

## MARCH 2001

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## MARCH 2001

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

Secretary of Labor, MSHA v. Kinder Morgan Operating LP "C", Docket No. KENT 2000-128-R, et al. (Judge Hodgdon, January 26, 2001)

Secretary of Labor, MSHA v. Watkins Engineers and Constructors, Docket No. WEST 99-280-M, et al. (Judge Manning, January 26, 2001)

Secretary of Labor, MSHA on behalf of John Noakes v. Gabel Stone Company, Docket No. CENT 2000-75-DM. (Judge Hodgdon, February 8, 2001)

Secretary of Labor, MSHA on behalf of Andrew J. Garcia v. Colorado Lava, Inc., Docket No. WEST 2001-14-DM. (Judge Weisberger, February 13, 2001)

No cases were filed in which Review was denied during the month of March:

## **COMMISSION DECISIONS**

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 14, 2001

BRYCE DOLAN

v.

F & E ERECTION COMPANY

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Docket No. CENT 97-24-DM

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

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

This discrimination proceeding, before the Commission a second time, involves a complaint by Bryce Dolan against F&E Erection Company (“F&E”) alleging that his refusal to continue to perform lead abatement work was protected by section 105(c) of the Mine Act, 30 U.S.C. § 815(c).<sup>1</sup> In his initial decision, Administrative Law Judge Jerold Feldman concluded that Dolan’s work refusal was protected, 20 FMSHRC 591 (June 1998) (ALJ), and that, accordingly, Dolan should be awarded back pay, attorney’s fees, and litigation expenses. 20 FMSHRC 847 (Aug. 1998) (ALJ).

On review, the Commission vacated the discrimination finding. 22 FMSHRC 171 (Feb. 2000) (“*Dolan I*”). The Commission affirmed the judge’s finding that Dolan had engaged in a protected work refusal, but held that the judge erred by failing to apply the Commission’s

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<sup>1</sup> Section 105(c) provides in pertinent part:

No person shall discharge or in any manner discriminate against . . . or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator’s agent . . . of an alleged danger or safety or health violation . . . or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.

constructive discharge doctrine, and remanded the case to the judge for a determination whether Dolan faced intolerable conditions. *Id.* at 174-81. We declined to address the issue of whether the judge erred in concluding that Dolan had incurred a willful loss of earnings and thereby failed to mitigate his damages, which the Commission had directed for review *sua sponte*. *Id.* at 181 n.12.

In his decision on remand, the judge found that F&E constructively discharged Dolan. 22 FMSHRC 554, 560 (Apr. 2000) (ALJ). Consequently, the judge reinstated his remedial order. *Id.* at 560. We granted F&E's petition for discretionary review challenging the finding of discrimination. The Commission also issued two directions for review *sua sponte*, one "on the question whether the judge properly followed the Commission's remand instruction 'to determine whether Dolan faced intolerable conditions as of the date of his resignation[,]'" and the other on whether the judge correctly determined in the reinstated decision on relief that Dolan failed to mitigate his damages. For the reasons that follow, we vacate the finding of discrimination, the determination that Dolan failed to mitigate damages, and the award of relief, and remand for further proceedings.

## I.

### Factual and Procedural Background

The facts are set forth in the Commission's prior decision and are summarized here. Dolan was an iron worker employed by F&E, a construction contractor that performed work at an alumina smelter in Point Comfort, Texas operated by the Aluminum Company of America ("Alcoa"). 22 FMSHRC at 171. As part of the process of welding "stiffeners" on trusses that supported large storage tanks, Dolan and the five to six other members of his crew removed lead paint from the trusses by burning it off using a cutting torch. *Id.* at 172. From late 1994 until March 1996, Dolan's crew was not furnished with any personal protective equipment or clothing. *Id.*

Upon learning that Alcoa employees performing similar tasks were furnished with protective clothing and respirators due to the presence of lead, Dolan complained to F&E management about the lack of personal protective gear and about lead poisoning symptoms experienced by Dolan and others in the crew. *Id.* In response, F&E had air samples taken, and provided Tyvek suits to the crew. *Id.* In addition, F&E gave half-face respirators to all crew members except the employee using the cutting torch, who was given a full-face respirator. *Id.* at 172-73.

In late March 1996, Dolan complained that the entire crew should wear full-face respirators due to their close proximity to each other, and that the Tyvek suits were inadequate to prevent lead contamination because they were easily torn and sparks from the cutting torch readily burned holes in them. *Id.* at 173. In response, F&E provided a large quantity of Tyvek

suits so they could be replaced as needed. *Id.* In addition, F&E required the crew to vacuum their clothing with high efficiency vacuums before leaving the work area. *Id.*

On April 16, 1996, following continued complaints by Dolan about the inadequacy of the half-face respirators and Tyvek suits, F&E held a meeting at which its general foreman stated that F&E would continue to use half-face respirators and Tyvek suits, and that employees who wished to transfer to non-lead work could do so. *Id.* No employees accepted the offer of reassignment. *Id.* At the conclusion of the meeting, Dolan quit his job due to his belief that the personal protective gear was inadequate to prevent lead exposure to himself and his family. *Id.*

After quitting his job, Dolan looked for work and received unemployment compensation. *Id.* In June 1996, Dolan's physician pronounced him unable to work due to pain, tremors and other neurologic symptoms. *Id.* Dolan worked on August 11 and 12, 1996 as a construction worker, but had to quit because of pains in his legs, and did not look for work thereafter. *Id.*

After MSHA declined to prosecute the claim of discrimination he filed against F&E, Dolan filed a complaint on his own behalf with the Commission under section 105(c)(3) of the Act. *Id.* at 173-74. Analyzing the case as a work refusal, the judge concluded that Dolan's work refusal was protected and that, accordingly, Dolan should be awarded back pay and other relief. 20 FMSHRC at 606, 847. Characterizing Dolan's removal from the labor market as "willful," the judge denied back pay for the period following August 12, 1996. *Id.* at 849-50.

#### A. Dolan I

In our prior decision in this case, we concluded that the judge erred by failing to analyze the case as a constructive discharge. 22 FMSHRC at 175. We distinguished between a work refusal, which is a form of protected activity, and a constructive discharge, which is a form of adverse action. *Id.* We stressed that, under the *Pasula-Robinette* test,<sup>2</sup> a finding of adverse action is a prerequisite to a finding of discrimination under section 105(c), and that a work refusal, in and of itself, did not constitute adverse action. *Id.* We noted that the judge's failure to analyze the case as a constructive discharge stemmed from his erroneous view that, in order to make out a constructive discharge claim, Dolan had to show that the operator had created intolerable conditions with the specific goal of encouraging him to quit his employment. *Id.* at 175-76. We pointed out that, under *Simpson v. FMSHRC*, 842 F.2d 453 (D.C. Cir. 1988), and its progeny, the focus is on the maintenance of intolerable conditions, rather than on whether the operator has retaliated against a miner's protected activities by deliberately causing hazardous conditions in an explicit effort to encourage the miner's resignation. *Id.* We stated that, in cases of constructive discharge, the Commission first examines whether the miner engaged in a

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<sup>2</sup> See *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, 812 (Apr. 1981).

protected work refusal, and then whether the conditions faced by the miner were intolerable. *Id.* at 176-77.

We upheld, on substantial evidence grounds, the judge's determinations that Dolan had a good faith, reasonable belief in the hazards of continuing to perform lead abatement work, and that F&E failed to address Dolan's concerns in a way that should have quelled his fears. *Id.* at 177-78. Consequently, we affirmed the judge's conclusion that Dolan's work refusal was protected. *Id.* at 180.

We warned, however, that the work refusal issue, based largely on subjective considerations, may not be collapsed into the constructive discharge question, which is governed by an objective inquiry into the existence of intolerable conditions. *Id.* at 179. In view of the judge's failure to analyze the case as a constructive discharge, we vacated his finding of discrimination and remanded "for the judge to determine whether Dolan faced intolerable conditions as of the date of his resignation." *Id.* at 180 (footnote omitted).<sup>3</sup> The Commission further instructed the judge to "consider anew the impact of F&E's offer to reassign Dolan and other crew members to non-lead jobs," noting that, under Commission precedent, a short-term reassignment which the miner reasonably believes will be followed by a retransfer to duties that would expose him again to intolerable conditions is an inadequate response to such conditions. *Id.* at 180-81. Finally, in view of our remand on the discrimination question, we declined to decide the mitigation of damages issue. *Id.* at 181 n.12. Consequently, we vacated the judge's finding of discrimination and remanded the case "for further proceedings consistent with this opinion." *Id.* at 181.

#### B. The Judge's Remand Decision

On remand, the judge commented that his statement at the hearing indicating that, to prove he was constructively discharged, Dolan was required to establish that F&E purposely created intolerable conditions to induce him to resign, referred to a "retaliatory constructive discharge." 22 FMSHRC 554. The judge noted the Commission's instructions that he "determine, using an objective standard, whether the working conditions at the time of Dolan's . . . resignation constituted a constructive discharge." *Id.* at 556. The judge reviewed the standard for finding a protected work refusal, reiterated that Dolan's fears were reasonable and made in good faith, and stressed that "a miner refusing work under a good faith belief that a hazard exists is not required to prove that the working conditions were, in fact hazardous." *Id.* at 558. The judge specifically declined to decide whether intolerable conditions existed, stating:

[W]hether or not full and half-face respirators and Tyvek suits were ineffective goes beyond the scope of this proceeding. The

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<sup>3</sup> The Commission also noted that the burning method chosen by F&E to remove paint, which was the subject of lengthy criticism by the judge, was not in and of itself an issue in the case, although it is relevant for evaluating the adequacy of F&E's protective measures. *Id.* at 179 n.9

determining factors in concluding Dolan was compelled to resign are the reasonableness of Dolan's continuing fears, and F&E's failure to adequately quell Dolan's fears, not the actual degree of hazard presented by F&E's lead abatement procedures.

*Id.* The judge concluded that “[i]t is F&E’s failure to remedy Dolan’s reasonable, good faith safety concerns that provides the ‘aggravating circumstances’ necessary to support a finding of constructive discharge.” *Id.* (citation omitted).<sup>4</sup>

On the question of the effect of F&E’s offer to transfer employees to non-lead work, the judge held that an offer of reassignment to complaining employees that leaves other miners exposed to the subject hazard does not mitigate the operator’s conduct. *Id.* at 559. Moreover, the judge credited the testimony of Dolan and crew member Kenneth Tam that “any reassignment would have been temporary in nature.” *Id.* Consequently, the judge found that Dolan had been constructively discharged. *Id.* at 560. Finally, the judge reinstated his Supplemental Decision on Relief. *Id.*

## II.

### Disposition of Issues

#### A. Constructive Discharge

F&E argues that it did more than was required by the OSHA Construction Industry Lead Standard, that the judge ignored evidence relating to the offer to transfer Dolan to a non-lead job, and that its response to Dolan’s complaints was “more than adequate.” F&E Br. at 13-14. F&E contends that, notwithstanding the Commission’s remand instructions, the judge again conflated the work refusal and constructive discharge issues, and failed to make the requisite finding of intolerable conditions necessary to support a determination that F&E constructively discharged Dolan. *Id.* at 14-15. F&E asserts that, despite this failure, remand to the judge on the constructive discharge question is unnecessary because the record will not support a finding of constructive discharge. *Id.* at 15-16. Consequently, F&E requests that the Commission reverse the judge’s finding of discrimination. *Id.* at 16. In response, Dolan argues that the judge identified aggravating factors, such as F&E’s failure to effectively address Dolan’s concerns, that are intertwined with the intolerable conditions inquiry. D. Br. at 16. Dolan asserts that substantial evidence in the record as a whole supports the judge’s conclusion that F&E constructively discharged Dolan. *Id.* at 12-16.

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<sup>4</sup> Notwithstanding the Commission’s statement in *Dolan I* that the burning of lead paint was not an issue in the case, the judge on remand again discussed the question and concluded that “F&E must bear the burden of departing from generally accepted methods of lead abatement.” *Id.* at 557.

We conclude that the judge failed to carry out the analysis required by the Commission's remand instructions. Instead, he basically reiterated his initial decision, again substituting the work refusal analysis for an inquiry into whether Dolan faced intolerable conditions. We find the judge's failure to follow Commission precedent, and particularly the law of the case set forth in *Dolan I*, troubling.

As we held long ago, “[a]n administrative law judge must follow the rules and precedents of the Commission.” *Sec’y of Labor on behalf of Jones v. Oliver*, 1 FMSHRC 23, 24 (Mar. 1979). This is the Commission’s formulation of the well-settled rule that requires a lower tribunal to strictly adhere to the terms, express or implied, of an appellate court’s mandate, “taking into account the appellate court’s opinion.” *Piambino v. Bailey*, 757 F.2d 1112, 1119 (11th Cir. 1985). The “law of the case” doctrine is a specific application of the mandate rule that requires a trial court to follow appellate determinations of fact and law in subsequent proceedings in the same case, unless new evidence or an intervening change in precedent dictates a different result. *Id.* at 1120. As the Supreme Court has stated,

When a case has been once decided by this court on appeal, and remanded to the [lower] court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The [lower] court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

*In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895).

We have noted that “[l]aw of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.” *E. Ridge Lime Co.*, 21 FMSHRC 416, 421 (Apr. 1999) (quoting 18 Charles Alan Wright, et. al., *Federal Practice and Procedure*, § 4478 at 874 (2d ed. Supp. 1999)); see also *Lion Mining Co.*, 19 FMSHRC 1774, 1777 (Nov. 1997) (matter decided by Commission becomes unassailable law of the case and may not be revisited by judge). The doctrine is “a salutary rule of practice designed to bring an end to litigation.” *Piambino*, 757 F.2d at 1120. “It also ‘protects against the agitation of settled issues and assures obedience of lower courts to the decisions of appellate courts.’” *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984) (quoting *United States v. Williams*, 728 F.2d 1402, 1406 (11th Cir. 1984)).

Our holding and instructions to the judge in *Dolan I* could not have been clearer. We determined that the judge erred by not analyzing Dolan’s claim as a constructive discharge. We restated Commission and court precedent to the effect that proof of a constructive discharge required a showing that Dolan had engaged in a protected work refusal *and* that he faced

“intolerable conditions.”<sup>5</sup> Upholding the judge’s conclusion that Dolan had engaged in a protected work refusal, we remanded the matter to the judge with specific instructions that he determine whether Dolan faced “intolerable conditions.” This the judge failed to do. Instead, he engaged in the identical analysis that led to our remand in *Dolan I*.<sup>6</sup>

Although we sympathize with F&E’s desire to avoid another remand in this case, we are not persuaded by its argument that, because the record compels the conclusion that the operator did not constructively discharge Dolan, i.e., that Dolan did not face intolerable conditions, remand is unnecessary. F&E relies on Dolan’s blood lead levels, its use of protective measures, the lack of harm to Dolan’s family, its compliance with the OSHA Construction Industry Lead Standard and the offer of transfer to non-lead work in support of its request that the Commission dismiss Dolan’s complaint. F&E Br. at 15-16. However, the efficacy of F&E’s protective measures was disputed at the hearing by Robert Miller, the industrial hygienist called as an

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<sup>5</sup> We stated in *Dolan I* that, since *Simpson*, the Commission has generally engaged in a two-step inquiry in constructive discharge cases: first, “whether the miner has engaged in a protected work refusal, and then whether the conditions faced by the miners constituted intolerable conditions.” 22 FMSHRC at 176-77. See *Sec’y of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265, 272-81 (Mar. 1999), *aff’d*, 230 F.3d 1358 (6th Cir. 2000) (table); *Sec’y of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2210-13 (Nov. 1994).

