowen as well as many others regarding the condition of the highwall and that Adkins had to have been aware of them.[2] While it is clear that such complaints were made, it is also clear that it was common knowledge that the highwall was not safe. Under these circumstances, however, such complaints would hardly be expected to elicit a retaliatory response against only one person, especially one so severe as to result in termination. For purposes of this decision, I also consider the undisputed evidence of Bowen's persistent requests to float out bulldozer operator Grimmet to be a protected "safety complaint." These requests are discussed later in this decision.

Following the *Pasula* analysis, the next issue to be determined is whether Bowen's protected activity resulted in adverse action. In this regard, it is essential to consider, in

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[2] I do not, however, necessarily credit Bowen's testimony regarding the frequency of his being denied rides through the cut-through.

particular, the testimony of Bowen and Adkins and to determine the weight to be given that testimony. According to Bowen, on January 31, he was working the 7:00 p.m to 7:00 a.m shift. He testified that Adkins drove him to the top of the hill past the cut-through along with bulldozer operator Wayne Grimmet. The events that followed were described by Bowen at trial in the following colloquy:

> Q. [By Mr. Addington] What happened once you arrived at the Impound:
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> A. As we was getting out of the truck, Wayne Grimmet turned to me and asked me if I cared to come back at lunchtime and float him out, and I told him I didn't care a bit to. And at that time, I heard the truck door slam, and I turned, and Tony yelled for me to come to him. I walked to him. We approached the rear of the vehicle and he proceeded over toward the belt structure, and I'm guessing approximately 16, 18 feet from the rear of the vehicle. He first told me to, very angrily grabbed a shovel, and go to R-2 belt and shovel the spill that was there. And I turned to do that. And as I was walking away, he told me, "Wait a minute. I'm not thought." And he started yelling at me over aggravating Wayne.
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> He said, "You've aggravated Wayne for three days to float him out. If I wanted him floated out, I'd see to it he got floated out" something to that effect.
>
> I told him that Wayne just asked me to come back at lunchtime and float him out. He more or less told me that was not true. And I told him that I didn't understand why he was doing this, because this was a normal duty that I had to float the operators out. There had to be more to it than that. It's not normal to reprimand an employee for doing things that he normally did on a regular basis as well as offering to hlp someone. That I had made, you know, several complaints about the highwall. I said, "Tony, you've not been picking me up every time I've ask you to. You're not picking me up. What's the problem?"
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> He screamed at me and told me that he was the boss, I'd do what he tells me to do, that I don't tell him what to do, something to that effect.
>
> And I told him I was not trying to tell him what to do, I was trying to find out what was wrong, why he wasn't picking me up.
>
> He told me that he was through with me, and told me I was fired. He said, "You're fired." He said, "I'm through with you."
>
> I did get upset at that comment and I said, "Stick it in your ass." I said, "You don't have the authority."

And he told me that he was going to take it to Billy McCoy the next day and have me fired.

I asked him then, I said, "Just go ahead and take me off the hill."

And he started stepping backward and said, "No. I will not, " and turned and walked away from me and walked back toward his truck.

At that time I turned and started off the hill.

Q. During the conversation on the hill, did you tell Tony Adkins you quit?
A. No, sir. I did not.
Q. At the point that conversation ended, what did you think your employment status was with Sidney Coal?
A. That I was fired.
Q. Where did you go after the conversation with Tony Adkins ended?
A. Proceeded through the cut-through. I think I just started through the cut-through about the R-3 belt head somewhere through there. Tony went by the Gary Hatfield. I proceeded off the hill to the foreman's office, or the lobby area.
Q. Now, why did you go to the lobby area, foreman office?
A. To get my personal belongings.
Q. Why did you get your personal belongings?
A. Because I thought I no longer had a job.
Q. Mr. Bowen, where did you go once you went back down to the foreman's office/lobby area?
A. I went into the women's restroom.
Q. Arthur, is that used as the women's restroom?
A. No, sir.
Q. What is that room?
A. It contains lockers that, I think Tony Adkins might have a locker in there and Rock Fitzpatrick, myself, Terry Ratliff. That's generally where me and Terry change.
Q. So, your locker room wasn't located in the changing room?
A. No, sir, it was not.
Q. And did you get your belongings out of your locker?
A. Yes, sir. I did.
Q. Then where did you go?
A. I come out the women's door, bathroom door, and as I come out the door -- well, if I may back up. As I came into the lobby area, Tony hollered for me on the radio and advised me that once I get to the R-2 belt head call for him and he would come and pick me up. I then advised him I was already in the foreman's office. And he told me that he would be right there. I got my things, come out, and as I

was coming out of the women's restroom --
Q. Let me stop you for a second. You said Tony called you on the radio and asked you when you got to the R-2 cut-through to call and he would come and pick you up.
A. That's correct.
Q. What time was this when he called?
A. Approximately 7:30 thereabouts. I don't know exact.
Q. Did he usually call for you to tell you to call when you needed to be picked up?
A. No, sir.
Q. Had he ever called for you?
A. No, sir.
Q. When did you usually call for him?
A. Approximately ten or fifteen minutes before break and lunch. That would be 15 till 10:00, 15 till 1:00, 15 till 5:00, approximately.
JUDGE MELICK: Do you have portable radios?
A. Yes, sir.
JUDGE MELICK: Each miner had his own personal radio?
A. Yes. Similar to what we carry as a police officer. Two-way radios.
Q. You said you would normally call before the first break.
A. Yes.
Q. And that's approximately when?
A. Ten to fifteen minutes till 10:00.
Q. Would you ever call for a ride before that?
A. No, sir.
Q. So, why would Tony Adkins call you at 7:30?
A. I felt like that it was because of the incident on the hill.
Q. You can continue. Once you got your stuff out of your locker, where did you go then?
A. Stepped through the women's restroom door, and at that time Tony came through the front door of the lobby. He started, not really yelling, but with a loud voice continued to talk about what had happened up on the hill.
JUDGE MELICK: What did he say? What were his words?
A. That I was trying to tell him what to do and that he was the boss, and that he wasn't going to stand for that. I told him I was not trying to tell him what to do. And I pointed

out the fact that he was yelling at me. And I told him I said, "That's what I have a problem with there with you right now, you're yelling at me." And I said, "If you don't want me to yell at you, don't yell at me." We passed about halfway through the lobby during this time. I walked over to the exit door. Tony was still talking to me very angrily. I had turned toward him, he was standing about at the superintendent's office door, and he was still yelling. I then yelled back and told him that I didn't have to take it, he had done already fired me and that I was leaving.

About that time Rocky Fitzpatrick come through the door. If you'll notice, located above the storage room wall, that north wall of the storage room, he come through that door, he walked over, Rocky walked over toward me about where the storage room door is on the west side of the storage room, asked me what was wrong. I told him about the incident up on the hill and how Tony, over the past eight days, had refused to pick me up wherever I called for him on the radio. And about, we discussed about the dozer operator getting floated out. I think Rocky made a statement that he agreed with me that the dozer operator should get floated out, and that if Tony was doing that, that it was wrong of Tony.