<sup>6</sup> In support of his refusal to apply the Commission’s objective intolerable conditions analysis, the judge cited pre-*Simpson* cases, some of which are work refusal cases involving express terminations rather than constructive discharges. See 22 FMSHRC at 557. The judge also purported to rely on *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989) and two subsequent decisions of the Commission in that case, *Gilbert v. Sandy Fork Mining Co.*, 12 FMSHRC 177 (Feb. 1990) (“*Gilbert I*”) and 12 FMSHRC 1203 (June 1990) (“*Gilbert II*”). 22 FMSHRC at 557, 558. In *Gilbert v. FMSHRC*, however, the court vacated the Commission’s work refusal holding without discussing the constructive discharge issue. And *Gilbert* cites the court’s earlier decision in *Simpson* with approval. 866 F.2d at 1439. In its decision on remand, the Commission stated that, because the miner “did not act precipitately and . . . he entertained a good faith, reasonable belief in a hazard, his departure from the mine constituted a discriminatory discharge in violation of section 105(c)(1) of the Mine Act.” *Gilbert I*, 12 FMSHRC at 181-82. However, the Commission was only deciding those issues remanded by the court (12 FMSHRC at 178) which did not include the constructive discharge question. 866 F.2d at 1441, 1443. Moreover, on petition for reconsideration filed by the operator, the Commission subsequently vacated its holding on the merits in *Gilbert I* (including the language quoted by the judge) and remanded the matter to the judge to ““make the necessary factual findings’ ordered by the Court’s remand.” *Gilbert II*, 12 FMSHRC at 1205. Thus, the *Gilbert* decisions in no way altered the *Simpson* holding that to make out a constructive discharge, intolerable conditions must be proven, nor have they been interpreted to affect the intolerable conditions inquiry by subsequent Commission decisions. See *Dolan I*, 22 FMSHRC at 175-77 (citing *Gilbert v. FMSHRC*); *Bowling*, 21 FMSHRC at 272-76 (same); *Nantz*, 16 FMSHRC at 2211-13 (same) .

expert witness on Dolan's behalf. 22 FMSHRC at 178-79. Miller's testimony was credited by the judge as to the half-face respirators, and undisputed concerning the Tyvek suits. *Id.* Similarly, the Commission held that the record contains evidence on both sides of the question whether F&E's transfer offer constituted an offer to a short-term reassignment, which does not mitigate intolerable conditions under Commission precedent.<sup>7</sup> *Id.* at 180-81. In addition, in light of evidence detailing Dolan's own exposure and that of his crew, lack of harm to Dolan's family would not preclude a finding of constructive discharge. Further, because the OSHA standard does not apply in this workplace, compliance with its terms concerning blood lead levels and medical removal is not necessarily dispositive here.

This is not the first instance that a Commission Administrative Law Judge has ignored remand instructions, nor is it the first time Judge Feldman has done so. In *RAG Cumberland Resources Corp.*, we noted: "Although the Commission instructed the judge on remand to consider all the record evidence regarding inspections in the haulage including [the operator's] log, and determine whether the Secretary met her burden of proving the absence of an intervening clean inspection, the judge failed to do so. . . . The judge's analysis in his remand decision is almost identical to his reasoning in the initial decision, which the Commission did not accept." 22 FMSHRC 1066, 1071 (Sept. 2000), *pet. for review docketed*, No. 00-1438 (D.C. Cir. October 6, 2000); *see also E. Ridge Lime*, 21 FMSHRC at 421-23 (noting that judge failed to carry out factfinding and analysis required by court remand). In light of the clarity of our instructions in *Dolan I*, and the judge's failure to follow them, we are inclined to remand this matter to another judge. Remand to a different judge, however, is a rarely-utilized measure, because it is inefficient administratively and results in the parties suffering an unfair delay in the final adjudication of the case. We have not recently taken the time to stress the overwhelming importance we attach to judges faithfully carrying out the remand instructions we provide in our decisions. We take the opportunity to do so now, and trust that remand to a different judge will not become necessary in this or subsequent cases.

Accordingly, we vacate the judge's determination that F&E constructively discharged Dolan in violation of section 105(c), and remand this proceeding for re-analysis of the constructive discharge issue and a determination whether Dolan faced intolerable conditions. In analyzing this question, we insist the judge reconsider his finding on the effect of F&E's reassignment offer. Although the judge did address the effect of the offer of transfer to a non-lead job on conditions faced by Dolan, contrary to the remand instructions, he examined this issue in isolation, without analyzing, or entering findings on, the overall conditions faced by Dolan at the time he quit his employment. *See* 22 FMSHRC at 180 ("[W]e remand for the judge to determine whether Dolan faced intolerable conditions as of the date of his resignation. *In so doing*, the judge must consider anew the impact of F&E's offer to reassign Dolan and other crew members to non-lead jobs.") (emphasis supplied).

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<sup>7</sup> *See Nantz*, 16 FMSHRC at 2214.

B. Mitigation of Damages/Back Pay

In his remand decision, the judge reinstated his remedial order in which he excluded from back pay the period during which Dolan claimed to be disabled from work, based on the holding that Dolan willfully removed himself from the labor market. 20 FMSHRC at 849-50. If on remand this second time the judge concludes that F&E unlawfully discriminated against Dolan, he must again confront this issue. As In *Dolan I*, this issue was directed for review *sua sponte*. Although in *Dolan I* we determined that “it [was] not appropriate to decide the mitigation of damages issue,” 22 FMSHRC at 181 n.12, we will do so now to avoid further remands in this case.

Dolan contends that the record does not support the judge’s conclusion that Dolan willfully failed to mitigate damages. D. Br. at 22. Dolan stresses that he did all he could do to obtain work, and argues that he should not be penalized for his disabling physical condition that made it impossible for him to work. *Id.* at 21, 22. F&E responds that Dolan should have “lowered his sights” and looked for non-construction work following his inability to perform construction work on August 12, 1996. F&E Resp. Br. at 8-9. His failure to do so, according to F&E, constitutes a failure to mitigate damages. *Id.* at 9. F&E also contends that Dolan would not have worked for it after August 12 due to his claimed physical condition, and that the Commission should apply the general rule that back pay is unavailable for periods when the employee is not seeking work. *Id.* at 9-10.

The question of whether and under what circumstances an employee who is disabled from work has failed to mitigate damages is one of first impression under the Mine Act. It is well settled, however, under the National Labor Relations Act<sup>8</sup> that employees are not entitled to back pay for periods of disability rendering the employee unavailable for work, *except* where disabilities are closely related to interim employment, or arise from the discriminatory conduct, and are not a usual incident of the hazards of living generally. *See NLRB v. Louton, Inc.*, 822 F.2d 412, 415 (3d Cir. 1987) (holding back pay not awarded during period in which employee unavailable for work due to disability); *Am. Mfg. Co.*, 167 NLRB 520, 522 (1967) (recognizing exception where interim disability closely related to interim employment or arises from unlawful conduct); *Becton-Dickinson Co.*, 189 NLRB 787, 789 (1971) (same); *see also Wells v. N. Carolina Bd. of Alcoholic Control*, 714 F.2d 340, 342 (4th Cir. 1983) (approving back pay award under Title VII of 1964 Civil Rights Act for period of disability caused by unlawful discrimination and interim employment); *Mason v. Ass’n for Ind. Growth*, 817 F. Supp. 550, 554-55 (E.D. Pa. 1993) (same); *Whately v. Skaggs Cos.*, 508 F. Supp. 302, 304 n.1 (D. Colo. 1981) (adopting same rule under Age Discrimination in Employment Act), *aff’d in relevant part*, 707 F.2d 1129, 1138 & n.8 (10th Cir.), *cert. denied*, 464 U.S. 938 (1983); *Grundman v. Trans World Airlines*,

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<sup>8</sup> The Commission has relied upon precedent under the National Labor Relations Act in resolving mitigation of damages questions. *See, e.g., Metric Constructors, Inc.*, 6 FMSHRC 226, 231-33 (Feb. 1984) (citing NLRA precedent on operator’s burden of proof and requirement that discriminatee make reasonable efforts to find other employment).

*Inc.*, 54 FEP Cases 224, 1990 WL 165756 (S.D.N.Y. 1990) (same); *Martin v. Dep't of the Air Force*, 184 F.3d 1366 (Fed. Cir. 1999) (adopting same rule under Back Pay Act).

We agree with the National Labor Relations Board that “the practice of disallowing back pay without inquiry as to the nature of the physical disability, [and] the cause thereof . . . may be convenient but it is not always equitable.” *Am. Mfg. Co.*, 167 NLRB at 522. Therefore, we adopt the exception discussed above to ensure that miners disabled due to the conditions which gave rise to their employers’ discriminatory conduct can still receive redress. Thus, if Dolan’s exposure to lead caused his disability, he is entitled to back pay for the period of time at issue.

According to F&E, on June 11, 1999, the Texas Workers’ Compensation Commission determined that Dolan was disabled beginning August 14, 1996. F&E Resp. Br. at 10 n.9. However, this is not a matter of record in this case, and the judge did not enter any findings concerning the nature or cause of Dolan’s disability. On the contrary, in his initial decision on remedy, the judge held that whether Dolan was disabled, and whether Dolan’s health condition was caused by F&E, were questions beyond the scope of the discrimination proceeding. 20 FMSHRC at 849. Should he find unlawful discrimination, he must revisit his remedial order and reopen the record<sup>9</sup> for the purposes of 1) adducing evidence that would permit the entry of findings on the existence, nature and cause of Dolan’s disability, and 2) determining whether the period of any such disability should be excluded from back pay based on the principles we announce today.

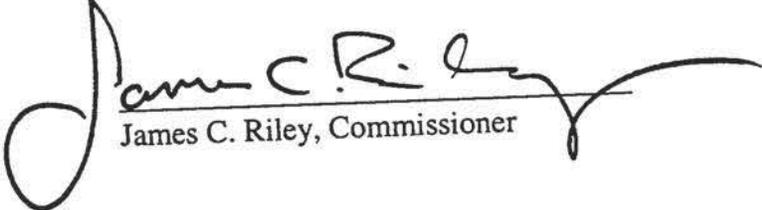
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<sup>9</sup> When the Commission announces a new rule of law, interpretation, or elements of proof, it permits the taking of additional evidence on remand. *See, e.g., Pyramid Mining Inc.*, 16 FMSHRC 2037, 2040-41 (Oct. 1994).

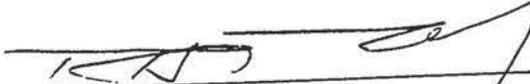
III.

Conclusion

For the foregoing reasons, we vacate the judge's finding of discrimination, his determination that Dolan failed to mitigate damages, and the award of relief, and remand the case for further proceedings consistent with this opinion.

  
James C. Riley, Commissioner

  
Theodore F. Verheggen, Commissioner

  
Robert H. Beatty, Jr., Commissioner

Chairman Jordan, dissenting:

I would affirm the judge's finding that Dolan was constructively discharged. As I stated in *Dolan I*, 22 FMSHRC 171 (Feb. 2000), a judge who determines that a miner's work refusal has protected status under section 105(c) of the Mine Act, 30 U.S.C. § 815(c), has necessarily concluded that the miner does not have to tolerate the conditions under which the employer is asking him or her to work. The conditions prompting the work refusal have therefore been deemed intolerable. *Id.* at 183. Consequently, because the judge in this case initially found that Dolan's work refusal was protected, it has never been necessary to remand this matter to him to determine whether intolerable conditions caused Dolan to quit.

My colleagues contend that, according to Commission precedent, a finding that a miner was constructively discharged and a finding that a miner engaged in a protective work refusal involve two distinct legal standards. Slip op. at 3, 6. They maintain that Commission law applies a subjective standard to determine whether a work refusal is protected, but uses an objective standard to determine if intolerable conditions prompted a miner's decision to quit. Slip op. at 4. I do not agree that such a neat dichotomy exists. Indeed, I view this case as one in which the determination that Dolan's work refusal was protected and the determination that Dolan was constructively discharged are simply two sides of the same analytical coin. A miner is considered to be engaged in a protected work refusal when that miner has a "good faith, reasonable belief in a hazardous condition." *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, 812 (Apr. 1981) (emphasis added). A refusal to work may lose its protected status if an operator takes reasonable steps to dissipate the miner's fears or ensure the safety of the challenged task or condition. *See Gilbert v. FMSHRC*, 866 F.2d 1433, 1440-41 (D.C. Cir. 1989); *Sec'y of Labor on behalf of Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 998-99 (June 1983).

Notwithstanding my colleagues' suggestion to the contrary, a work refusal based on a miner's idiosyncratic, subjective belief in a hazard would not be deemed reasonable and consequently would not enjoy protected status under the Mine Act. Consider, for example, a miner who holds firmly to the belief that the number 13 is unlucky. If that miner refused to work in the section of the mine designated 0013 because of that belief, I daresay we would not consider that miner to be engaged in a protected work refusal. This is so even though there might be no doubt that the miner honestly believed he or she would be risking injury if compelled to work in section 0013. The miner's subjective fear alone would be insufficient to bring the miner within the protective ambit of section 105(c) because his or her fear would not be considered reasonable.

To determine whether a miner's belief in a hazard is reasonable, the Commission must necessarily consider more than the miner's subjective belief. We must consider the conditions confronting the miner and ask whether a reasonable miner might fear for his or her health or

safety under those circumstances. This is not to say that a miner who refuses to work must be prepared to demonstrate that an actual hazard existed in order to have the work refusal deemed protected. *See Liggett Indus. v. FMSHRC*, 923 F.2d 150 (10th Cir. 1991); *Gilbert*, 866 F.2d at 1439. The miner need only prove that he or she had a reasonable and good faith belief that such a hazard did exist. (The lack of a hazard, however could bear on the reasonableness of an employee's belief that his health or safety is in danger. *Liggett*, 923 F.2d at 152).

By the same token, I am unclear what to make of my colleagues' assertion that Commission law imposes a different, objective standard to determine whether a miner has been constructively discharged. I trust they do not mean to imply that a miner who quits because of a reasonable good faith fear for his or her safety will not prevail under section 105(c) unless that miner can demonstrate that an actual hazard did in fact exist.

Although my colleagues insist that an objective standard must be applied to constructive discharge cases, I can envision awarding relief under section 105(c) to a miner who quits work because of a purely subjective fear. Take the same superstitious miner I described earlier. What if the evidence revealed that this miner was assigned to section 0013 because management was confident this particular miner would resign under those circumstances and it wished to retaliate against the miner for reporting safety violations to MSHA? Would we apply an objective standard to the condition confronting the miner at the time he or she quit? On the one hand, it is difficult to see how the number of the mining section to which one is assigned could be considered an intolerable condition under which to work. Despite the subjective nature of the miner's fear, however, it is obvious that the protective purpose of section 105(c) would be completely thwarted if this hypothetical operator were to escape liability.

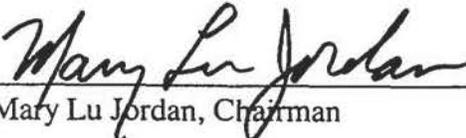
My colleagues' insistence on separate standards is all the more puzzling when one considers that, whether we say a miner was engaged in a protected work refusal or whether we say a miner has been constructively discharged, the economic implications for the operator are the same. As long as a work refusal retains its protected status, the operator cannot cause the miner to suffer lost wages. This is the same obligation that will be imposed upon an operator who is deemed to have constructively discharged a miner. Therefore, whether an employee engages in a continuing protected work refusal or quits under conditions deemed intolerable, the economic bottom line for the operator is the same: liability for lost wages.

In this case, the judge concluded that Dolan had a good faith reasonable belief that a hazardous condition existed – namely, overexposure to lead. 20 FMSHRC 591, 599, 605 (June 1998). The judge noted that Dolan did not act precipitately. 22 FMSHRC 554, 558 (Apr. 2000). Dolan initially raised safety related complaints in March 1996 and he did not resign until April 16, 1996, when it became clear that F&E would not take any further steps to alleviate Dolan's continuing concern that he was at risk for lead exposure. 20 FMSHRC at 596-98. The judge considered the steps that F&E took in response to Dolan's complaints and found they failed to address Dolan's concerns in a way that should have alleviated his fears. *Id.* at 600-604. Thus, the judge concluded that Dolan's resignation on April 16, 1996 constituted a constructive discharge.

In their earlier opinion, my colleagues concluded that substantial evidence supported the judge's finding that Dolan's refusal to perform lead abatement work was protected, but remanded the case because he had not analyzed it as a constructive discharge. 22 FMSHRC at 180. In the current proceeding, my colleagues remand this matter once again because the judge, although deeming Dolan's quit to be a constructive discharge, "engaged in the identical analysis that led to our remand in *Dolan I.*" Slip op. at 7. My colleagues attribute the judge's errors to an obstinate refusal to follow the law of the case. Slip op. at 5-7. I do not share that conviction. While they understandably consider their prior opinion to have been drafted with sufficient clarity so as to preclude inadvertent error on remand, I am unable to rule out that possibility.

I also disagree with my colleagues' determination that it is necessary to remand this matter so the judge can determine whether the operator's offer to transfer Dolan to a non-lead removal job defeated Dolan's claim that he faced intolerable conditions. Slip op. at 8. My colleagues have reiterated the view expressed in their earlier opinion (with which I agreed) that "a short-term reassignment which the miner reasonably believes will be followed by a retransfer to duties that would expose him again to intolerable conditions is an inadequate response to such conditions." Slip op. at 4. In his first opinion, the judge found that the transfer would be temporary, and he made that finding again on remand. 22 FMSHRC at 559. In light of this determination, I fail to understand why my colleagues nevertheless "insist the judge reconsider his finding on the effect of F&E's reassignment offer." Slip op. at 8.

Consequently, I would affirm the judge's holding that Dolan was constructively discharged. I would remand the case only to reopen the record for the judge to receive evidence and make a finding on the issue of mitigation of damages, according to the principles set forth in my earlier opinion and subsequently adopted by my colleagues.

  
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Mary Lu Jordan, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 30, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. CENT 98-230-RM
	:	CENT 99-242-M
CENTRAL SAND AND GRAVEL	:	
COMPANY	:	

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

DECISION

BY: Jordan, Chairman; Verheggen and Beatty, Commissioners

In these consolidated civil penalty and contest proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), Administrative Law Judge David F. Barbour affirmed a citation charging Central Sand and Gravel Company (“Central Sand”) with a violation of 30 C.F.R. § 56.12045 for failure to maintain adequate clearance under a high-voltage powerline. 22 FMSHRC 779 (June 2000) (ALJ). The case involved the electrocution of an 11-year old boy playing on a company stockpile after working hours. *Id.* at 779-80, 782. We granted Central Sand’s petition for discretionary review, and affirm the judge’s decision for the reasons that follow.

I.

Factual and Procedural Background

Central Sand’s mining operations include Pit No. 77, a sand and gravel extraction and processing facility encompassing 40 to 50 acres of land in Hall County, Nebraska. *Id.* at 779, 781. The company also owns almost half of the lake abutting the southern edge of the land portion of the mine, from which sand and gravel is dredged. *Id.* at 781. That material is transported by pipeline across the lake to a screening plant, where it is processed and carried by conveyor belt to a radial stacker. *Id.* The stacker deposits the sand and gravel in one of six stockpiles, which reach up to a maximum height of approximately 45 feet. *Id.* A front-end

loader later transfers processed material onto trucks for delivery to Central Sand customers. *Id.*; Tr. 331-32.

The only official access to the mine is through an entrance gate on the western side of the property, from which there is a gravel road to the stockpiles. 22 FMSHRC at 781. Electric powerlines serving the mine run roughly parallel to the road. *Id.* Mine property was posted with “no trespassing” signs before the accident. *Id.* at 782. However, unauthorized entry to the mine property was possible by boaters on the lake and by trespassers from a nearby area of trailer homes, because the mine perimeter fence was down or otherwise in need of repair and certain points in between. *Id.*

During the latter half of June 1998, a stockpile of fine road gravel mixed with sand was constructed where previous stockpiles had been located. Tr. 293, 314-15. The western edge of the stockpile was directly under three electrical lines: two parallel high voltage lines and a static line above those two lines. 22 FMSHRC at 782; Tr. 68; Gov’t Ex. 3A-B, E-G. The powerlines, installed in 1978 by the City of Grand Island Utility Department and not modified since, carry 13,800 volts of electricity, which was described by Robert Smith, assistant director of the department, as the utility’s “standard primary voltage.” 22 FMSHRC at 784; Tr. 67.

The accident occurred after the mine had closed for the day on July 1, 1998. 22 FMSHRC at 782; Tr. 29. The decedent boy, Ryan Pochop, lived in the nearby trailer park. 22 FMSHRC at 782; Tr. 29. Entering mine property where the fence was down, Pochop, accompanied by a friend, crossed a shallow river and traveled through dense brush and vegetation, failing to heed at least one “no trespassing” sign. 22 FMSHRC at 782-83. Footprints indicated that the boys, after unsuccessfully attempting to climb one stockpile, ascended to the top of the stockpile under the power lines from the east. *Id.* at 783; Tr. 42-43. Ryan Pochop then slid down the western side of the stockpile on the sand and gravel. 22 FMSHRC at 783. While trying to pass under the power lines, the boy’s hand touched the closest line, electrocuting him. *Id.* He continued to slide down the pile, stopping about 15 feet from the ground. *Id.* Rescue personnel were quickly summoned, but the boy was pronounced dead at the hospital. *Id.*

Deputy Frank Bergmark of the Hall County Sheriff’s Office, the lead investigator of the accident, began his investigation that night. *Id.* at 782. After determining that, since the accident, no rescue personnel or other person had been to the top of stockpile or to the point on it where the victim had touched the powerline (Tr. 58, 62), Bergmark ascended the stockpile to measure clearances between the wires and the stockpile. 22 FMSHRC at 784. While doing so, sand and gravel shifted beneath his feet and slid down the pile. *Id.* Bergmark measured a vertical distance of 29 inches and a horizontal distance of 60 inches. *Id.* The next morning, July 2, a utility company employee in a bucket truck measured the height of the stockpile at 35 feet, 7 inches, and the height of the three powerlines at 25 feet, 5 inches, to 29 feet, 10 inches, from ground level. *Id.*; Gov’t Ex. 4.

MSHA inspector Lloyd Caldwell arrived the afternoon of July 2 to begin his separate investigation into the accident. 22 FMSHRC at 783; Tr. 107.<sup>1</sup> Because of the instability of the stockpile, Caldwell did not attempt to climb it to measure the vertical and horizontal clearances. 22 FMSHRC at 784 n.3. Instead, he relied on Bergmark's measurements. *Id.* at 784.

In Caldwell's view, the clearances Bergmark measured did not meet the requirements of the National Electric Code ("NEC"). *Id.* at 784. Consequently, on July 15, 1998, Caldwell issued Citation No. 7926022 to Central Sand, charging a violation of section 56.12045.<sup>2</sup> *Id.* at 784-85; Gov't Ex. 9. The citation alleged that the stockpile was built more than 10 feet higher than the powerlines and less than 2 feet from the lines on its west side. 22 FMSHRC at 785; Gov't Ex. 9.<sup>3</sup> The violation was designated significant and substantial ("S&S") and the result of the operator's unwarrantable failure. 22 FMSHRC at 784-85; Gov't Ex. 9.<sup>4</sup> The Secretary proposed a penalty of \$25,000. 22 FMSHRC at 780.

In his decision following a hearing, the judge determined whether the powerlines were "installed as specified by the NEC" by looking to the National Electric Safety Code ("NESC"), as it is incorporated by reference in the NEC for clearances applicable to conductors over 600 volts. 22 FMSHRC at 785; Gov't Ex. 6 at 70-57. After determining that section 23 of the NESC was the most appropriate section, by process of elimination the judge found that subsection 234 includes clearances most relevant to stockpiles. 22 FMSHRC at 786-87. Under the category in table 234-1 entitled "signs, chimneys, billboards, radio and television antennas, tanks, and other installations not classified as buildings or bridges," the applicable clearance was determined to be

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<sup>1</sup> Caldwell was a certified electrician who trained other MSHA inspectors as to the meaning and application of MSHA's electrical regulations. 22 FMSHRC at 784.

<sup>2</sup> Section 56.12045 requires that "[o]verhead high-potential powerlines shall be installed as specified by the National Electric Code." Because they carry more than 650 volts, the powerlines here are "high-potential" under section 56.12045. 30 C.F.R. § 56.2; 22 FMSHRC at 785.

<sup>3</sup> The citation was later amended to allege in the alternative a violation of 30 C.F.R. § 56.12030, which requires that "[w]hen a potentially dangerous condition is found it shall be corrected before . . . wiring is energized." 22 FMSHRC at 780 n. 1. Because the judge affirmed the part of the citation alleging a section 56.12045 allegation, he did not address whether section 56.12030 was also violated. *Id.* at 789 n.5.

<sup>4</sup> The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology, taken from the same section of the Act, establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

8 vertical feet and 5-1/2 horizontal feet, because the powerlines exceed 750 volts but no maintenance is required on the stockpiles. *Id.* at 787; Gov't Ex. 7 at 101. The judge, although he described the Secretary's regulatory approach with respect to clearances as not "user-friendly," went on to characterize the NEC and NESC as "not impossible to understand and apply" in this instance. 22 FMSHRC at 787 n.4.

The judge rejected the operator's contention that the stockpile was in compliance with required clearances until the boys' descent pushed material from the top to the area under the powerlines. *Id.* at 788-89. The judge relied on testimony from the investigators and photographs of the stockpile to conclude that the stockpile was not in compliance with the NESC prior to and at the time of the accident. *Id.* The judge also rejected the contention that section 56.12045 applied only to the original installation of the powerlines, stating that the operator's failure to maintain required clearances meant that the lines were not "installed as specified" by the NEC and NESC. *Id.* at 789.

The judge also determined that the violation was S&S, because the hazard contributed to by the failure to maintain clearances between the stockpile and overhead powerlines is electrocution from contact with the lines, which is what occurred in this case. *Id.* The judge further determined that the violation was not the result of Central Sand's unwarrantable failure, a determination not appealed by the Secretary. *Id.* at 790-91. The judge reduced the Secretary's proposed penalty to \$6,000. *Id.* at 792.

## II.

### Disposition

#### A. Interpretation of Section 56.12045

Central Sand maintains that, by its literal terms, section 56.12045 does not apply because it only requires that overhead power lines "be installed" in accordance with the NEC, language which limits the obligation to comply with the NEC to the act of initially setting up the lines for use. CSG Br. at 9-12. Central Sand contends that, by charging it with a violation of the standard, the Secretary is holding it responsible for maintenance of the lines, which Central Sand argues is beyond the scope of the regulation. *Id.* at 12-15. The Secretary responds that it is counterintuitive to interpret the standard in the way Central Sand suggests. S. Br. at 12-13. The Secretary submits that the standard is ambiguous with respect to whether it applies beyond the initial placement of the lines, and that the Commission should defer to her reasonable interpretation of the standard as requiring that the lines remain in compliance with the NEC after their initial placement. *Id.* at 13-20.

The "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is

clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993) (“*Consol*”).

We cannot agree that the standard should be limited in its application by the dictionary definition of “install” that Central Sand urges upon the Commission: “to set up for use or service.” *See* CSG Br. at 11-12. Construing the standard in this manner would mean that it would impose no obligation upon operators beyond the initial “set up” of the power lines. This would lead to the plainly absurd result of permitting mining operations to take place without adherence to many provisions in the NESC intended to safeguard persons from the obvious post-installation hazards of overhead high-potential powerlines.

As the judge correctly recognized, adopting Central Sand’s reading of the standard would negate much of its protective intent. *See* 22 FMSHRC at 789. Limiting the coverage of section 56.12045 to only the initial installation of overhead powerlines would turn a blind eye to the fact that clearances can change due to alterations in the surfaces or structures from which clearances were first established. In this case, the surface and structures were under the control of Central Sand, as it was responsible for locating and constructing the stockpile. We can hardly conceive that, in promulgating section 56.12045, the Secretary intended to grant operators license to ignore the extensive safety measures incorporated by reference into the standard from the NESC. Accordingly, we refuse to adopt Central Sand’s interpretation of section 56.12045. *See Consol*, 15 FMSHRC at 1557-58 (rejecting literal definition of standard derived from dictionary definition because it would lead to absurd result of defeating clear purpose of standard); *see also Rock of Ages Corp.*, 20 FMSHRC 106, 122 (Feb. 1998) (construing explosives training requirement to avoid absurd result of permitting miners to work with explosive despite not being trained with that particular explosive), *aff’d* 170 F.3d 148 (2d Cir. 1999); *cf. Jim Walter Res., Inc.*, 19 FMSHRC 991, 998 (June 1997) (reversing ALJ’s decision that standard requiring that conveyor be equipped with slippage and sequence switches was satisfied even though switches were inoperable).

We conclude that it is logical for the Secretary to interpret section 56.12045 to require that clearances from overhead powerlines mandated by the NESC be adhered to beyond the time of initial installation. The material incorporated by reference in the regulation indicates the Secretary’s intention to require operators to adhere to minimum powerline clearances at all times. The purpose of the NEC “is the practical safeguarding of persons and property from hazards arising from the *use* of electricity.” Gov’t Ex. 6 at 70-17 (emphasis added). Similarly, the objective of the NESC provisions on high-potential powerlines, incorporated by reference in the NEC, “is the practical safeguarding of persons during the installation, *operation*, or maintenance of overhead supply and communication lines and their associated equipment.” Gov’t Ex. 7 at 59 (emphasis added). Consistent with concern for the safe operation of powerlines, the NESC requires that applicable clearances be “maintained.” Gov’t Ex. 7 at 71.

Moreover, there is no indication in the regulatory history that the Secretary, in promulgating the standard, intended to limit application of the NEC's provisions to only the original setting up of powerlines.<sup>5</sup> *Cf. Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989) (finding support for Secretary's interpretation in lack of drafter's intent to exclude that interpretation).

In addition, the Secretary's interpretation is consistent with the primary purpose of the Mine Act, which is to protect the health and safety of the nation's miners. *See id.* There is no dispute that requiring adequate clearances from energized overhead powerlines be maintained at all times furthers the goal of mine safety, through avoidance of the danger posed by live powerlines. The danger posed by high-potential powerlines does not cease after the initial installation of the lines.