(Tr. 66-74)

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Q. You say you were talking to Rocky Fitzpatrick during the argument and Tony Adkins had stepped, where did he step to while you were talking to him?
A. He walked towards the foreman's office and stepped in the door for approximately eight to ten seconds maybe. It was very brief. And then he walked back into the lobby area.
Q. What happened after that?
A. He told me that I was a liar and told me that he was through with me, and was very verbal. I don't recall the exact words that were said, but I made a comment that I was, I said, "Tony, you already fired me. I don't have to stand here and take it. I'm leaving." And I left.
Q. You left?
A. Yes.
Q. During this argument, did he raise his voice?
A. Yes.
Q. Did you raise your voice?
A. Yes, sir.

(Tr. 80-81)

Maintenance foremen Tony Adkins described the same events at trial in the following colloquy:

Q. [Mr. Heath] I'd like to turn your attention to January of 2005 and particularly the last part of the month, okay. Now, do you recall Mr. Bowen calling and asking for a ride?
A. Yes, sir.
Q. How did you respond?
A. "I'll be there."
Q. Did you ever respond any differently?
A. No, sir.
Q. Did you ever refuse to pick him up or -
A. No, sir.
Q. Did you ever tell him to walk through the R-2 area?
A. No, sir.
Q. Who is Wayne Grimmet?
A. Wayne Grimmet was a refuse dozer operator that we hired.
Q. Whose shift did he work on?
A. He worked on my shift, sir.
Q. And I'd like to turn your attention to January 29. Was Mr. Grimmet working?
A. He worked that night, yes, sir.
Q. What day was that for him on your shift?
A. That was his first day, sir.
Q. How did he get to the top of the hill?
A. I myself would transfer him up there, sir.
Q. And, where did he ride in your vehicle?
A. In the passenger side seat.
Q. Was there anyone else in the vehicle besides yourself and Mr. Grimmet?
A. Yes, sir, Mr. Bowen.
Q. And where was Mr. Bowen?
A. In the backseat. It was a king cab truck.
Q. And where would you take them to?
A. I would take them up to the R-4 head.
Q. And for identification purposes, looking at R-9, could you point out where the R-4 head is as you call it?
A. Yes, sir. It would be out here where you've got a head drive out here, where the refuse dumps are.
Q. How is it labeled on this map?
A. It says R-4 head, I believe.

Q. Is there also some words there near the end of the belt?
A. Yes. It says Sukey Branch Impoundment.
JUDGE MELICK: Could you pull the microphone closer. Speak closer to the microphone. Thank you.
Q. Is that basically on top of the Embankment?
A. Yes, sir.
Q. And, tell me about the first night that you took both Mr. Grimmet and Mr. Bowen up on the job.
A. Wayne, it was his first day, and I just normally chitchat. He was a new man. I was trying to talk to him. And we took him up to R-4 head and went through the box cut to the Impoundment.
Q. And did Mr. Bowen have any conversation on the ride up?
A. He wanted to float Mr. Grimmet out for --
JUDGE MELICK: I'm sorry. I can't - Could you repeat what you just said?
A. He explained he'd like to float Mr. Grimmet out for lunch. Float Wayne out for lunch.
Q. How did Mr. Grimmet respond?
A. He said, "No, I'm fine."
Q. On that first day, did Mr. Grimmet ask you to float him out or give him a break during the night?
A. No, sir.
Q. Do you leave that up to your employees to decide --
A. No, sir.
Q. You're talking about who does the floating out.
A. Yes, sir.
Q. But as to whether the actual operator wants a break or not, how do you handle that?
A. If an operator wants a break, he'll holler and I'll get somebody up there to float him out.
JUDGE MELICK: I'm sorry. I can't hear you.
A. When the operator wants floated out, I usually send someone up to float him out.
JUDGE MELICK: I see. And I don't think we've ever really had a clear explanation of what does floating out mean?
A. Oh, it's a slang term about --
JUDGE MELICK: Yes, I'm just concerned, we all understand here, but when somebody reads this transcript, they might not understand.

A. Okay. Well, it's to give him a break on his dinner.
Q. Someone else would come in and run that piece of equipment while the person eats lunch?
A. Yes, sir.
Q. And, then as a foreman, is it your job to determine who would actually float someone out if that employee wants to be floated out?
A. Yes, sir.
Q. Now, I'd like to turn your attention to January 30th, which would be the second day for Mr. Grimmet.
A. Yes, sir.
Q. Can you tell me about the ride up the hill that evening.
A. Just normal chitchat again when I took them up to the R-4 head, and ask him how he was liking the dozer and stuff.
Q. Did again Mr. Bowen get in the conversation?
A. Yes, Mr. Bowen was trying, yes, sir, he was in there.
Q. Did he ask anything, or what did he say?
A. He asked about floating Wayne out again, relieving Wayne out at dinner, sir.
Q. How did Mr. Grimmet respond?
A. He said, "No, I'm fine."
Q. Now, again going to January 31st, did you again take Mr. Bowen and Mr. Grimmet up on the hill?
A. Yes, sir.
Q. Did Mr. Bowen ask anything on the way up the hill?
A. Yes, sir. Yes, sir. He wanted to float Wayne out at dinner again.
Q. How many times did he ask?
A. Twice, two or three times, I guess.
Q. And each time how was Mr. Grimmet responding?
A. He kept saying, "I'm fine. I'm fine."
Q. How long was it on your crew until Mr. Grimmet actually wanted to be floated out or to be given, someone to run his machine during lunchtime?
A. It was a while. I mean, Wayne was new and he wanted to, it was a while, a month or something like that.
Q. And, when an employee first starts working, are they under any kind of a trial period or observation?
A. Yes, sir. Yes, sir. Wayne was nervous about the

job.
Q. So, was Wayne, in fact, going to be judged on his performance in his initial time of working for the Company?
A. Yes, sir.
Q. And that would include what his dozer work looked like; is that right?
A. Yes, sir.
Q. What do you have to do up on the Impoundment as far as placing refuse?
A. You have to put your refuse in one-foot lifts and get your compaction and keep the R-4 head from being gobbed off.
Q. By gobbed off, you mean blocked?
A. Right. With refuse.
Q. And what level of compaction does it have to get to?
A. Do what, sir?
Q. To what level is the material compacted?
A. I have no idea on that. I mean, it has to be compacted in one-foot lifts, I mean, it's got to be put in one-foot lifts and then run over with the dozer and compacted each time.
Q. Now, as soon as you got up on the hill - First of all, on this night, where did you let Mr. Grimmet and Mr. Bowen out at?
A. At the R-4 head.
Q. Did you talk to the dozer operator to let him know you were there?
A. Yes, sir. Yes, sir.
Q. What did you tell him?
A. I hollered and I said, "Come on back here old man, I've got you some relief there."
JUDGE MELICK: I'm sorry, I didn't get what you just said.
A. I just hollered, I said, "Come on back old man, I've got you relief. Wayne's here to relieve you out."
JUDGE MELICK: To whom did you say that to?
A. Gary Hatfield.
Q. Is he the day-shift dozer operator?
A. Yes, sir.
Q. Did he then move the dozer toward you all?
A. Yes, sir.
Q. What happened next?