In short, because operating overhead powerlines pose a great hazard, the term "installed" in section 56.12045 does not designate a limited, initial period of time during which the NESC applies. Rather, it is short hand for the constant vigilance that the NESC makes clear is appropriate when high-potential powerlines are involved. *See Crown Pacific v. OSHRC*, 197 F.3d 1036, 1040 (9th Cir. 1999) (common sense, regulatory purpose, and practical consequences taken into account in interpreting regulations). Accordingly, we affirm the judge's adoption of the Secretary's interpretation of section 56.12045.

#### B. Notice

Central Sand contends that it should not be assessed a penalty for violating section 56.12045 because the regulation, by not clearly defining what conduct is prohibited, is unconstitutionally void for vagueness. CSG Br. at 15. Central Sand argues that the terms of the standard would not alert an operator to the obligation to maintain clearances after the initial installation of the lines, nor that the NESC was applicable. *Id.* at 16-17. Central Sand also maintains that the difficulty utility company employee Smith, inspector Caldwell, and the judge all had in determining the required clearances demonstrates that the regulation is unconstitutionally vague. *Id.* at 16-18.

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<sup>5</sup> Comparing section 56.12045 with the Secretary's regulation that specifically imposes a maintenance obligation in addition to an installation obligation as to boiler and pressure vessels (30 C.F.R. § 56.13001), Central Sand argues that the Secretary must have made a conscious choice to exclude "maintenance" in connection with overhead powerlines. CSG Br. at 12-13. As the Secretary explains in her brief, however, she is not interpreting "installed" as including a "maintenance" obligation in the sense that affirmative action must be taken by the operator to "service" the utility department's powerlines, as would be necessary to keep boilers in working order. Rather, the operator merely needs to refrain from certain actions, such as building stockpiles too close to the lines, to ensure that the status quo of clearance is "maintained." *See S. Br.* at 16-18. Moreover, there is no suggestion in this case that "maintenance" of powerlines was necessary to prevent clearances from becoming inadequate.

The Secretary responds that it would have been unreasonable for Central Sand to believe that section 56.12045 only applied to the original installation of the powerlines, as that would provide little protection to miners during ongoing mining operations, and thus be contrary to the purpose of the Mine Act. S. Br. at 21-22. The Secretary also points out that Central Sand received actual notice of the need to maintain clearances between stockpiles and overhead powerlines, when its officials attended a safety conference at which Caldwell spoke about the obligation to do so. *Id.* at 22-23. The Secretary further argues that any attentive operator, exercising due diligence, could readily ascertain the proper clearances required in this case, and that in any event the evidence is that Central Sand was attempting to adhere to even stricter clearances. *Id.* at 24-26.

Separate from the issue of regulatory interpretation is whether the regulated party has received fair notice of the Secretary's interpretation of the regulation. Where the imposition of a civil penalty is at issue, considerations of due process prevent the adoption of an agency's interpretation "from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (citations omitted). An agency's interpretation may be permissible but nevertheless may fail to provide the notice required to support imposition of a civil penalty. *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982).

The notice requirement is satisfied when a party receives actual notice of MSHA's interpretation of a regulation prior to enforcement of the standard against the party. *See Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996); *see also Gen. Elec.*, 53 F.3d at 1329 (reasoning that agency's pre-enforcement warnings to bring about compliance with its interpretation may provide adequate notice to regulated party). Here, the judge found that Central Sand was aware it had to maintain clearances of powerlines from its stockpiles. 22 FMSHRC at 790-91. In so doing, the judge relied on the testimony of Stanley Benke, the safety director of Central Sand's parent, Lyman-Richey Corporation, who attended an MSHA Regional Safety Seminar in 1996, where inspector Caldwell discussed the need to maintain adequate powerline clearances from stockpiles in order to avoid the issuance of an MSHA citation. Tr. 194, 199, 251-52. The notes Benke took of Caldwell's presentation support his testimony, as does a subsequent memo he sent to other corporate personnel, including those at Central Sand, regarding the seminar. Tr. 197-98, 249-51; Gov't Ex. 12 at 1, 3. While the judge's finding was not made in the context of determining whether Central Sand had adequate notice, it is nevertheless supported by substantial evidence.<sup>6</sup> Consequently, we hold that Central Sand had

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<sup>6</sup> When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

actual notice that it was required under MSHA regulation to maintain safe clearances between stockpiles and overhead powerlines.

There is no evidence, however, that Central Sand had actual notice of the precise minimum clearances the judge found to be applicable to the powerlines: 5-1/2 horizontal feet and 8 vertical feet. In the absence of actual notice, the Commission normally applies an objective standard of notice, i.e., the reasonably prudent person test. *E.g.*, *Otis Elevator Co.*, 11 FMSHRC 1896, 1906 (Oct. 1989), *aff'd*, 921 F.2d 1285, 1292 (D.C. Cir. 1990); *Ala. By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). The Commission has summarized this test as “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). However, to establish that inadequate notice has led to a deprivation of due process rights, a party must show it was materially prejudiced by the allegedly insufficient notice. *See Rapp v. OTS*, 52 F.3d 1510, 1520 (10th Cir. 1995); *see also Gen. Elec.*, 53 F.3d at 1333-34 (inadequate notice found where party relied on reasonable alternative interpretation of unclear regulation); *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 632 (D.C. Cir. 2000) (same).

Here, no evidence was presented to show that the powerline clearances Central Sand attempted to maintain were derived in any way from section 56.12045. Indeed, Benke testified that he was not familiar with what the NEC mandated in the way of clearances from stockpiles, and that the company policy regarding clearances was set without reference to what the NESC required. Tr. 210, 271. Furthermore, testimony from Benke and other Central Sand employees indicates that it was company policy to maintain clearances of 10 feet, both vertically and horizontally, with respect to overhead lines. Tr. 202, 254-55, 279-80, 289, 328. Thus, Central Sand was apparently trying to maintain clearances even *greater* than those mandated by section 56.12045. Central Sand’s failure to consult the applicable regulation and incorporated codes, and its attempt to adhere to greater clearances than those that were applicable, demonstrate that Central Sand was not prejudiced by any failure on the part of section 56.12045 to provide adequate notice of the minimum clearances required. Absent evidence that the complexity of the regulatory scheme contributed to Central Sand’s failure to maintain the proper minimum clearances in this instance, we need not reach the issue of whether a reasonably prudent person in Central Sand’s position would have recognized that clearances of 5-1/2 horizontal feet and 8 vertical feet applied in the case of the Central Sand stockpile.<sup>7</sup>

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<sup>7</sup> We note, however, that the judge’s description of the Secretary’s regulatory approach as not “user-friendly,” is, if anything, an understatement. Both utility official Smith and MSHA inspector Caldwell initially identified the wrong NESC table as applicable in this instance. Tr. 71-75, 132-35, 155-57; Gov’t Ex. 7 at 77. Moreover, in ascertaining the correct clearances, the judge mistakenly relied on NESC Section 23’s reference to “temporary installations.” 22 FMSHRC 786 (citing Gov’t Ex. 7 at 69). That is prefatory material in Section 23 which addresses the temporary installation of powerlines, and not the temporary nature of the objects over which the lines may pass. Gov’t Ex. 7 at 69. Given our holding, however, that error is

C. Whether Substantial Evidence Supports the Finding of Violation

Attacking the judge's finding of violation on factual grounds, Central Sand argues that the stockpile was 45 to 47 feet tall, and that by playing on it the boys sloughed 10 feet of material from the top, which resulted in a significant decrease to the previously maintained 7-1/2 to 10-foot horizontal and vertical clearances from the powerlines. CSG Br. at 6-7. The Secretary disagrees, maintaining that substantial evidence — provided by Caldwell's credited testimony and the photographs of the accident scene, as well as by one of the operator's witnesses — supports the judge's decision to reject Central Sand's theory. S. Br. at 29-30.

We conclude that the record contains sufficient evidence to support the judge's finding that the boys' descent of the stockpile was not the cause of the inadequate clearance.<sup>8</sup> The only evidence the company presented that the stockpile was 45 to 47 feet high before the boys began playing on it was the testimony of pit manager John Brezina that the radial stacker used on that stockpile can reach that height, that it is company policy to build stockpiles as high as the stacker could build them, and that the stacker had completed constructing the pile. Tr. 291-93, 325-27, 337-38. However, the judge gave little weight to Brezina's testimony, describing Central Sand's position on the greater height of the stockpile on July 1 versus July 2 as nothing more than a "hypothesi[s]." 22 FMSHRC at 788.<sup>9</sup>

The judge was also not persuaded by Brezina's testimony that he verified clearances of 10 feet or so were being maintained by viewing them each day from a car traveling between 20 and 25 miles per hour, and that on the day of the accident he estimated both the horizontal and the vertical clearances between the stockpile and the powerlines at between 7-1/2 and 8 feet. Tr. 316-22, 329-31, 340. Noting that the clearances were not referenced on company inspection reports,<sup>10</sup> the judge found Brezina's daily inspection "not conducive to accurate measurement" of

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harmless.

<sup>8</sup> Because the Secretary did not make the argument, we do not address whether Central Sand's contention that the boys were the cause of the inadequate clearances is answered by the Mine Act's imposition upon operators of strict liability for violations. *See, e.g., Sewell Coal Co. v. FMSHRC*, 686 F.2d 1066, 1071 (4th Cir. 1982) (mine operators liable for violations without consideration of fault).

<sup>9</sup> Brezina's testimony contradicted an earlier statement in which he estimated the height of the stockpile at 35 to 37 feet. Gov't Ex. 13 at 4. He explained at trial that he based that earlier estimate on his mistaken understanding that the stacker could only reach that high, only to later learn that the stacker could actually build piles as high as 45 to 47 feet. Tr. 292, 336-38.

<sup>10</sup> The company also submitted no documentary evidence regarding the construction of the stockpile or the capabilities of the stacker.

powerline clearances and concluded that “Central Sand did not offer any reliable evidence regarding the clearances as they existed prior to the accident.” 22 FMSHRC at 788.

In contrast, the judge credited Caldwell’s testimony on the state of the stockpile at the time the accident occurred. *Id.* On cross examination, Caldwell rejected the notion that the top 10 feet of the stockpile had sloughed off, because photographs taken the day after the accident depict the top of the pile as undisturbed. Tr. 162-63; Gov’t Ex. 9 at 6-9. Caldwell pointed out water streaks in the pile from the last wet sand and gravel put on it by the stacker, and testified that these streaks would not have been evident if the top 20 percent of the pile had sloughed down its sides. Tr. 162, 188-89. In addition, Caldwell pointed out that any activity on the stockpile in the area of the powerlines would have resulted in an increase in the clearances, not a decrease, because of the consequential sloughing of material further down the stockpile. Tr. 120-21. In light of the foregoing, the judge agreed with Caldwell that photographs of the immediate area of the stockpile on which the accident occurred do not indicate significant movement of material, thereby accepting the conclusion the Secretary drew from the circumstantial evidence: stockpile clearances were inadequate at the time of the accident. 22 FMSHRC at 788-89.

The judge’s conclusion that measurements taken the night of the accident reflect clearances as they existed at the time of the accident was based on credibility determinations. A judge’s credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge “has an opportunity to hear the testimony and view the witnesses[,] he is ordinarily in the best position to make a credibility determination.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). Nonetheless, the Commission will not affirm such determinations if they are self-contradictory or if there is no evidence or dubious evidence to support them. *Id.* at 1881 n.80; *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989).

Here, we see no reason to take the extraordinary step of overturning the judge’s decision to credit the testimony of Caldwell over that of Brezina on the state of the stockpile at the time of the accident. The judge had the opportunity to view both witnesses, and explained in detail why he was crediting one over the other. Consequently, we affirm the judge’s finding of violation.

#### D. S&S

Central Sand argues in its brief that, even if the Commission upholds the finding of violation, substantial evidence does not support the S&S determination. CSG Br. at 8. Central Sand contends there was no reasonable likelihood that the failure to maintain clearances between the stockpile and the powerlines would lead to an accident, given that the clearances were checked daily, and that it was a trespasser who was electrocuted. *Id.* at 8-9. The operator also

requests that its limited duty to trespassers under state law be taken into account in determining the duty it had to protect the boy from the powerlines. *Id.* at 9.

In response, the Secretary urges the Commission to uphold the judge's S&S determination on substantial evidence grounds, arguing that the two boys gained access to the mine property with little difficulty, and the judge was correct in viewing Ryan Pochop's electrocution as evidence of the danger posed by the lack of proper clearances. S. Br. at 30 n.30. The Secretary also contends the state trespass law is irrelevant to determining whether a violation is S&S. *Id.* at 31 n.30.

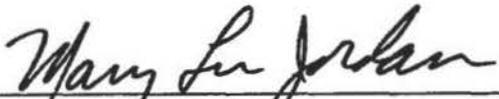
Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), and Commission Procedural Rule 70, 29 C.F.R. § 2700.70, require that each issue on which Commission review is sought be separately numbered and plainly and concisely stated. These provisions also limit the Commission's review to the questions raised in a granted petition for discretionary review ("PDR") or by the Commission *sua sponte*. See, e.g., *Wyo. Fuel Co.*, 16 FMSHRC 1618, 1623 (Aug. 1994) (refusing to consider issue), *aff'd*, 81 F.3d 173 (10th Cir. 1996) (table). Here, Central Sand's PDR addressed only two issues: whether section 56.12045 was applicable in this instance and whether the regulation was void for vagueness. No mention was made in the PDR of whether the judge correctly determined the violation to be S&S, and the Commission did not issue a *sua sponte* order to review the S&S issue.

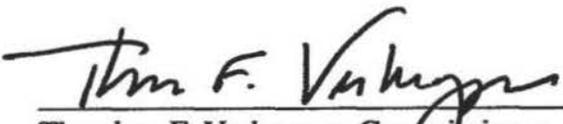
The Commission has recognized that issues implicitly raised by a PDR, or that are closely related to an issue raised in the PDR, may satisfy the requirements of section 113(d) and Rule 70. However, whether a violation is S&S is an entirely separate issue from whether the regulation violated actually applies and whether there was adequate notice of the conduct prohibited by the regulation. Consequently, in these cases the Commission has historically declined to review an S&S determination when it was not listed by counsel in the PDR as an issue on which review was sought. See *Broken Hill Mining Co.*, 19 FMSHRC 673, 678 n.9 (Apr. 1997) (limiting review to penalty issue raised in PDR). We see no reason to depart from that precedent here, and thus refuse to consider Central Sand's S&S arguments.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

  
\_\_\_\_\_  
Mary Lu Jordan, Chairman

  
\_\_\_\_\_  
Theodore F. Verheggen, Commissioner

  
\_\_\_\_\_  
Robert H. Beatty, Jr., Commissioner

Commissioner Riley, dissenting in part:

While I agree with the majority on the issues relating to the question of violation in this case, I cannot agree that Central Sand, by failing to separately list in its PDR its challenge to the judge's S&S determination, thus failed to properly preserve its right to have the Commission consider the issue during briefing. In my opinion, Central Sand properly preserved its right to challenge the S&S determination when it filed a PDR taking issue with the finding of the underlying violation, and that PDR was granted. This is in keeping with the Commission's past practice of considering issues either implicitly raised by a PDR or related to an issue that was raised in the PDR.<sup>1</sup> As there can be no S&S finding without a predicate finding of violation, I believe it exalts form over substance to require a party to separately list its challenge to an S&S finding when it is already challenging the violation.<sup>2</sup>

Moreover, consistent with section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), and Commission Procedural Rule 70(c), 29 C.F.R. § 2700.70(c), Central Sand alleged in its PDR that, with respect to the judge's decision, "necessary legal conclusions are erroneous." PDR at 2 (emphasis added).<sup>3</sup> I thus would consider Central Sand's arguments that the judge erred in concluding the section 56.12045 violation was S&S.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*,

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<sup>1</sup> *See, e.g., Black Mesa Pipeline, Inc.*, 22 FMSHRC 708, 717 n.8 (June 2000) (reversing finding of violation of record-keeping violation even though not directly contested in PDR because to do so was "direct and logical outgrowth of" reversal of related primary violation); *Hubb Corp.*, 22 FMSHRC 606, 611 (May 2000) (considering argument regarding judge's failure to consider statutory criterion where PDR raised issue with respect to regulatory criterion that had "virtually identical language"); *Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998), *aff'd in part on other grounds*, 170 F.3d 148 (2d Cir. 1999) (issue of unwarrantable failure considered because it was sufficiently related to negligence issue raised in PDR); *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 & n.4 (Sept. 1997) (finding that inclusion of subsidiary issue in PDR common to three Mine Act issues raised those issues by implication).

<sup>2</sup> While my colleagues rely on the Commission's decision in *Broken Hill Mining Co.*, 19 FMSHRC 673, 678 n.9 (Apr. 1997), that case is easily distinguishable. There, the operator was not challenging the underlying finding of violation, but merely the penalty assessed for the violation.

<sup>3</sup> I also note that the Secretary in her response brief did not object to the Commission's consideration of the issue.

3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

*Id.* at 3-4 (footnote omitted); accord *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec’y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). Here, we would need only consider the third *Mathies*’ element – the reasonable likelihood that the danger from inadequate clearances will result in an injury – because there is no dispute that the failure to maintain required clearances can result in inadequate distances between a stockpile and powerlines, and that the injury resulting from coming into contact with a powerline would be a serious one.

In concluding that there was a reasonable likelihood of injury resulting from the inadequate clearances, the judge implicitly found a reasonable likelihood that a person would come in contact with the powerlines. However, the judge made a number of other findings which contradict that finding. Most importantly, the judge found that “[m]iners *never* worked nor traveled on the stockpile.” 22 FMSHRC at 791 (emphasis in original). In my opinion, this finding by itself compels the conclusion that the violation was not S&S. The Mine Act is a workplace safety statute. See *UMWA on behalf of Rowe v. Peabody Coal Co.*, 7 FMSHRC 1357, 1364 (Sept. 1985) (Mine “Act’s concerns are the health and safety of the nation’s miners”). Therefore, if a violation does not pose any risk to a miner, it cannot be S&S. The Commission recognized as much when it decided to limit its evaluation of the third *Mathies* element to “continued normal mining operations.” *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985). Because “continued normal mining operations” at the Central Sand stockpile means that

miners would never come near the dangerous condition posed by the powerlines, I would reverse the judge's S&S determination, and remand the case to him for a reassessment of the penalty.<sup>4</sup>

  
James C. Riley, Commissioner

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<sup>4</sup> Even if the danger to trespassers on the stockpile posed by the inadequate clearances were taken into account, the judge's findings made in determining that the violation had not been shown to be due to Central Sand's unwarrantable failure militate against a finding of reasonable likelihood of harm occurring to trespassers. Specifically, the judge found Central Sand had little prior notice that the mine was subject to trespass, and that the boys in this instance had to go to great lengths to place themselves in harm's way. 22 FMSHRC at 791.

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**ADMINISTRATIVE LAW JUDGE DECISIONS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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March 6, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-356-M
Petitioner	:	A. C. No. 41-03959-05505
	:	
v.	:	
	:	
MATBON INCORPORATED,	:	
Respondent	:	Matbon Incorporated

**DECISION**

Appearances: Christopher V. Grier, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of Petitioner;  
Jean S. Boney, Matbon Incorporated, Dallas, Texas, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the 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. (1994), the "Act," charging Matbon Incorporated (Matbon) with eighteen violations of mandatory standards and proposing civil penalties of \$10,565.00 for those violations. The general issue before me is whether Matbon violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

At hearings, Respondent acknowledged the violations as charged and agreed with the Petitioner to a settlement to resolve these proceedings. The parties agreed that the amount of civil penalties would be based upon the disposition by the trial judge of two legal issues.<sup>1</sup> The

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<sup>1</sup> In a letter accompanying its post-hearing brief Matbon sought to void the settlement agreement if it did not prevail on these issues. Matbon subsequently acknowledged in a supplemental post-hearing brief that the settlement agreement was enforceable but nevertheless asked the trial judge to exercise his discretion to allow Matbon to withdraw from the agreement - - presumably only if it does not prevail on the two legal issues submitted for decision. I find no basis to permit Matbon to now withdraw from the agreement. Not only is the agreement enforceable under Texas law but I note that Ms. Boney, Matbon's representative at hearings was

issues relate to two of the six criteria under Section 110(i) of the Act used to determine an appropriate civil penalty, i.e. the operator's history of previous violations and the appropriateness of the penalty to the size of the operator's business.<sup>2</sup>

More particularly the first issue is whether a corporate mine operator may be held responsible for its history of violations regardless of its stock ownership. The history of this corporate operator includes violations committed during May 1998 and through September 1999. On October 22, 1999, Jean Boney purchased 51% of the outstanding stock of Matbon thereby taking controlling interest in the corporation.

As noted, under Section 110(i), in assessing civil penalties, consideration must be given to the the "operator's history of previous violations." The modern corporation is a creature of statute acquiring its existence and authority to act from the state. *Fletcher Cyc Corp.* § 2.10 (Perm Ed). There is no dispute that Matbon is a corporation under Texas law and has been, during relevant times, the operator of the subject mine. A corporation is one of the forms of association, having rights and relations, and the characteristic attributes of a legal entity distinct from that of the persons who compose it or act for it in exercising its functions *Id.* § 1. It is an artificial being, invisible, intangible and existing only in contemplation of law with an identity separate and distinct from that of its owners. *Horne Motors Inc., v. Latimer*, 148 S.W. 2d 1000. Thus, regardless of stock ownership, a corporate mine operator is an independent legal entity responsible for any history of violations committed by that corporate operator. Under the circumstances, the history of violations utilized by the Secretary in calculating the civil penalties proposed in the instant case dating back twenty-four months and including the period of time during which the corporation was under a different mix of stock ownership, was legally correct.

The second issue before me is whether the size of the mine operator may properly include the hours worked by all miners or must be limited to only the production miners working on Matbon's dredge. As noted, under Section 110(i), consideration must be given to the

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specifically advised in the pre-trial conference that if she wished, even at that late date, to retain counsel, the hearing would be postponed to enable her to do so. She declined to avail herself of this opportunity. Ms. Boney also acknowledged at the pre-trial conference that she was aware, by agreeing to the proposed settlement, that she was giving up certain defenses to the violations at issue.

<sup>2</sup> Under Section 110(i) of the Act, the Commission and its judges must consider the following criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. For purposes of the settlement Respondent does not dispute the Secretary's findings set forth in the civil penalty petition and charging documents regarding the other four criteria under Section 110(i).

appropriateness of the penalty to “the size of the business of the operator charged.” It is not disputed that the size of an operator may properly be based on the number of miners employed and the hours worked at its mine. It is also undisputed that, during relevant times, Respondent had an average of two persons working on the extraction of mine product from a dredge, eleven persons working on the processing of this mine product at the same mine property and two persons working in the mine office on the same mine property.

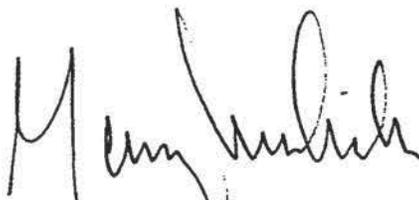
Under Section 3(g) of the Act, “miner” is defined as “any individual working in a coal or other mine.” Under Section 3(h)(1) of the Act, “coal or other mine” means: “ (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.”

Within this framework of law it is clear that all fifteen employees working at the Matbon mine were “miners” within the meaning of the Act and all of their work hours must appropriately be considered in determining mine size.

Within the framework of the settlement agreement reached at hearing, in light of the findings herein and in consideration of the criteria under Section 110(i) of the Act, I find that a civil penalty of \$7,395.50, is appropriate.

### **ORDER**

Respondent Matbon Incorporated is directed to pay a civil penalty of \$7,395.50, within 40 days of the date of this decision.



Gary Melick  
Administrative Law Judge

Distribution: (Certified Mail)

Christopher V. Grier, Esq., Office of the Solicitor, U.S. Dept. of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202

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\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

March 6, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2000-50
Petitioner	:	A. C. No. 46-01318-04419
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Robinson Run No. 95

**DECISION**

Appearances: Melonie J. McCall, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Petitioner;  
Robert M. Vukas, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the 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.* (1994), "the Act," charging the Consolidation Coal Company (Consol) with one violation of the mandatory standard at 30 C.F.R. § 75.370(a)(1) and proposing a civil penalty of \$5,000.00 for that violation. At hearings on November 14, 2000, Consol admitted the violation as alleged and challenged only the Secretary's "significant and substantial" and "unwarrantable failure" findings. The general issues before me then are whether the violation was "significant and substantial," whether it was the result of the operator's "unwarrantable failure" and what is the appropriate civil penalty to be assessed for the violation considering the criteria under Section 110(i) of the Act.

The order at bar, number 4867384, issued October 6, 1999, pursuant to Section 104(d)(2) of the Act, charges as follows:<sup>1</sup>

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<sup>1</sup> Section 104(d) provides as follows:

(1) "If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause

The currently approved mine ventilation plan is not being complied with on the 084-0 mmu, 13-0 Longwall section, in that only 435 fpm velocity was measured at the No. 10 shield with a properly calibrated anemometer. This is the fourth citation that has been issued for inadequate air velocity on this section. Citation No. 7142544 was issued on 08/25/1999. Citation No. 4866439 was issued on 10/04/1999. A methane/dust face ignition occurred on 09/16/1999. Citation No. 7142156 was issued on 09/30/1999 for failure to comply with the applicable respirable dust standard.

The cited standard requires in essence that the operator follow the ventilation plan that has been approved by the District Manager for the Department of Labor's Mine Safety and Health Administration (MSHA). In this case there is no dispute that the relevant ventilation plan required that the air velocity at the cited location be maintained at 500 feet per minute (Jt. Exh. No. 1 Para. 10).

Gregory Fetty is Chief of the Health Section in MSHA District 3. On October 6, 1999, he was working as an MSHA inspector at the Robinson Run No. 95 Mine for the purpose of abating a September 30, 1999, excessive dust violation. Fetty took an air velocity reading at the No. 10 shield and found only 440 feet per minute (fpm) where 500 fpm was required by the ventilation

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and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

plan.<sup>2</sup> The violation was abated by placing a curtain between the No. 1 shield and the headgate rib and by tightening the gob check curtain in the No. 3 entry (Gov't Exh. No. 1).

The Secretary maintains that the violation was "significant and substantial." A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety 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 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.

See also *Austin Power Inc. 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)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *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, 916-17 (June 1991).

According to Inspector Fetty, several health and safety hazards were presented by the violation at issue including the inhalation of excessive respirable dust contributing to black lung disease and the contribution to a fire or explosion resulting from a face ignition because methane would not be promptly removed from the longwall face. Fetty opined that, in the latter cases, fatal injuries were reasonably likely. Fetty also noted that the subject mine was under the "Section 103(i)" gassy mine spot inspection program involving mines liberating more than 1,000,000 cubic feet of methane in a 24-hour period. He also noted that there had been an ignition on September 16, 1999, on the same 13D longwall face. Within this framework of evidence and the reasonable inferences to be made therefrom, I conclude that indeed, the violation was "significant and substantial" and of high gravity.

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<sup>2</sup> The parties apparently agree that Inspector Fetty found 440 cfm not the 435 cfm alleged in the order at bar.

In reaching this conclusion I have not disregarded Consol's argument that, because the violation was quickly abated, it was short lived and therefore, the hazard, if any, was minimized. However, under present law, in determining whether a violation is "significant and substantial" the likelihood of an injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement, *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. Consol also appears to argue that the Secretary failed to prove that this violation "would necessarily lead to an explosion, a fire or black lung." As previously noted, however, the correct standard of proof requires only that the Secretary establish by direct evidence or by reasonable inference a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury or illness. *U.S. Steel Mining Co.*, at 1836. That standard of proof has been met herein.

The Secretary also argues that the violation was the result of Consol's "unwarrantable failure" and high negligence. In this regard the Secretary argues that prior violations for inadequate ventilation were issued at the same location on August 25, August 30, 1999, and, on September 30, 1999 (Gov't Exhs. No. 3 and 4).<sup>3</sup> The Secretary also argues that Inspector Fetty had discussed with the operator at a closeout conference on October 4, the importance of compliance with the ventilation requirements. The Secretary also alleged but failed to prove that the anemometer utilized by the section foreman was not properly calibrated and that he was not using any correction or error factor in calculating air velocity. Fetty acknowledged however, that he did not know how the section foreman actually took his air readings for compliance purposes. Finally, Inspector Fetty testified that he relied in part also upon what he apparently believed was a serious deficiency in the air velocity, *i.e.*, 440 fpm when 500 fpm was required by the ventilation plan.

In defense of the Secretary's allegations of "unwarrantable failure" and high negligence Consol presented the reports for the three pre-shift examinations preceding the issuance of the order at bar performed at the No. 10 shield. The most recent pre-shift examination prior to the issuance of the order showed a reading of 605 (presumably feet per minute) at the No. 10 shield measured during the examination between 5:00 a.m. and 7:15 a.m., on October 6, 1999 (Resp.'s Exh. No. 4). The examination preceding that showed 612 (presumably feet per minute) at the No. 10 shield and the exam preceding that showed 730 (presumably feet per minute) at the No. 10 shield. In addition, the pre-shift examination for the preceding day, October 5, 1999, showed

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<sup>3</sup> At hearing the Secretary sought to amend the citation at bar by also referencing a charging document issued October 4, 1999, for a similar violation of inadequate air in the cited section. However, because the Secretary had failed to disclose this information in a timely manner, the proposed amendment was denied. The admission of that charging document was also barred for purposes of establishing "unwarrantable failure" because the Secretary's failure to disclose her intended use of that document in a timely manner. In any event, even had that prior charging document been admitted and considered, it would not have been sufficient under all the circumstances to support a finding of unwarrantability or greater negligence than found herein.

readings at the No. 10 shield of 700, 600 and 625 (presumably feet per minute). The uncontradicted and credible record thus shows that for the six pre-shift examinations preceding the issuance of the order at bar the air measurements at the No. 10 shield were well above the minimum required by the ventilation plan.

In further defense of the unwarrantable failure allegations, Consol cites the testimony of longwall section foreman Gary Graham that he obtained an air reading on October 6, 1999, only five or ten minutes before 9:00 a.m., and found 535 fpm at the No. 10 shield. Since the order at bar was issued at 9:05 a.m., it is apparent that Graham's readings were obtained only 10 to 15 minutes before inspector Fetty found the air reading had dropped to 440 fpm at the No. 10 shield. Graham also testified that it required only five minutes to tighten the curtains necessary to bring the air readings up to the requisite level. Graham also observed that the curtains had been tight at that location when he passed earlier around 9:00 that morning and noted that when he later returned to that location after the order had been issued he observed that the curtain had been torn out from the spad. Graham opined that this could have been caused by someone passing through the curtain in the interim. He noted that the other curtain had been loosened by moving the shield.