A. He pulled over to where we was parked in the truck.
Q. And, did anybody get out of your vehicle?
A. Yes, sir. Mr. Grimmet and Mr. Bowen.
Q. Tell me what happened when they got out of the vehicle?
A. Wayne exited the vehicle and Trooper opened the door behind him on the back door and he said, "Holler at me if you want me to float you out," when they got out again.

(Tr. 276-283)

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Q. [By Mr. Heath] How many times now had he then asked to relieve Mr. Grimmet on the way up the hill?
A. Twice, I guess. Twice. Several times.
Q. And is this time that you got out an additional time?
A. Do what, sir?
Q. Is the time that he asked this while getting out of the vehicle an additional time?
A. Yes, sir.
Q. How many times is that?
A. About three times.
Q. What did you do at this point?
A. I exited the vehicle on my side.
Q. How did you get out of the vehicle?
A. I opened the door.
Q. How did you close the door?
A. I just shut it back.
Q. Did you slam your door?
A. No, sir.
Q. So, you got out of the vehicle. What did you then do?
A. I hollered at Mr. Bowen and told him to come over to the side, I wanted to talk to him.
Q. Why did you want to talk to him?
A. Because I told him that I wanted to keep him from making Wayne mad about being floated out.
JUDGE MELICK: Sorry. Again, I missed that. What was that?
A. I told him to stop aggravating Wayne about being floated out, sir.

Q. So that's the reason you wanted to pull -

JUDGE MELICK: I'm sorry. My hearing is difficult -

Q. I believe he said he didn't want him to, to stop aggravating Wayne about floating him out.

A. Yes, sir.

MR. HEATH: You'll need to just speak a little slower and real clear.

A. Okay. I'm sorry. I ain't used to talking in a microphone and stuff.

Q. Have you ever testified in a hearing before?

A. No, sir. No, sir.

Q. All right. Mr. Adkins, you told me that that's the reason you wanted to talk to Mr. Bowen?

A. Yes, sir.

Q. Where did you talk to him at?

A. At the back of the pickup truck.

Q. Was this away from Mr. Grimmet and Mr. Hatfield?

A. Yes, sir.

Q. Why did you take him away from that?

A. Not to embarrass him in front of his coworkers.

Q. Now, if you would, please, walk me through the conversation that you had with Mr. Bowen there on the Impoundment?

A. I told Trooper, I said, "Come over here, I need to talk to you." And I said, "You need to leave Wayne alone." I said, "If he wants floated out, he'll holler at me and let me know."

And he said, "Well, he asked me to float him."

And I said, "No, he didn't. He said he was fine." I said, "You need to stop aggravating him." I said, "You need to do your job."

And he said, "The man told me he needed floated out."

And I said, "No, he didn't. He said he was fine."

And he said, "Well, he just told me."

And I said, "No, he didn't."

And he said, "You kiss my ass." And, he started walking off.

And I said, "Hold it just a minute." I said, "You can't talk to me that way." And I said, "I'll take you to Billy McCoy," which is the plant superintendent.

And he turned around and he throwed up both hands

and said, "Take me."
Q. Where did he go then.
A. He proceeded to walk up the belts.
Q. Did you suspend Mr. Bowen up there on the hill?
A. No, sir.
Q. Did you fire Mr. Bowen up on the hill?
A. No, sir.
Q. Did you believe that he was going about to do his job at this point?
A. Yes, sir.
Q. Did you tell him to do that?
A. Yes, sir.
Q. All right. Did you talk to anybody before you left that hillside or Impoundment?
A. I talked to Wayne and I told Wayne if he wanted floated out to holler at me, you know.
Q. And just so, that was a little blurred there, but I think he said - What did you tell Wayne?
A. I told Wayne if he wanted a break to let me know.
Q. Did you then take Mr. Hatfield off the Impoundment?
A. Yes, sir.
Q. Where do you recall seeing Mr. Bowen?
A. At R-3 head?
Q. Is that where he goes to do his exams?
A. Yes, sir.
Q. Now, did you then take Mr. Hatfield off of the hill?
A. Yes, sir.
Q. Where did you take him to?
A. I took him to the bathhouse, sir, to change.
Q. Up on the hill in your conversation with Mr. Bowen, was there any discussion of the R-2 highwall or the cut-through?
A. No, sir.
Q. Was there any discussion of giving him rides through the cut-through?
A. No, sir.
Q. Once you got back across the road, did you drop Mr. Hatfield off at the bathhouse?
A. Yes, sir.
Q. Did you also go in the bathhouse?
A. I went in, we come in the, we already come into the main office, yes, sir.

Q. Is that the area that you call the lobby area?
A. Yes, sir.
Q. And we're looking at R-1?
A. Yes, sir.
Q. What did you go into the bathhouse for?
A. Gary always goes in to change clothes and to put his shoes on, sir.
Q. Why did you go into the bathhouse?
A. I wanted to talk to Rocky Fitzpatrick.
Q. Did you, in fact, talk to Mr. Fitzpatrick?
A. Yes, sir.
Q. Tell me about your conversation with Mr. Fitzpatrick.
A. I told Rocky what happened with me and Mr. Bowen up on the hill.

JUDGE MELICK: Rocky is Mr. Fitzpatrick?

A. Yes, sir.

JUDGE MELICK: Let me just make sure we're all talking on the same wavelength. I've heard this from other witnesses, but Trooper is another nickname for Mr. Bowen.

A. Yes, sir.
Q. Has Mr. Fitzpatrick, I think you call him Rocky; is that correct?
A. Yes, sir.
Q. Has he been a foreman longer than you?
A. Yes, sir.
Q. Did you, in fact, talk to him about what happened?
A. Yes, sir.
Q. Tell me what you told Mr. Fitzpatrick.
A. I told him about the incident about Trooper wanting to float Wayne out and I told him to stop aggravating Wayne, and what Trooper said.
Q. Did you talk anything in particular as to what he had said to you?
A. Yes, sir.
Q. Any cussing that he had told you?
A. Yes, sir. I told Rocky about him telling me to kiss his ass.
Q. What did Mr. Fitzpatrick advise you to do?
A. To write him up.
Q. And, in fact, did you start to write him up?
A. Yes, sir.
Q. I'd like for you to look at what is in the book in

front of you at Tab 2. Do you recognize this document?
A. Yes, sir.
Q. Does it have your signature on it?
A. Yes, sir.
Q. Is this the document you started to fill out that evening on January 31st?
A. Yes, sir.
Q. What did you put down as the problem?
A. Insubordination.
Q. Did you make a recommendation as to whether or not Mr. Bowen should continue to work for this operation?
A. Do not retain, sir.
Q. What does that mean?
A. That means he wasn't to come back.
Q. Do you then have to submit this to the appropriate parties?
A. Yes, sir.
Q. Do you have the power to fire someone?
A. No, sir.
Q. Who handles that at the operation for you?
A. We go through proper channels, sir.
Q. Who are the channels?
A. It goes from plant foreman to plant superintendent, then from plant superintendent to H.R. and then to the president, sir.