Longwall section foreman Graham's testimony is not disputed and his credibility is not otherwise challenged. Under the circumstances I accord Graham's testimony significant weight and conclude that indeed he checked the air velocity at the No. 10 shield only ten or fifteen minutes before the violative condition was discovered by Fetty. Fetty's lower and violative air reading was apparently the result of curtains becoming loosened subsequent to their examination by Graham, thereby causing the decrease in ventilation. Because of the extremely brief period during which the violative condition therefore existed, the permissible air reading obtained only shortly before the violation was discovered and the fact that the six preceding pre-shift reports showed air readings well above the requisite level, I cannot find that the violation herein was a result of "unwarrantable failure" or high negligence.

I do find however, that the violation was the result of moderate negligence based on Graham's admission that they had been having trouble keeping air at the face for several weeks before the order in this case was issued. At the same time I also note that the mine foreman had instructed Graham to take four to five readings per shift to monitor the problem. Under all the circumstances the order at bar must be modified to a citation under Section 104(a) of the Act.

### Civil Penalty

Under Section 110(i) of the Act, the Commission and its judges must consider the following criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Gravity has been found to have been high and negligence to have been moderate. Respondent has a significant history of violations as shown by Gov't Exh. No. 10. It has been stipulated that Consol is a large mine operator. There is no dispute that Consol demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. There is no evidence that the penalty imposed herein would have any effect on the operator's ability to continue in business. Within this framework of evidence I find that a civil penalty of \$2,500.00, is appropriate.

**ORDER**

Order No. 4867384 is hereby modified to a citation pursuant to Section 104(a) of the Act. Consolidation Coal Company is hereby directed to pay a civil penalty of \$2,500.00, for the violation charged in Citation 4867384 within 40 days of the date of this decision.



Gary Melick  
Administrative Law Judge

Distribution: (Certified Mail)

Melonie J. McCall, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 400, Arlington, VA 22202

Robert M. Vukas, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 SKYLINE, 10th FLOOR

5203 LEESBURG PIKE

FALLS CHURCH, VIRGINIA 22041

March 8, 2001

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Petitioner : Docket No. WEVA 99-49  
v. : Citation No. 46-06051-03754  
: :  
CANNELTON INDUSTRIES, INC., : Stockton Mine - Portals No. 1 and  
Respondent : No. 130  
: :  
UNITED MINE WORKERS OF AMERICA, :  
LOCAL UNION 8843 :  
Intervenor :  
: :  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Petitioner : Docket No. WEVA 2000-46  
v. : Citation No. 46-06051-03773A  
: :  
Stockton Mine  
FRANK MATRAS, employed by :  
CANNELTON INDUSTRIES, INC., :  
Respondent : Portals No. 1 and No. 130  
: :  
UNITED MINE WORKERS OF AMERICA, :  
LOCAL UNION 8843 :  
Intervenor :  
: :  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :  
Petitioner : Docket No. WEVA 2000-47  
v. : Citation No. 46-06051-03774A  
: :  
Stockton Mine  
ROBERT HILL, employed by :  
CANNELTON INDUSTRIES, INC., :  
Respondent : Portals No. 1 and No. 130  
: :  
UNITED MINE WORKERS OF AMERICA, :  
LOCAL UNION 8843 :  
Intervenor :

## DECISION

Appearances: Melonie J. McCall, Esq., Office of the Solicitor, U.S. Dept. of Labor, Arlington, Virginia;  
David J. Hardy, Esq., Heenan, Althen & Roles, LLP, Charleston, West Virginia;  
Mr. William Willis, United Miner's of Workers of America, Miner's Representative, Pratt, West Virginia.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Penalty filed by the Secretary of Labor, through the Mine Safety and Health Administration ("MSHA"), against Cannelton Industries, Incorporated ("Cannelton"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815, and Frank Matras and Robert Hill as agents of Cannelton, pursuant to Section 110(c) of the Act, 30 U.S.C. § 820. The Petition against Cannelton seeks seven civil penalties totaling \$37,000.00 for alleged violations of section 75.1722(b), 30 U.S.C. § 22(b); 75.1725(a), 30 U.S.C. § 1725(a); and 75.400, 30 U.S.C. § 400.<sup>1</sup> The Petitions against Frank Matras and Robert Hill, individually, seek civil penalties of \$7,700.00 and \$5,500.00, respectively, for knowingly authorizing, ordering, or carrying out, as an agent of Cannelton, the seven violations charged to Cannelton.

A hearing on the merits was convened on January 30, 2000, in Charleston, West Virginia. Prior to convening the hearing, the Parties entered into a discussion and negotiated a settlement, whereby the Secretary agreed to vacate the charges and penalties proposed against Matras and Hill, and Cannelton agreed to pay, in-full, the penalty of \$8,600.00. the Orders, initial assessments, and the proposed settlement amounts are as follows:

<u>Order No.</u>	<u>Initial Assessment</u>	<u>Proposed Settlement</u>
4203559	\$1,400.00	\$1,400.00
4203560	1,200.00	1,200.00
4203655	1,200.00	1,200.00
4204261	1,200.00	1,200.00
4204262	1,200.00	1,200.00
4204264	1,200.00	1,200.00
4204266	1,200.00	1,200.00
<b>TOTAL</b>	<b>\$8,600.00</b>	<b>\$8,600.00</b>

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<sup>1</sup>Upon recognition that MSHA had misapplied the procedures to be followed pursuant to a mine ownership change, MSHA's office of Assessments reduced the total proposed penalty against Cannelton from \$37,000.00 to \$8,600.00.

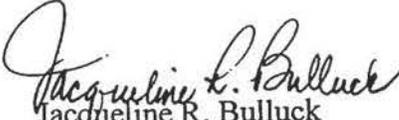
Additionally, under the terms of the agreement, Cannelton is required to take the following action:

1. lay track between the 2<sup>nd</sup> North Portal and the 3<sup>rd</sup> Right Portal of the No. 130 Mine, which shall be completed by April 30, 2001;
2. provide training sessions, involving a smoke machine, to all eight active section crews at the Shadrick Mine and the No. 130 Mine, on or before December 31, 2001;
3. provide Frank Matras, Robert Hill and Jack Hatfield, Jr., with an eight-hour class at the MSHA Academy on the duties and responsibilities of an agent, on or before July 31, 2001 (Hatfield, Matras and Hill are to hold a class for foremen at the Shadrick Mine and No. 130 Mine on the same subject);
4. pay for the monthly safety runs performed by the Safety Committee during 2001, for the Shadrick Mine and No. 130 Mine, in accordance with the Collective Bargaining Agreement;
5. formulate a general plan to clean and maintain the belt system at the Shadrick Mine and No. 130 Mine, on or before March 16, 2001; and
6. require a foreman from the No. 130 Mine to regularly attend the communication meetings between mine management and the Union, commencing January 31, 2001.

The settlement was approved at hearing, pending filing of the written, executed agreement. I have considered the representations and documents submitted in these cases and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. I hereby confirm my approval of settlement.

### ORDER

The settlement is appropriate and is in the public interest. **WHEREFORE**, the approval of settlement is **GRANTED**, and it is **ORDERED** that the charges against Frank Matras and Robert Hill, as individuals, are **VACATED**, and the Cannelton **PAY** a penalty of \$8,600.00 within thirty (30) days of this Order. Upon receipt of payment, these cases are **DISMISSED**.

  
Jacqueline R. Bulluck  
Administration Law Judge

**Distribution:**

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**David J. Hardy, Esq., Heenan, Althen & Roles, LLP, P.O. Box 2549, Charleston, WV 25329**

**William "Bolts" Willis, UMWA Miner's Representative Local Union 8843, P.O. Box 126, Pratt, WV 25162**

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 9, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-118-M
Petitioner	:	A. C. No. 41-00009-05548
v.	:	
	:	Fairland Plant & Quarries
CACTUS CANYON QUARRIES OF	:	
TEXAS, INC.,	:	
Respondent	:	

**DECISION**

Appearances: Sheryl L. Vieyra, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;  
Andy Carson, Esq., Marble Falls, Texas, for Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalties filed by the Secretary of Labor against Cactus Canyon Quarries of Texas, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815. The petition alleges six violations of the Secretary's mandatory health and safety standards and proposes civil penalties totaling \$2,686.00. A hearing was held in Burnett, Texas on November 30, 2000. The parties submitted post-hearing briefs following receipt of the hearing transcript. For the reasons set forth below, I vacate one citation, affirm five citations and assess penalties totaling \$1,416.00.

**The Evidence — Findings of Fact**

Cactus Canyon's Fairland Plant & Quarries is a small operation producing marble, crushed granite and quartz in a variety of colors. Its primary customers are in the more artistic market and quality control, to assure consistent color and sizing, is essential. It has a small, experienced work force with very low employee turnover.

On August 24 and 25, 1999, Danny Ray Ellis, an inspector employed by the Department of Labor's Mine Safety and Health Administration (MSHA), conducted an inspection of Respondent's Fairland Plant and Quarries. Inspector Ellis has been an MSHA inspector for nine years and has numerous years of prior experience as a miner and in the mining industry. In the course of the inspection he observed what he determined to be violations of the Secretary's

mandatory safety and health standards. Six citations issued by Ellis in the course of that inspection are at issue here.

As Ellis inspected the shop area, he observed what he perceived to be a violation of 30 C.F.R. § 56.20003(a) which requires that workplaces “be kept clean and orderly.” He issued Citation No. 7881518, and described his observations in the “Condition or Practice” section of the citation as follows:

The floor of the shop was not being kept clean and orderly. There were parts and pieces of metal laying on the shop floor. There were chains laying around the shop also there were pump parts on the floor. The area was very littered with old pieces of motors, crushers and machinery parts.

He concluded that the conditions presented a trip and fall hazard and that an employee who fell might sustain a sprain or fracture resulting in lost workdays or restricted duty. Because there were clear walkways through the area, such that employees would not have to encounter the obstacles unless they were trying to get a part, he concluded that it was unlikely that the violation would result in an injury. He assessed the degree of operator negligence as moderate, because the owner, Jack Carson, admitted that he was aware of the problem and had instructed his employees to clean the area. The condition was abated the following day, by which time the area had been cleaned.

While in the shop Ellis also observed what he perceived to be a violation of 30 C.F.R. § 56.15003, which requires the wearing of protective footwear in areas “where a hazard exists which could cause an injury to the feet.” He issued Citation No. 7881519, and described his observations in the “Condition or Practice” section of the citation as follows:

There were two men working in the shop and they were not wearing protective footwear. The men were working on a backhoe and had to pick up and carry various parts or tools that if dropped would cause damage to their feet.

Ellis was told by one of the men that they were replacing a relatively heavy part on the backhoe, a starter or an alternator. He concluded that it was reasonably likely that a serious injury, i.e., broken toes resulting in lost workdays or restricted duty, could result from the violation and concluded that it was significant and substantial. While the owner stated that he thought the men were wearing protective footwear, Ellis concluded that he should have known of the violation had reasonable diligence been exercised. He classified the degree of operator negligence as moderate, having given some credence to the owner’s statement. The violation was promptly abated. The owner had all fourteen of his employees transported to a local store, where protective footwear was purchased for them.

While inspecting the crusher, Ellis observed what he perceived to be a violation of 30 C.F.R. § 56.12008, which reads, in pertinent part:

Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter \* \* \* electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

He issued Citation No. 7881520, and described his observations in the "Condition or Practice" section of the citation as follows:

The wires going into the junction box for the primary crusher were not properly bushed. The wires going into the bottom of the box were loose and could possibly be pulled out of the box. There were four wires going into a one inch hole.

The hole was located on the bottom of the box, which was approximately at waist height. He had bent over to look at the bottom of the box and did not see evidence of any bushing in the hole. He did not open the box, however, because he is not allowed to open junction boxes when the circuits are energized. He concluded that the condition presented an electrocution hazard and that any resulting injury would likely be fatal, because the box was energized at 220 volts.<sup>1</sup> However, because he did not observe any broken or defective insulation on the wires, he concluded that an injury was unlikely to occur. He rated the operator's negligence as high because approximately nine prior citations had been issued at the facility for the violations of the same standard.

Respondent established during its case that there was a porcelain bushing installed in the opening of the junction box, through which the wires passed. Respondent introduced a picture of the box taken a day or two following the inspection with the box's door open and the bushing clearly visible from the interior of the box. Carson also testified credibly that the box and bushing had been in the same condition since 1983 and had not been cited during previous inspections.

At the crusher, Ellis observed what he perceived to be a violation of 30 C.F.R. § 56.11002, which requires that handrails be provided on "[c]rossovers, elevated walkways, elevated ramps, and stairways." He issued Citation No. 7881521 and described his observations in the "Condition or Practice" section of the citation as follows:

There were two sections of handrailing missing at the crusher at the #1 plant. One section missing was where a person had to cross over the feed to the crusher. A

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<sup>1</sup> At the hearing he testified that the box was energized at 480 volts. However, his notes, taken during the inspection, stated the voltage as 220 volts and Carson testified that 220 volts is the highest voltage used at the facility.

person could fall into the crusher. The fall would be approximately 4 feet. The crusher could be running.

The railing was missing on the walkway going down the steps on the side of the crusher. A person could fall approximately 3 feet into the crusher.

A person works in the control booth and has to pass by a section without a handrail to get to the control booth.

The missing section of railing at the crossover left a gap of 24 inches. The missing piece would have been attached with screws, but had been removed some undetermined amount of time prior to the inspection. The other missing railing piece had been permanently attached and it did not appear that it had been removed recently. He concluded that it was reasonably likely that an injury would occur as a result of the violation and that the injury might be fatal. He classified the violation as significant and substantial because he determined that the hazard contributed to by the missing handrails was reasonably likely to result in a reasonably serious injury. Though the owner disclaimed knowledge of the missing railings, Ellis classified the operator's negligence as moderate because he determined that in the exercise of reasonable diligence, the problem should have been known and corrected.

Carson testified that employees had removed the railing pieces to facilitate their clearing of blockages at the opening of the crusher jaws, which were located approximately four feet (horizontally) away from, and 1-1.5 feet lower than, the crossover. The opening to the crusher jaws was 12 inches by 24 inches and was located at the end of the reciprocating feeder that passed under the crossover. Occasionally rocks would clog the opening and Respondent's employees would stand on the crossover or the walkway, insert the hooked end of a bar into the cluster of clogged rocks and then pull back, or lift, in order to dislodge the stoppage. The employees did not like to lean over the railings and could get more leverage by removing them. Carson also testified that the openings in the railings were relatively small, such that a person could reach a railing from anywhere on the crossover or the walkway and that no employee has ever been hurt by falling into the jaws of the crusher.

After observing two men drinking from the same bottle at a water cooler, and the absence of other containers available for men to drink from, Ellis issued Citation No. 7881522, for a violation of 30 C.F.R. § 56.20002(b), which prohibits use of common drinking cups. He concluded that it was unlikely that an injury would occur, because he was unable to determine whether one of the men had a communicable disease or illness. The risk of injury presented was of transmission of illness or disease, which he concluded might result in lost work days or restricted duty. He rated the operator's negligence as moderate because the violation should have been known in the exercise of reasonable diligence. Carson had provided individual cups to the men from time to time, had asked them to use them and thought that they were using them. Ellis did not know why the two men were drinking from the same container on this occasion, he did not know, for example, whether one of the men had simply temporarily misplaced his drinking

container.