(Tr. 283-290)

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Q. [By Mr. Heath] Walk me through your conversation with Mr. Bowen on the radio.
A. I hollered at Mr. Bowen and I said, "Trooper, when you get to R-2 cut," I said, "holler at me and I'll come pick you up."
Q. And what did Mr. Bowen respond?
A. He said, "I'm already in the foreman's office.
Q. How did you respond?
A. I said, "I'll be right there."
Q. Did you, in fact, go to the foreman's office?
A. Yes, sir.

(Tr. 292)

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Q. [By Mr. Heath] Now, so you said you asked him what he was doing. Now take me through the conversation at this point between you and Mr. Bowen in the Preparation Plant office.
A. I come to the door and I said, "What are you doing?"
And he said, "I'm quitting.
And I said, "You're quitting?"
And he said, "Yeah."
Q. Anything else said?
A. We passed each other, and we passed each other in the lobby area and he said he was tired of being treated like a child.
JUDGE MELICK: I'm sorry. I missed that again.
A. He said he was tired of being treated like a child.
Q. How did you respond to that?
A. I told him I didn't treat him like a child.
Q. What else?
A. And he explained about the, where Billy McCoy and where that refuse, about the R-4 where we had a spill and we had to clean it up and he said I didn't take up for him.
Q. Let's explain that just a little bit. When had this happened that there was a spill on the R-4 belt?
A. A week prior, actually. A couple of weeks prior.
Q. After this spill, was the spill cleaned up on your shift?
A. No, sir.
Q. Did you then meet with Mr. McCoy.
A. Yes, sir.
Q. Was Mr. Bowen involved?
A. Yes, sir.
Q. And, what was Mr. Bowen saying about this meeting with Mr. McCoy?
Q. He said that I never took up for him. I let Mr. McCoy talk to him, and like that.
JUDGE MELICK: And Mr. McCoy was in what position at that point?
A. Plant Superintendent, sir.
JUDGE MELICK: Go ahead, I'm sorry.
Q. And what else did he say about this meeting with Mr. McCoy?
A. He said I didn't take up for him. He said I let

Billy talk to him and I never took up for him. I never took none of the blame.
Q. What else did he talk about? First of all, what's his demeanor during this conversation?
A. Very agitated, sir.
Q. What's his voice like?
A. Loud.
Q. Is he shouting or is he just talking loud? What's your --
A. Shouting.
Q. And what's your voice like?
A. About normal.
Q. You have a very high pitched voice, don't you?
A. Yes, sir.
Q. Did, in this conversation, anybody else come in there?
A. Rocky Fitzpatrick.
Q. Did an individual by the name of Cobb or Mr. Blackburn come into the area?
A. Yes, sir.
Q. When did he come in?
A. He was in the bathroom, I think, sir.
Q. Where do you recall seeing him standing?
A. Over at the entrance to the bathhouse.
Q. Now, I think you told me Mr. Cobb is in that area where the door is to the bathhouse.
A. Yes, sir.
Q. Did Mr. Fitzpatrick, Rocky Fitzpatrick, come in?
A. Yes, sir.
Q. Okay. Tell me what else was being said during this conversation?
A. He explained to Mr. Fitzpatrick that, about Wayne needed floated out, that the man should have a brake [sic], and that he should have a break and that I wouldn't let him float him out.
Q. So, Mr. Bowen is telling everybody that he's still wanting to run the dozer during lunchtime?
A. Yes.
MR. ADDINGTON: Objection, your Honor. That's leading.
Q. Did you think that Mr. Bowen wanted to run the dozer or didn't want to run the dozer during lunchtime?
A. Mr. Bowen wanted to run the dozer.

Q. Now, did anyone else come in during this conversation?
A. Robby Hicks.
Q. When did he come in during the conversation?
A. Later on during the conversation.
Q. Where did he come in at, or what did he do?
A. He come in to use the bathroom.
Q. And I ask you to tell me, looking again at R-1, what door he would have come in through?
A. He would have come in through the main lobby area entrance.
Q. If you're looking at that building, on this map it's over to the left off the lobby area.
A. Yes, sir.
Q. Anything else that's being said in this conversation?
A. Mr. Bowen explained that all the guys on my shift didn't like me and that they should, that I should hear how they talk about me behind my back. And I said, "That's fine. That's okay."
Q. Anything else that you recall being said in this conversation?
A. That's, about how he was being treated on the job.
Q. Did Mr. Bowen at any point tell you that he quit?
A. Yes, sir.
Q. How many times do you think he said that?
A. Several, sir.
Q. Did he, in fact, leave the area?
A. Yes, sir.
Q. At any point during this conversation, did you step out of the room?
A. Yes, sir.
Q. When did you step out?
A. After we had the conversation about he explained, said nobody didn't like me and stuff like that, and I walked back to the foreman's office.
Q. Is that what's labeled Foreman's Office?
A. Yes, sir.
Q. How long did you stay in the foreman's office?
A. I just read the on-shift report and come back out.
Q. Any, during your conversation in the lobby area, did Mr. Bowen, in any way, discuss the R-2 cut-through?
A. No, sir.

Q. Did he discuss getting rides through the R-2 cut-through?
A. No, sir.
Q. Did he, in fact, ultimately leave the lobby area?
A. Yes, sir.
Q. What did you do at that point?
A. I observed Mr. Bowen walking across the parking lot.
Q. In going to the parking lot, where does he go?
A. From the plant office right there to a, there is a catwalk leading to the main parking lot?
Q. Is that, in fact, labeled on R-9?
A. Yes, sir. Right here's your walkway, here's your main office, and this is your walkway.
Q. For identification purposes, that's in the left hand corner of R-9 here.
A. Yes, sir.
Q. Now, did you call anyone or attempt to call anyone that night?
A. I called security.
Q. What did you tell them?
A. I told them not to let Mr. Bowen on the property.
Q. Did you also do any work with R-2, the form there?
JUDGE MELICK: Are you talking about Exhibit R-2 as opposed to the belt R-2?
MR. HEATH: Thank you, your Honor.
JUDGE MELICK: We have a lot of R's here.
Q. Looking at Exhibit R-2, when did you complete filling that out?
A. As I stated earlier, I signed it the next morning.
Q. Did you, first of all before we get to the next morning, did Mr. Bowen call you later that evening?
A. Yes, sir.
Q. About what time did he call you?
A. Approximate time, I've no idea.
Q. Can you give me a ballpark of how far into the evening?
A. I'd say about between, about 9:00 somewhere.
Q. So, can you tell me about your conversation with Mr. Bowen by telephone?
A. Mr. Bowen said that, he apologized about what happened.
Q. Anything else that he asked you to do?

A. No, sir. No, sir.
Q. What did you tell him about where things stood as far as any discipline?
A. I told him it was out of my hands.
Q. Why did you tell him that?
A. Sir?
Q. Why did you tell him it was out of your hands?
A. Because it was already, I had already filled the paper out.
Q. Once something like this happens, what are you required to do?
A. It has to go to the plant superintendent.
Q. And anything else that Mr. Bowen told you in this conversation?
A. No, sir.

(Tr. 295-303)

Adkins version of events as to the origins of the conflict at the impoundment was corroborated by dozer operator Wayne Grimmet. His testimony in this regard is noted in the following colloquy:

Q. [By Mr. Heath] And, sir, who are you employed by?
A. Sidney Coal Company.
Q. How long been at Sidney Coal?
A. Since the end of January.
Q. What is your work experiences as far as working the dozer?
A. Roughly 18, 20 years experience.
Q. Did you ret urn back to this area in January to your wife's home?
A. I did.
Q. What did you do prior to coming to Sidney related to dozer work?
A. I was a general foreman for a construction company in Hampton, Virginia.
Q. When did you start at Sidney?
A. Exact date?
MR. HEATH: Yes.
A. I think it was the 29th of January.
Q. Do you recall getting a couple days of training before that?
A. Day-shift training, I did.

Q. Do you recall then starting on second shift on the evening of the 29th?
A. Yes.
Q. And, what were your duties?
A. My duties were to run the Impoundment dozer, to spread the Impoundment in one-foot lifts in the direction I was directed to do so.
Q. And did you meet Arthur Bowen on your first night on the job?
A. I did.
Q. What did he ask you?
A. He asked me if I needed floated out, that he would float me out.
Q. Did he ask you anything about your dozer background or skills?
A. He asked me, he informed me that - He did. He asked me if I had, what experience I had and did I know how to read a topo map, that he had been passed over for the job and was wanting to know kind of why.
Q. He basically asked you what your skills were versus his?
A. I think so.
Q. That's the impression you got?
A. Absolutely.
Q. Okay. And then he asked you to float him out on the night of the 29th (sic) - First of all, how did you get up to your job on the 29th?
A. Tony would take us up, the foreman would take us up in the company vehicle.
Q. Where would you sit?
A. I always sat in the passenger seat.
Q. Up front?
A. Up front.
Q. Where did Mr. Bowen sit?
A. Back seat.
Q. On the way up the hill, is that when he asked you about floating out for lunch?
A. Yes.
Q. And, did you want to be relieved when you first started working in this operation?
A. No, I did not.
Q. Why not?
A. Because I wanted to make sure my duties that was

expected of me in my work was done and performed correctly, and I didn't know anybody to trust to leave me in a situation that I would have to work harder for to try to catch up or something, not knowing anybody else's experience.
Q. Are you basically, so this is your starting period. Are you sort of being graded as to how you're doing your job in this initial period?
A. I think I would be, yes.
Q. Let's go to the second night, which would have been the 30th. Are you again in the vehicle with Mr. Bowen and Mr. Adkins?
A. I am.
Q. Did Mr. Bowen ask you about running your dozer?
A. He asked again to float me out for lunch.
A. What did you tell him?
A. No.
Q. Same thing you told him the night before?
A. Correct.
Q. What was the tone of this conversation?
A. I don't think that there was a really negative tone. I think that, you know, just a normal tone, I expect.
Q. What happened on the 31st?
A. Again, the same journey up the hill. Mr. Bowen asked me to float me out for the dozer. I felt like, you know, getting maybe kind of irritated, I wouldn't let him do it, more persistent of doing so.
Q. Did he ask you more than once that night?
A. Yes, he did.
Q. Again, how did you respond to that?
A. I just told him I'd let him know, because I didn't want to directly say no. I just said, "I'll let you know." And I didn't feel it was my position to, you know, to okay that. I felt that would be the boss's position to okay that.
Q. Do you know how many times he asked you to run that dozer?
A. The last day up the hill?
MR. HEATH: Yes.
A. Not exactly how many times, but it was quite a few times going up the hill.
Q. At any point did you tell him, "Hey, I want you to run the dozer for me?"
A. No.
Q. Getting out of the vehicle at the top of the hill,

did you ask Mr. Bowen about him running your dozer? Did you request him to?
A. No, I did not.
Q. And did you ever fall asleep running the dozer?
A. No.
Q. And, when you got up on the hill, first of all, and we've got a map here, but where would you all get off to switch out the dozer?
A. Always at the stacker belt, at the end of the stacker belt or very close to it.
Q. Would that be somewhere around the end of R-4?
A. That's exactly right.
Q. For the record, we're looking at R-9 and what's labeled Sukey Branch Slurry Impoundment Embankment. Is that correct?
A. Yes.
Q. And that would be your work area?
A. Yes, that's correct.
Q. When you got out of the vehicle, what did you do?
A. I went to Gary Hatfield, as I do at the beginning of every one of my shifts, because he directs me on what direction the material is going to be pushed throughout the night.
Q. And Hatfield was the dozer operator.
A. Yes, he's the day-shift operator.
Q. While you're having your conversation with Mr. Hatfield, where is Mr. Bowen?
A. At that particular moment he was standing with us.
Q. Was he basically listening to what's being discussed?
A. Correct.
Q. Where was the last time you saw Mr. Bowen?
A. Going to his belt job, to what he did to belts. He was headed that way.
Q. And did Mr. Adkins talk to him up on the hill that you could tell?
A. Yes.
Q. Could you hear any of the conversation?
A. No.

(Tr. 202-208)

Foreman Rocky Fitzpatrick corroborated Adkins' testimony regarding events at the impoundment and when they later met in the plant office. His testimony in this regard is reported in the following colloquy:

> A. We went in and he [Adkins] closed the door behind us and he proceeded to tell me that him and Trooper had had a confrontation on the Impoundment. He said that, I think Wayne Grimmet had only worked like, I think, three days at that time, and he said all three days on the way to the Impoundment that Trooper had, I'm not sure how he put it, I think he said had aggravated the tar out of the man or something about wanting to float him out for dinner and breaks. He said when he got to the Impoundment, said Trooper had been pressuring the guy and the guy had insisted that he didn't want a break, that he wanted to stay on the dozer and he'd eat something on the run, because he didn't want to get behind or whatever. Anyway, and Wayne's one of these guys that takes a lot of pride in his work. And he said Trooper had been aggravating the guy, I think is how he put it.
>
> Anyway, when they got over there, he said that he called Trooper to the back of the truck, I think he said, and told him basically quit aggravating the man, he says he don't want you to break him out. And at that point, he said Trooper flew mad and started insisting that it wasn't fair for this guy to have to work 12 hour shifts and not get a break, and it just wasn't right. And I guess, I don't know why he got so upset about it, but anyway, the way Tony described it, he got very upset and was being very loud with him and insisted that it wasn't fair and that this guys needed a break like everybody else. I don't know what and all was said, but at one point he said that he told Trooper he was going to take him to Billy the next morning, and that Trooper said, "I don't know care what you do. You can kiss my ass."
>
> And at that point, he left and came back to the office.
>
> My advice to him was, I said, "Well --
>
> Q. Let me clarify something. When you say "he left," are you referring to Mr. Adkins?
>
> A. Tony. Tony. He got Gary Hatfield and they came back to the plant where he called me in there and was telling me this. Now, this is what he told me in the office.
>
> Q. You started to say "my advice."