On August 25, 1999, Ellis was examining Respondent's records related to testing of the electrical grounding system and observed that the last continuity and resistance test of the grounding system had been performed on May 22, 1998, more than one year earlier. He issued Citation No. 7881523 for a violation of 30 C.F.R. § 56.12028, which requires that such tests be performed "annually." He testified that MSHA has consistently interpreted this and other "annual" testing requirements to mean that no more than 365 days can elapse between tests. Because he did not find any defects in the grounding system, he determined that it was unlikely that an injury would occur as a result of the violation, but that if one did occur it would be fatal. He rated the operator's negligence as moderate because, even though Respondent had been cited for violating this provision twice in the past, the owner had stated that he had requested that a qualified electrician perform the test and Ellis knew that mine operators in the area had a difficult time obtaining the services of a qualified electrician.

### **Conclusions of Law and Fact**

#### *Respondent's Objection to Inspector's Testimony on Gravity and Negligence*

Respondent objected to portions of exhibits and related testimony as to the gravity of the alleged violations and the extent of Respondent's negligence, contending that such evidence was expert opinion and, therefore, was barred by a prehearing order precluding the Secretary from offering expert testimony, within the meaning of Rule 702, Fed. R. Evid.<sup>2</sup> The objection was overruled, subject to further briefing on whether specific testimony constituted expert testimony. For the reasons set forth below, I conclude that the disputed evidence is more properly characterized as lay rather than expert opinion and was not precluded by the order. Alternatively, if the disputed evidence was deemed to be expert opinion under Rule 702, I would reconsider the prehearing order and hold that the evidence was properly admitted.

Respondent contends, specifically, that the degree of operator's negligence and various aspects of the gravity of a potential violation, i.e., the likelihood and seriousness of an injury

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<sup>2</sup> Prior to the hearing, Respondent filed a motion entitled, "Motion to Exclude Testimony of Government Experts." The grounds for the motion were that the Secretary had failed to respond to discovery requests directed at potential expert testimony, stating that she did not intend to call any expert witnesses. Respondent contended that anticipated evidence on the issues of gravity and negligence amounted to expert opinion and that the Secretary's failure to provide substantive responses to its discovery requests justified precluding such testimony. By order dated November 17, 2000, Respondent's motion was denied to the extent that it sought to preclude otherwise admissible lay testimony, but was granted as to possible expert testimony. Absent good cause, the Secretary was "precluded from offering expert testimony, within the meaning of Fed. R. Evid. 702."

resulting from the violation, are matters provable only by expert testimony within the meaning of Rule 702. With respect to Citation No. 7881519, for example, Respondent contends that Ellis' conclusions, 1) that an injury was "Reasonably Likely" to occur as a result of miners' failure to wear protective footwear when handling machine parts and tools, 2) that an injury would be severe enough to result in "Lost Workdays or Restricted Duty", 3) that the violation was "Significant and Substantial" because there was a reasonable likelihood that the hazard contributed to would result in an injury or illness of a reasonably serious nature, and 4) that the degree of the operator's negligence was "Moderate", are matters of expert testimony that should have been precluded under the pre-hearing order.

Ellis' conclusions were based upon his observations of two miners working in Respondent's shop area who were not wearing hard-toed boots. In response to his questions, one of the men told him that they were engaged in replacing a part, a starter or a generator, on a backhoe. Ellis concluded that men wearing soft-toed boots handling a heavy part, like an alternator or generator, or tools that would be used in the process of replacing one, might drop the part or tools on their, or a fellow employee's, foot and that broken bones might be the result. He determined that the failure to wear hard-toed boots presented a hazard, that an injury would be reasonably likely to occur, that it would result in lost time or restricted duty and would be of a reasonably serious nature. He also determined that Respondent's management, in the exercise of reasonable diligence, should have known of the condition. He accepted the owner's mitigating explanation that he thought that protective footwear was being worn, and assessed the degree of negligence as "moderate."

Rule 701, Fed. R. Evid., deals with opinion testimony by lay witnesses and, at the time of the hearing in this case, read as follows:<sup>3</sup>

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

*Asplundh Mfg. Div. v. Benton Harbor Eng'g.*, 57 F.3d 1190 (3d Cir. 1995), cited in the Advisory Committee Notes to the 2000 Amendment of Rule 701, Fed. R. Evid., is a very informative case on the distinction between lay and expert testimony. As noted in *Asplundh*, Rule 701 has been applied by the courts to permit lay persons to express opinions that go beyond shorthand statements of fact, so long as the personal knowledge, rational basis, and helpfulness standards of the Rule are met. The cases "are arrayed along a spectrum, ranging from what might be described as modest departures from the core area of lay opinion testimony . . . to those which

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<sup>3</sup> Rule 701 was amended, effective December 1, 2000, the day following the hearing in this case, to add a third qualification "(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

approach the ambit of Rule 702 expert opinion.” *Id.* At 1198. The conclusions or opinions at issue here would be representative of those in cases at the end of the spectrum furthest from the ambit of Rule 702. See discussion and cases cited in *Asplundh*, 57 F3d. at 1198-99.

Conclusions as to the general likelihood and seriousness of injuries and operator negligence that Ellis formed in the performance of his duty as he personally observed what he believed to be violations of mandatory safety standards are not opinions based upon scientific, technical, or other specialized knowledge within the scope of Rule 702. They are not opinions on complex issues, such as whether a particular injury or illness was caused by a particular negligent act. They are merely general conclusions about the risk that an injury may occur, what types of injuries may be reasonably anticipated, and the degree of operator culpability. These types of conclusions result “from a process of reasoning familiar in everyday life” not from one that “can be mastered only by specialists in the field.” *State v. Brown*, 836 S.W.2d 530, 549 (1992), also cited in the Advisory Committee Notes. Ellis’ conclusions were clearly lay, rather than expert, opinion. See, *Wilburn v Maritrans GP Inc.*, 139 F.3d 350, 359-60 (3d Cir. 1998) (expert testimony not required for jury to conclude that certain actions under conditions presented would negligently expose plaintiff to injury); *Eckert v. Aliquippa & Southern Railroad Co.*, 828 F.2d 183, 185 n. 5 (3d Cir. 1987) (plaintiff with thirty years experience and familiarity with railroad procedures allowed to offer lay opinion on likelihood that injuries would have occurred had railroad cars been properly coupled); *Hulmes v. Honda Motor Co., Ltd.*, 960 F.Supp. 844, 859-60 (D.N.J. 1997), *aff’d*, 141 F.3d 1154, *cert. denied*, 119 S.Ct. 49 (police officer’s testimony, based upon post-accident investigation, that vehicle was traveling over posted speed limit and that accident resulted from driver inattention, admitted as lay opinion).

This conclusion is entirely consistent with settled Commission precedent that the judgement of an MSHA inspector “is an “important element” in making significant and substantial findings. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1278-79 (Dec. 1998); *Mathies Coal Co.*, 6 FMSHRC 1, 5 (Jan. 1984); *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822-825-26 (Apr. 1981); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7<sup>th</sup> Cir. 1999) (inspector’s opinion alone sufficient to support “common sense conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation to miners”). While the inspectors, who generally have considerable experience in the mining industry, possess specialized experience and training, the nature of their testimony as to gravity and negligence issues results from a “process of reasoning familiar in everyday life”<sup>4</sup>, like the “common sense” conclusion referenced in *Buck Creek*. As the Advisory Committee Notes make clear, the Federal Rules of Evidence do not “distinguish between expert and lay witnesses, but rather between expert and lay testimony.”

The testimony at issue here was clearly lay opinion testimony and was not precluded by the prehearing order. Even if the disputed evidence was deemed to be more properly classified as expert opinion under Rule 702, it was properly admitted. The prehearing order was not intended to establish a rule of admissibility more restrictive than should have been applied in this

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<sup>4</sup> *State v. Brown, supra.*

administrative proceeding.

The complicated rules of evidence applicable to judicial trials were designed to govern decisionmaking by juries. They are premised on the belief that lay jurors are likely to misuse large categories of relevant evidence if they become aware of that evidence. Whether or not the [Federal Rules of Evidence] are well-suited to that purpose, they are totally inappropriate for application either to agency adjudications or to judge-trying cases. . . .

II Davis and Pierce, *Administrative Law Treatise* 118 (3<sup>rd</sup> ed.).

The Commission, like most federal agencies, operates under a far more relaxed standard for the admission of evidence. Commission Procedural Rule 63(a), 29 C.F.R. § 2700.63(a), provides that: "Relevant evidence, including hearsay evidence, that is not unduly repetitious or cumulative is admissible." The Federal Rules of Evidence are referred to only for guidance. *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 n. 8 (Dec. 2000) (Federal Rules of Evidence "may have value by analogy," but are not required to be applied to Commission hearings); *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1843 (Nov. 1995), *aff'd, sub nom, Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C.Cir. 1998) (on issues of admissibility and crediting of expert testimony, Commission is "guided by principles established under Rule 702 of the Federal Rules of Evidence").

The disputed evidence was clearly relevant and was properly admitted. Moreover, barring the evidence based upon a failure to provide discovery would have been an overly harsh sanction here. Respondent was fully apprized of Inspector Ellis' conclusions on the issues of gravity and negligence because they were clearly itemized on the citations. Ellis had discussed the citations with Respondent's owner, who was aware that Ellis' conclusions were formed as a result of observations during the inspection, as guided by his general experience and training. Respondent had determined not to depose Ellis to determine the precise basis for each of his conclusions. It could hardly claim surprise or prejudice by the admission of Ellis' testimony and related exhibits.

*Citation No's. 7881518, 7881519 and 7881522.*

I find that Respondent violated the health and safety standards cited in the subject violations and also find that the gravity and negligence of the violations was accurately assessed by Inspector Ellis. Respondent's only real defense to these citations was its evidentiary challenge to what it claimed to be expert testimony on issues of gravity and negligence. Those objections are without merit as discussed above. I also find that the violation charged in Citation No. 7881519 was significant and substantial.

A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause

and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Nat'l Gypsum, supra*, 3 FMSHRC at 825.

In *Mathies Coal, supra*, 6 FMSHRC at 3-4, the Commission explained:

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

See also, *Buck Creek Coal, Inc. v. MSHA, supra*, 52 F.3d at 135; *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g, Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., 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., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

There can be little question that the violation contributed to a discrete safety hazard, the potential that any dropped or falling machine part or tool could land on unprotected feet causing injury. The more serious of the injuries likely to result, broken bones, is easily classified as reasonably serious. The circumstances of the violation also made it reasonably likely that the hazard contributed to would result in a reasonably serious injury. The two men were working in relatively close proximity and would have been handling machine parts and tools with some

frequency. It is reasonably likely that one of them would drop a part or tool, or that a loose part or tool would fall, and strike one of their feet and that a broken bone, or bones, would result.

*Citation No. 7881520*

I find that Respondent did not commit the violation charged in Citation No. 7881520. The citation was issued because Inspector Ellis did not observe an insulated bushing in the junction box hole when he bent over to look at the bottom of the box. In fact there was a porcelain bushing in the hole through which the wires passed. There was also some testimony that a proper fitting should have included a clamp for the wires. However, the source of that requirement was never explained, and it appears that the standard's reference to "proper fittings" applies only to cables not wires.<sup>5</sup> I find that there was a substantial insulated bushing in the hole through which the wires passed and that the Secretary has not carried her burden on this citation.

*Citation No. 7881523*

Respondent's defense specific to this citation is that the Secretary's interpretation of the requirement that grounding and continuity tests be performed "annually" as requiring that no more than 365 days elapse between tests is unreasonable. The correct interpretation, according to Respondent is that the standard would be satisfied if the test is performed at any time in each calendar year. Any ambiguity in the term "annually" was apparently addressed by the Secretary long ago. I accept Inspector Ellis' testimony that the Secretary's interpretation is taught to inspectors at MSHA's training academy and that other similar standards are interpreted and enforced in the same manner. As he explained, Respondent's interpretation would permit deferring the test for almost two years. The Secretary's interpretation of this, and apparently other similar standards, appears to be well-settled, is a reasonable interpretation of the regulatory provision consistent with the purposes of the Act, and is entitled to deference. *See, e.g., Kerr-McGee Coal Corp. v. FMSHRC*, 40 F.3d 1257, 1261-62 (D.C.Cir. 1994), *cert. denied*, 115 S.Ct. 2611 (1995); *Island Creek Coal Co.*, 20 FMSHRC 14, 18-19 (Jan. 1998).

I find that Respondent violated the standard as alleged and that the assessment of gravity issues made by Inspector Ellis were reasonable. I disagree with his assessment of "moderate" negligence, however. It is uncontested that mine operators in the area have considerable difficulty securing the services of qualified electricians to perform such tests. I accept Carson's testimony that he had ordered the test previously and that the test was overdue by only a little over two months. Under the circumstances, I assess the operator's degree of negligence as "low."

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<sup>5</sup> The applicable standard appears to address two types of electrical conductors, "wires" and "cables," establishing somewhat different requirements for each. Though Inspector Ellis referred to the conductors as cables, he also referred to them as wires and both his notes and the citation itself refer to them as wires.

I find that Respondent violated 30 C.F.R. § 56.11002 as charged in this citation and that the violation was significant and substantial. The standard clearly requires that handrails be provided on these elevated walkways. Parts of the handrails that satisfied the standard had been deliberately removed. While the resulting openings were not large, they created a risk of falling three to four feet for anyone traveling the walkways. Respondent's point that a person could still reach a handrail from anywhere on the walkways does not diminish the violation. The safety enhancement provided by handrails goes considerably beyond providing a secure handhold for someone deliberately seeking to steady himself. It also acts to prevent inadvertent movement of a person's body from the walkway and a secure place to grab in the event of an unanticipated slip. The missing portions of handrail clearly contributed to the hazard of falling from the walkways. It was also reasonably likely that an injury would result, i.e., that a fall would occur, and that an injury resulting from a fall of three to four feet would be reasonably serious. Consequently, the violation was significant and substantial. I disagree with Inspector Ellis in only one respect. I find that the possibility of a fatal injury was so remote as to reduce the gravity of the offense. Ellis' assessment was premised upon someone falling into the 12" by 24" opening of the crusher while it was operating. That opening, however, was some four feet away from the crossover walkway and, if the crusher was operating, would have been filled with rocks. While it might be possible that a person falling from the crossover or the side walkway would encounter the opening and rocks for a sufficient length of time to suffer injury from the crusher, that prospect appears quite remote. The type of injury that could be reasonably likely to occur could reasonably be expected to result in no more than lost work days or restricted duty.

### **The Appropriate Penalties**

As noted above, Respondent is a small operator. Respondent's history of violations was reflected in an Assessed Violation History Report, referred to as an "R-7." The report had been prepared shortly before the hearing.<sup>6</sup> That report and the assessment sheet reflect that in the 24 months preceding the subject inspection that Respondent's operation had been inspected on 17 days and that 41 citations had been written. Findings on the gravity and negligence associated with each sustained citations are also noted above.