A. My advice to Tony was, I said, "Well," he insisted that he was going to take him to Billy, and I said, "Well, that's what you need to do." And my advice was, "If he comes over here and says one word to you," I said, "don't argue with him, don't fight with him, call security and have him put him off the property. We'll deal with him tomorrow." I said, "We can't fire no one, but we can have them removed from the property." I said, "You don't have to take that abuse," basically is what I told him.

I then left --

Q. Before you left, was there any discussion about any paperwork that needed to be filled out?

A. Oh, he had pulled a Disciplinary Action form out and the only part of it I seen him fill out was he wrote William's names on the top. He wrote "William Bowen." That's all I seen him fill out on the paper. It's a little pink form, a Disciplinary Action form. He did write his name down. I seen him do that.

Q. At this point did you understand Mr. Bowen was still working on the hill?

A. As far as I knew, he was still over there.

Q. Did Mr. Adkins say he had fired Mr. Bowen?

A. No. There was nothing said about anybody firing anyone. And we don't have this authority no way.

Q. Did he say he had suspended Mr. Bowen?

A. No. He hadn't suspended him. He merely was, he pulled the Disciplinary Action form out and put his name on it.

(Tr. 256-259)

A short time later Fitzpatrick, was at his locker in the changing room when he heard Bowen yelling in the lobby area. Fitzpatrick returned to the lobby area and saw that Bowen was "almost yelling or screaming, if you will, at Tony Adkins" and "kept insisting that it wasn't fair," that Grimmet did not get a break. Bowen then attempted to engage Fitzpatrick in a discussion about Grimmet getting a break so that Bowen could drive the dozer. According to Fitzpatrick, Adkins responded, "Well, you know, that's my place. That's not your place to worry about it. If the man needs a break, I'll give him a break. "

Fitzpatrick testified that Bowen "was being very loud and aggressive," and using intimidating behavior: "[H]e had a pair of boots or shoes in his left hand, and he was standing with like his arm up on the file cabinet, and from time to time he would hit the boots and shake the file cabinets." According to Fitzpatrick, at one point during the dispute, Bowen told Adkins

that nobody on his crew liked him, and "he ought to hear what they said about him when he wasn't in the room." Bowen purportedly told Adkins he could not get along with him and told Adkins, "I quit." Adkins responded, "Well, you've made your decision." Fitzpatrick testified that during their argument Bowen said he quit "on two or three different occasions." According to Fitzpatrick, there was no discussion about the R-2 cut-through during the argument.

Other Sidney employees were present during the exchange between Bowen and Adkins in the lobby of the preparation plant office. Loader and dozer operator Gary Hatfield was in the locker room getting ready to leave for the day, when he heard Bowen "hollering and screaming." As Hatfield was leaving the locker room, Bowen was walking towards him, heading to the parking lot. According to Hatfield, Bowen was "mad," and "hollering and raving" as he left the building. Hatfield testified that Bowen said he was not going to be talked to "like a child."

Preparation plant worker Randall Blackburn had followed Bowen into the foreman's office around 7:30 p.m. Blackburn testified that, as soon as Bowen entered the office area, he "started hollering at Tony Adkins, screaming". Blackburn testified that Bowen was so angry that he slammed boots down and hit the top of the filing cabinet in the superintendent's office. According to Blackburn, Bowen's behavior became so threatening that Blackburn though Bowen was about to strike Adkins. Blackburn testified in this regard that "I thought he was going to hit Tony when he brought his hand over, and he pointed his finger in his face and told him he could kiss his ass, he quit."

Beltman Robert Hicks also heard Bowen tell Adkins to "kiss his ass" and saw Bowen walk off the job with his belongings. Jeffery Brock was a dozer operator at Sidney Coal. Brock testified that he left the prep plant office at the same time as Bowen and spoke with him in the parking lot. Bowen told Brock that he quit because "they treated him like a dog," and "quitting was better than getting fired." Significantly Bowen also admitted to Brock that he and Adkins had argued over leaving the dozer man alone and that he (Bowen) told Adkins to "kiss his ass, he quit" (Tr. 247-278).

I have evaluated the evidence in this case, some of which is obviously in conflict, and conclude, based on the credible evidence, that the Complainant in fact resigned from employment with the Respondent before he suffered any adverse action. It is not alleged that the Complainant was the victim of a constructive discharge and, under the circumstances, the complaint herein must be denied.[2]

I note, first of all, that the person who Bowen claims fired him i.e. Tony Adkins, denied under oath that he fired Bowen and denied that he told Bowen that he was fired (Tr. 283). While

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[2] A constructive discharge is established when a miner who engages in protected activity shows that the mine operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. *Dolan v. F&E Erection Co.*, 22 FMSHRC 171, 176 (February 2000).

Adkins did testify that, in response to Bowen telling him "You kiss my ass", he responded "Hold it just a minute ...You can't talk to me that way...I'll take you to [Plant Superintendent] Billy McCoy", that statement is not alleged to be an adverse action. I note, moreover, that Bowen himself admitted in a deposition that "I never said I quit, but I guess technically you could say I did because I did walk away from the job" (Tr. 147). This testimony also corroborates Adkins' testimony that Bowen had, without authorization, just walked off the job and told him at the foreman's office "I'm quitting".

As previously noted, Bowen also admitted to former coworker Jeffrey Brock that after he (Bowen) and Adkins had an argument at the impoundment, Bowen said "he told Tony [Adkins] to kiss his ass, he quit" (Tr. 247-248). Additional corroboration of the finding that Bowen had resigned is found in the testimony of the other witnesses to the confrontation that took place later at the plant office. As previously noted, Mssrs. Fitzpatrick, Blackburn and Brock all testified to hearing Bowen say that he quit.

In any event, even assuming, *arguendo*, that Adkin's statement to Bowen following their confrontation at the impoundment that "I'll take you to [Plant Superintendent] Billy McCoy" (with the implication of recommending disciplinary action) could be construed as an adverse action, I do not find that the statement or the subsequent initiation by Adkins of the "Disciplinary Action Form" and the follow-through of disciplinary action by Respondent's management, was motivated in any part by Bowen's protected safety complaints. First, it is apparent that a number of employees other than Bowen had complained about the unsafe condition of the highwall adjacent to the cut-through and there is no evidence of retaliation against any of them. Indeed the record suggests that the highwall condition was a common concern among both hourly and management employees. Second, the confrontation at the impoundment immediately preceding Bowen's resignation was clearly about Bowen's purported harassment of bulldozer operator Wayne Grimmet and Bowen's persistent efforts to operate Grimmet's bulldozer over both Grimmet and Adkins objections. Bowen's testimony, that he raised during this confrontation the issue of Adkins allegedly not giving him rides through the cut-through is also totally out of context with even his own description of, and reason for the confrontation. Third, Bowen admitted to former co-worker Jeffrey Brock that he had resigned because of the confrontation with Adkins concerning the relief of dozer operator Grimmet. Fourth, although the Complainant claims that the confrontation at the impoundment was a protected safety complaint, it is clear that the issue of his resignation or other adverse action was about the Complainant's insubordinate behavior and not safety. Finally, Bowen's exaggeration of, and conflicting testimony regarding the number of times he had been denied a ride through the cut-through seriously damages the credibility of his entire testimony.

However, even assuming, *arguendo*, that Adkins had been motivated in part by Bowen's protected activity, the credible record would overwhelmingly support the affirmative defense that he was also motivated by Bowen's unprotected activity and that Adkins would have taken the adverse action for the unprotected activity alone. See *Pasula*, 2 FMSHRC at 2799-2800. Clearly, Adkins' statement - - "You can't talk to me that way... I'll take you to Billy McCoy" - -

was a direct, understandable and rational response to Bowen's perceived harassment of bulldozer operator Wayne Grimmet and Bowen's insubordinate response "you kiss my ass" (or, according to Bowen himself, "Stick it in your ass").

The Complainant, in his brief, essentially ignores the overwhelming evidence that he had already in fact resigned and appears to argue that the initiation of termination procedures by Adkins at the plant office shows that Adkins in fact had already fired Bowen and that the continuation of termination procedures by Sidney management confirms this argument.

Adkins testified in this regard that he had never previously initiated disciplinary action (Tr. 308) and that he began filling out the company's Disciplinary Action Form on the advice of Foreman Fitzpatrick (Tr. 289). Adkins explained that he was recommending that Bowen "wasn't to come back" (Tr. 302). Adkins completed the disciplinary action form by signing it on February 1, 2005, (Exh. R-2) and presented it to Acting Superintendent Joe Holt for further action in accordance with company procedures. Adkins acknowledged in his deposition that he also told Holt that Bowen had quit (Tr. 316). Thereafter, there were clearly communication problems among upper management as to whether Bowen had quit or was fired. In any event, on February 1, 2005, a letter to Bowen was sent under the signature of Vice President Arch Runyon (with the approval of company President Sid Young) advising Bowen of a "5 day suspension without pay with intent to discharge" (Exh. R-4).

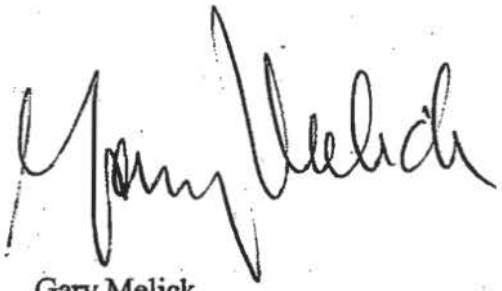
These events occurred prior to MSHA advising Fitzpatrick and Young on the evening of February 1, 2005, about a complaint they received about a piece of ice almost hitting someone. Although Bowen was not identified by MSHA as the initiator of the complaint, there is no dispute that Bowen had, earlier that day, phoned a "103(g)" complaint to MSHA about the condition of the highwall (the Complainant's second alleged protected activity). According to Respondent's President, Sid Young, he had the suspension letter dated February 1, 2005, withdrawn when he learned that Bowen had previously voluntarily resigned. The letter confirming Bowen's resignation was thereafter issued on February 2, 2005. Even assuming, *arguendo*, however, that Respondent's management suspected that the Complainant had triggered the MSHA inspection on February 1, 2005, and therefore the letter dated February 2, 2005 was issued with such knowledge, the alleged adverse action of issuing the second letter is irrelevant since the Complainant had already resigned on January 31, 2005.

Alternatively, even assuming, *arguendo*, that Bowen had been discharged by the February 1st letter, any such discharge as previously determined in this decision would not have been motivated by Bowen's claimed protected activity and, since the letter dated February 1st also preceded the MSHA inspection, it too could not have constituted an adverse action triggered by Bowen's "103(g)" complaint to MSHA.

Under all the circumstances, this discrimination complaint must be dismissed.

ORDER

Discrimination Proceeding, Docket No. KENT 2005-249-D, is hereby dismissed



Gary Melick
Administrative Law Judge
202-434-9977

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

March 30, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2004-68-M
Petitioner	:	A. C. No. 54-00297-11648
v.	:	
	:	
MASTER AGGREGATES TOA BAJA CORP.,	:	Cantera Master Aggregates
Respondent	:	

ORDER DENYING MOTION TO PERMIT SUPPLEMENTAL RESPONSE TO SECRETARY'S SECOND REQUEST FOR ADMISSIONS

On March 23, 2006, Respondent filed a motion captioned Supplemental Response to Secretary's Second Request for Admissions in which it seeks to amend, without explanation or justification, its response to the Secretary's Second Request for Admissions (Request No. 5).

Said Request No. 5 states as follows:

> Request No. 5: On November 13, 2002, Jeffrey Albrecht did not examine ground conditions at the base of the highwall, the site of the fatality, prior to the accident.

In its initial response filed December 1, 2005, Respondent states as follows:

> Response to Request No. 5: Master Aggregates objects to Request No. 5 on the ground that it is vague and ambiguous, as it is not known what is meant by the phrase "prior to the accident." Subject to the foregoing objection, however, and without waiving the same, Master Aggregates states that for the purposes of the above-captioned administrative proceedings only, Request No. 5 is admitted [emphasis added].

On March 23, 2006, following hearings on March 8-9, 2006, Respondent filed the motion at bar seeking to amend its response to read as follows:

> Response to Request No. [5]: Master Aggregates objects to Request No. 5 on the ground that it is vague and ambiguous, as it is not known what is meant by the phrase "prior to the accident." Subject to the foregoing objection, however, and without waiving the same, Master Aggregates states that for the purposes of the above-captioned administrative proceedings only, Request No. 5 is denied [emphasis added].

The Secretary objects to the present motion arguing that it is untimely and prejudicial. More particularly the Secretary argues as follows:

> Respondent initially served the Secretary with its response to Secretary's Second Request for Admissions on December 1, 2005. Since that date, the Secretary has used Respondent's admission in response to Request No. 5 to support her Opposition to Respondent's Motion for Partial Summary Decision and Cross-Motion for Partial Summary Decision dated February 2, 2006. The Secretary also listed Respondent's admission in response to Request No. 5 in her Prehearing Statement dated February 16, 2006. At no time between December 1, 2005, and March 7, 2006, did the Respondent allege that its admissions in response to Request No. 5 was inaccurate or a misstatement of the facts. The Secretary is prejudiced by Respondent's tardy contention, first made at trial on March 8, 2006, that it made in [sic] an error in responding to Request No. 5 of Secretary's Second Request for Admissions. Respondent had ample time to review this admission before trial, particularly since the Secretary called Respondent's attention to the particular admission at issue in two separate filings. Respondent instead chose to wait until trial before changing its answer, thus depriving the Secretary of any opportunity to conduct further discovery on this material point.

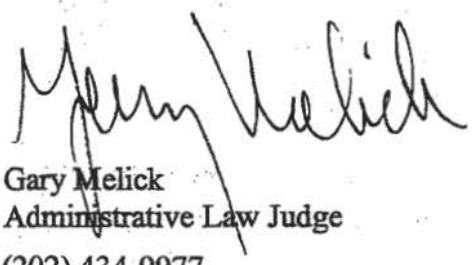
In a response to the Secretary's opposition to the motion, Respondent argues that the Secretary would not be prejudiced should the motion be granted because it had informed the Secretary on the date of hearing on March 8, 2006, of its intention to change its response to Admission Request No. 5 from "admitted" to "denied," and because the Secretary had the opportunity to examine the witness, Mr. Albrecht, at his deposition and at trial regarding any perceived discrepancies. Respondent further asserts, but without explanation, that the initial response to Request for Admission No. 5 was the result of an "error by counsel."

The appropriate framework for resolving the issue presented is provided by the Federal Rules of Civil Procedure, applicable hereto by Commission Rule 1(b), 29 C.F.R. § 2700.1(b). Fed. R. Civ. P. 26 (e)(2) imposes an ongoing and broad reaching duty to correct disclosures and to seasonably amend a prior admission if the party believes that the response is incorrect in a material sense. Under Fed. R. Civ. P. 37(c), if a party, without substantial justification, fails to amend a prior response to discovery as required by Rule 26(e)(2), a party may not use the undisclosed information as evidence at trial unless the failure to disclose was harmless. See *7 Moore's Federal Practice* § 37.60 (Matthew Bender, 3d ed.)

Respondent has failed to provide any explanation to justify its failure, until the day of trial, to notify the Secretary of its proposal to assert a denial in place of an admission made in discovery three months earlier regarding a material issue in the case. The question of whether Mr. Albrecht inspected the highwall on the day of the fatal accident is, of course, at the very core of the case. Respondent has also failed to adequately explain why the initial response to the request for admissions was made as it was. Merely alleging that it was due to "error by counsel" is insufficient. Respondent, who has the burden of proving the basis for its motion, failed to question Mr. Albrecht at hearing regarding the basis for the alleged error. The attorney who made the alleged error could also have testified to explain the circumstances (though would then have been required to withdraw from representation).

Moreover, I do not find that the failure to have provided timely disclosure was harmless. The Secretary clearly placed significant reliance on the admission, using it, without objection, in the motions for partial summary decision, and obviously intending to use it at trial. Learning, on the day of trial, only moments before the commencement of trial, that Respondent was seeking to deny what had been relied upon to be a critical admission, denied the Secretary a reasonable opportunity to obtain alternative evidence.

Under all the circumstances, I find that the requested change from an admission to a denial, in the response to Admission Request No. 5 may not be used as evidence in the case at bar. Accordingly, the Respondent's Motion to Permit Supplemental Response to Secretary's Second Request for Admissions, is denied.



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Washington DC, 20001-2021
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April 11, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2005-116-M
Petitioner	:	A. C. No. 19-01114-56147
v.	:	
	:	
R.J. CINCOTTA CO., INC.,	:	Mine: Portable Crusher
Respondent	:	

ORDER DENYING RESPONDENT'S REQUEST TO REOPEN PENALTY ASSESSMENT ORDER TO PAY

On February 6, 2006, the Commission remanded this matter to me for further consideration and determination as to whether the operator, R.J. Cincotta Company, Inc., ("Cincotta") is entitled to relief under Rule 60(b) of the Federal Rules of Civil Procedure.[1] Subsequently, on February 28, 2006, I issued an order in which I directed Cincotta to submit a sworn statement addressing why it failed to timely contest the proposed penalties, particularly in light of its receipt of the show cause order. I stated that if Cincotta were to restate its claim of not having received the show cause order, it must explain why this Commission should not consider the certified return receipt as proof of its receipt of the show cause order.[2]

On March 6, 2006, I received the Petitioner's Motion for Approval of Settlement and Order, however, the following day, my assistant left a voicemail message for Cincotta, informing the company that despite the Secretary of Labor's filing of a settlement motion, I would still need to determine whether relief from the final order was warranted. Unless the penalty assessment is reopened, no settlement motion can be considered. On March 8, 2006, company representative, Debbie Cincotta, called my office and spoke to my Attorney-Advisor, who reiterated the company's requirement to file a sworn statement in response to my order. Finally, on March 14, 2006, I received Cincotta's timely response to my order, in which Debbie

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[1]While the Commission is not obligated to adhere to the Federal Rules of Civil Procedure, the Commission has found guidance and has applied "so far as practicable" Rule 60(b). 29 C.F.R. § 2700.1(b).

[2]This matter arose because Cincotta did not file a timely answer to the Secretary of Labor's ("Secretary") penalty petition or to my August 18, 2005 show cause order. When I did not receive a response to the show cause order, I issued a default order on November 2, 2005, in which I directed Cincotta to pay the proposed penalty assessment. In support of its request, Cincotta, appearing *pro se*, claims it never received the default and that it "never heard back for [sic] an order to respondent to show cause." Resp't Jan. 12, 2006 Let.

Cincotta asserts the following:

(1) I personally did not receive the Order of Default sent to us on August 22, 2005[3] and signed by and [sic] administrative person in our company.
(2) I was on vacation and never received the notice when I returned.
(3) The Company would have responded to the original notice in a timely manner, if an officer of the Company was [sic] notified.

Resp't Mar. 8, 2006 Let.

The Commission has stated that default is a harsh remedy, and if the defaulting party makes a showing of adequate or good cause for failing to timely respond, the case may be reopened. *Coal Prep. Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept.1995). In addition, the Commission has held pleadings drafted by *pro se* litigants to a less stringent standard than that applied to documents drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992)(*citing Haines v. Kerner*, 404 U.S. 519, 520 (1972)).

Despite Cincotta's *pro se* status, based upon the evidence before me, I must deny Cincotta's request. The record includes a certified return receipt indicating the company's receipt of the show cause order, a copy of which I included with my February 28 order. Debbie Cincotta acknowledges the company's receipt of the document but seeks to be excused because she did not personally receive the document. However, it is a company's responsibility to ensure that the proper person within its managerial hierarchy receives time sensitive documents. The Commission can not and will not attempt to regulate these types of inner-workings of a company. The record shows Cincotta's receipt of the show cause order, and thus, Cincotta should have filed a response within 30 days.

Accordingly, Cincotta's request to reopen the penalty assessment is **DENIED**, and, thus, the settlement agreement between the parties is moot. Cincotta is **ORDERED TO PAY** the proposed penalty assessment of $4,555.00 within 30 days of this order.[4] Upon receipt of payment, this matter is **DISMISSED**.

Robert J. Lesnick
Chief Administrative Law Judge

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[3]Cincotta actually received the Order to Respondent Show Cause on August 22, 2006. I will assume this is the document to which Cincotta is referring.

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

Enc.

Distribution: (Certified)

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Debbie Cincotta, R.J. Cincotta Company, Inc., P.O. Box 556, Waltham, MA 02454

/aak

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