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<sup>6</sup> Respondent objected to admission of the report on grounds that it was produced for the first time at the hearing and had not been properly authenticated. The report, Petitioner's exhibit "P-12", bore the certification of the custodian of such records, the Assistant Director of Assessments for MSHA's Civil Penalty Compliance Office, dated November 28, 2000, two days prior to the hearing. While the report was produced to Respondent on short notice, it was produced as soon as it was available and at least some of the information would have been available to Respondent upon request. Respondent has not identified any inaccuracies in the report in its post-hearing briefs. The certified report was properly admitted over Respondent's objection. As noted, *supra*, under Commission rules of procedure, all relevant evidence, including hearsay, is admissible.

Upon consideration of the factors itemized in § 100(i) of the Act, I impose the following penalties, which are appropriate to the size of Respondent's business. As to Citation No. 7881518, I assess a penalty of \$224.00, the penalty proposed by the Secretary. As to Citation No. 7881522, I assess a penalty of \$242.00, the penalty proposed by the Secretary. As to Citation No. 7881519, I assess a penalty of \$200.00, a reduction of the proposed penalty of \$294.00, because Respondent's abatement effort substantially exceeded its obligations. As to Citation No. 7881521, I assess a penalty of \$450.00, a reduction from the proposed penalty of \$655.00, because of the reduced severity of the reasonably likely injury. As to Citation No. 7881523, I assess a penalty of \$300.00, a reduction from the proposed penalty of \$399.00, because of the lower degree of negligence.

### *Financial Hardship*

Respondent contends that imposition of the proposed penalties totaling \$2,686.00 would result in financial hardship. Carson testified that neither he nor Respondent's representative have drawn a salary from Respondent's operation in years and that he deferred purchasing a used fork lift truck because of the pending assessment of penalties for the citations at issue. Respondent's gross sales range from approximately \$500,000.00 in a "bad" year to \$900,000 in a "good" year. Sales in 1998, the last year for which sales figures were available, were approximately \$890,000.00. While Respondent has paid some past penalties on an installment basis, it did not approach MSHA seeking a reduction in the proposed penalties on the basis of financial hardship.

While Respondent asserts, in essence, that imposition of the proposed penalties would result in financial hardship, it does not directly claim, and did not introduce any evidence, that imposition of those penalties would threaten its ability to remain in business. In fact, the only impact upon Respondent's operations described by Carson was the deferral of the purchase of a piece of equipment. Respondent's evidence and arguments fall far short of demonstrating that either the proposed penalties or the reduced penalties imposed above would threaten its ability to remain in business. *Broken Hill Mining Co*, 19 FMSHRC 673 (April 1997); *Spurlock Mining Co.*, 16 FMSHRC 697 (April 1994).

**ORDER**

Based upon the foregoing, Citation numbered 7881520 is **Dismissed**. Citations numbered 7881518, 7881519, 7881521, 7881522 and 7881523 are affirmed, as modified, and Respondent is ordered to pay a civil penalty of \$1,416.00 within 30 days.



Michael E. Zielinski  
Administrative Law Judge

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/mh

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 13, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-585-M
Petitioner	:	A.C. No. 35-03309-05509
	:	
v.	:	Docket No. WEST 2000-586-M
	:	A.C. No. 35-03309-05510
MELVIN BARLOW, d/b/a BARLOW ROCK,	:	
Respondent	:	Barlow Pit

**DECISION**

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;  
Lenora Barlow, O'Brien, Oregon, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Melvin Barlow, an individual doing business as Barlow Rock ("Barlow Rock"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). A hearing was held in Grants Pass, Oregon.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Barlow Rock operates the Barlow Pit in Josephine County, Oregon. On June 7, 2000, MSHA Inspector Randy Cardwell inspected the Barlow Pit. MSHA had inspected the Barlow Pit many times, but this was the first time that it had been inspected by Inspector Cardwell. Barlow contested nine citations in these cases.

Melvin Barlow, the owner of Barlow Rock, testified that he has operated the Barlow Pit for about 41 years. (Tr. 98). The pit has been inspected by MSHA since its inception and it generally received no more than three or four citations per inspection. He testified that he never contested any citations issued during previous inspections. He further testified that Barlow Rock received 37 citations resulting from Inspector Cardwell's inspection. *Id.* He stated that some of the citations issued by Inspector Cardwell were legitimate and he did not contest them. (Tr. 102). He contested other citations issued by this inspector, including the citations at issue here, because he does not believe that they are legitimate, as set forth below.

**A. Citation No. 7986908**

Citation No. 7986908 alleges a violation of 30 C.F.R. § 56.11002, as follows:

Handrails were not provided along the outer edges of the elevated walkways that were located on the sides of the orange universal flat deck screen. The walkway was approximately 20 inches wide, approximately eight feet long, and approximately 89 inches above the ground level. There was a portable ladder leaning up against the end of the walkway allowing access up to the walkway. Employees access the walkway when adding air to the air bags on the side of the screen and when performing regular maintenance.

Inspector Cardwell determined that the violation was of a significant and substantial nature (“S&S”) and was the result of Barlow’s moderate negligence. Section 56.11002 provides, in part, that “elevated walkways, elevated ramps, and stairways shall be ... provided with handrails...” On July 12, 2000, Inspector Cardwell returned to the pit to see if the cited conditions had been abated. He issued Order No. 7986976 under section 104(b) of the Mine Act alleging that Barlow had removed the ladder up to the walkway, but had not provided handrails along the outer edges of the walkway. The Secretary proposes a penalty of \$453 for this alleged violation.

There is no dispute that the cited area lacked handrails. Mr. Barlow testified that the cited area has never had a handrail and that MSHA has never required a handrail at that location in the past. (Tr. 102). He testified that MSHA has inspected this screen many times and handrails were never required. He stated that employees do not climb up onto the cited boards to maintain the air bags or to service the equipment. (Tr. 103). He stated that employees perform these functions while standing on the ladder. He further testified that the only function that these boards serve is to provide “a flat surface to lean the ladder against.” (Tr. 104). The ladder is not present except when someone needs to service the screen.

Inspector Cardwell did not observe anyone on the cited boards. He stated that he issued the citation because of the presence of the ladder. (Tr. 20). There is no testimony that Inspector Cardwell was advised that the cited area was used as a walkway. Inspector Cardwell did not testify that he observed direct proof, such as footprints in the accumulated dirt, that anyone had used the boards as a walkway. He believes that employees went up on the boards because of the nature of the work that had to be performed. (Tr. 20, 68, 92). He does not believe that all of these tasks could be performed from a ladder.

The safety standard requires that elevated walkways must be provided with handrails. The term “walkway” is not defined in the Secretary’s regulations. The term “travelway” is defined as a “passage, walk or way regularly used and designated for persons to go from one place to another.” 30 C.F.R. § 56.2. I find that the Secretary did not establish that the cited area was an elevated walkway. The cited area was simply two boards that had been placed across

supports on the screen. (Ex. R-3). These supports apparently are used to carry various hoses for the screen. *Id.* The testimony of Mr. Barlow establishes that employees do not stand or walk on the boards to perform maintenance on the screen. Inspector Cardwell believes that employees would have to stand or walk on these boards to perform these tasks or, at the very least, that these boards are available for such purpose. The inspector's belief is not enough to establish a violation in this case. The fact that a ladder is leaning against a horizontal surface does not establish that the surface is a walkway. I find that the Secretary did not establish a violation. *See Tide Creek Rock, Inc.*, 18 FMSHRC 390, 410-412 (March 1996)(ALJ). Consequently, Citation No. 7986908 is **VACATED**. If Barlow employees begin standing on these boards for any purpose, Barlow must install handrails or provide fall protection (§ 56.15005).

**B. Citation No. 7986909**

Citation No. 7986909 alleges a violation of 30 C.F.R. § 56.14107(a), as follows:

The V-belt drive on the drive motor of the orange universal flat deck screen was not guarded to prevent employee contact. The pinch points were approximately two feet and five feet above the elevated walkway that ran along side the universal screen. There was not a guard for the V-belt drive and this condition allowed the moving machine parts to be accessible to employee contact.

Inspector Cardwell determined that the violation was not S&S and was the result of Barlow's moderate negligence. Section 56.14107(a) provides, in part, that "[m]oving machine parts shall be guarded to protect persons from contacting ... drive, head, tail, and takeup pulleys ... and similar moving parts that can cause injury." On July 12, 2000, Inspector Cardwell returned to the pit to see if the cited conditions had been abated. He issued Order No. 7986977 under section 104(b) of the Mine Act alleging that Barlow had not made any effort to guard the cited V-belt drive. The Secretary proposes a penalty of \$371 for this alleged violation.

There is no dispute that the cited V-belt drive was not guarded. Inspector Cardwell estimated that the two pinch points were about two and five feet above the "elevated walkway" discussed in the previous citation. As discussed above, I found that the cited boards are not an elevated walkway. Section 56.14107(b) provides that "guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces." The cited pinch points are more than seven feet above the ground. Nevertheless, I find that the Secretary established a violation. Mr. Barlow testified that his employees perform maintenance from the ladder. The drive motor is regularly greased from the ladder. (Tr. 136-38). Employees would be within seven feet from the pinch points when greasing the motor. In such instances, the ladder would constitute a working surface.

As is true at most facilities, ordinary maintenance activities are performed at the Barlow Pit before the equipment is turned on. Nevertheless, the Commission has interpreted this guarding standard to take into consideration "ordinary human carelessness." *Thompson Bros.*

*Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984). The construction of safety standards involving the behavior of employees “cannot ignore the vagaries of human conduct.” *Id.* It is conceivable that someone might attempt to perform minor maintenance on the operating deck screen while standing on the ladder without first shutting it down. In such an instance, the employee’s clothing could easily become entangled in the pinch points and a serious injury could result. Guards are designed to prevent just such an accident.

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

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

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

I find that the Secretary established a violation and I affirm the citation. I agree with Inspector Cardwell that an accident was unlikely and that the violation was not S&S. If an accident did occur, a severe injury could result. I find that Barlow’s negligence was low because this condition had existed for years through many MSHA inspections and had never been cited. Barlow did not rapidly abate the condition and a section 104(b) order was issued. Consequently, I find a lack of good faith abatement and I increase the penalty from what I would have otherwise assessed. I assess a penalty of \$110 for this violation.

#### **C. Citation No. 7986915**

Citation No. 7986915 alleges a violation of 30 C.F.R. § 56.14107(a). Barlow withdrew its contest of this citation. (Tr. 8-9). This citation was abated within the time set for abatement. Consequently, this citation and the Secretary’s proposed penalty of \$55 are affirmed.

#### **D. Citation No. 7986917**

Citation No. 7986917 alleges a violation of 30 C.F.R. § 56.11002, as follows:

The elevated walkway on the left side of the Cedar Rapids washing screen was missing one of the floor boards. The outer floor board was in place and it was approximately 9 inches wide and 14 feet

long. The distance from the missing floorboard to the material inside the chute where a person would fall was approximately 58 inches. Employees access the walkway when performing maintenance to the Cedar Rapids washing screen.

Inspector Cardwell determined that the violation was S&S and that it was the result of Barlow's moderate negligence. Section 56.11002 provides, in part, that "elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition." On July 12, 2000, Inspector Cardwell returned to the pit to see if the cited conditions had been abated. He issued Order No. 7986978 under section 104(b) of the Mine Act alleging that Barlow had not made any effort to install an additional floor board on the washing screen. The Secretary proposed a penalty of \$453 for this citation.

Inspector Cardwell issued this citation because the elevated walkway was not "maintained in good condition." He based this conclusion, in part, on the fact that when he asked Mr. Barlow if he knew that there was a board missing from the walkway on the washing screen, Mr. Barlow replied "no." Evidence at the hearing revealed, however, that there had never been a board in the cited location. (Tr. 108). The single floor board that was present is about 9 inches wide and about 14 feet long. (Tr. 32). The distance between the floor board and the washing screen was about 13 inches. (Tr. 34). A handrail was provided on the other side of the single board.

(Ex. P-1). Inspector Cardwell was concerned that the 13-inch gap could cause an employee to trip or fall thereby causing an injury.

The gap was present because every time the washing screen is used, an employee must walk on the walkway and climb down through the 13-inch gap to clean the bottom deck of the screens and to install a baffle. (Tr. 106-07, 111). On cross-examination, Mr. Barlow admitted that employees must also use the walkway to grease the screens and to change the screens. (Tr. 141-43). He stated that the gap is not necessary when performing those tasks.

I find that Barlow violates the safety standard when employees use the walkway for purposes other than gaining access to the bottom deck through the 13-inch gap. The walkway was not being maintained in "good condition" under those circumstances because of this gap. Consequently, I find that the Secretary established a violation. I find, however, that the secretary did not establish that the violation was serious or S&S. An S&S 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 ... mine safety or health hazard." A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of

whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I find that the Secretary did not establish a reasonable likelihood that the hazard contributed to by the violation will result in an injury of a reasonably serious nature. First, the walkway is frequently used to access the bottom deck. In those instances, the gap must be present. Second, a handrail was present and the gap was immediately adjacent to the frame of the washing screen. If someone were to stumble as a result of the gap, a serious injury is not likely. In addition, the existing plank is wide enough to provide solid footing for an employee greasing the screens. I also find that Barlow's negligence was low. The washing screen had been operating in this manner for years and no citations had been issued despite the fact that the washing screen had been inspected by MSHA on many occasions. I increase the penalty from what I would have otherwise assessed because Barlow failed to abate the citation within the time set by Inspector Cardwell. I assess a penalty of \$110 for this violation.

#### **E. Citation No. 7986923**

Citation No. 7986923 alleges a violation of 30 C.F.R. § 56.14132(a), as follows:

The automatic reverse activated signal alarm on the 550 International Hough front-end loader ... was not maintained in a functional condition. The front-end loader is used in various area around the rock crushing plant around employees and equipment.

Inspector Cardwell determined that the violation was S&S and that it was the result of Barlow's moderate negligence. Section 56.14132(a) provides, in part, that "audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." The Secretary proposes a penalty of \$196 for this alleged violation.

Inspector Cardwell testified that "whenever the loader was put into reverse, the backup alarm did not sound." (Tr. 36). He stated that he observed the loader moving in reverse. *Id.* Mr. Barlow testified that the backup alarm worked, but only after the loader actually starts backing up. (Tr. 111-13). He testified that he was basing this information on statements made by his mechanic Mike Neville. Mr. Barlow did not personally observe the loader while traveling in reverse at the time of Inspector Cardwell's inspection and he was not present when the mechanic tested the alarm. When Inspector Cardwell returned to the pit on July 12, he abated the citation.

Mr. Barlow testified that his mechanic did not do anything to repair the alarm. (Tr. 113). This testimony was based on statements made to him by the mechanic.

I credit the testimony of Inspector Cardwell that the backup alarm was not working on the day of his inspection. He observed the loader moving in reverse without the alarm working. Mr. Barlow did not have any direct knowledge of the critical events. His testimony was based entirely on information provided by others. It is possible that the alarm works on an intermittent basis. Consequently, I affirm this citation.

I find that the violation was reasonably serious and was S&S. Many employees throughout the country have lost their lives or have been seriously injured when struck by self-propelled mobile equipment moving in reverse without backup alarms. I also find that Barlow's negligence was moderate. I assess a penalty of \$140 for this violation.

**F. Citation No. 7986924**

Citation No. 7986924 alleges a violation of 30 C.F.R. § 56.4201(a)(2), as follows:

The yearly inspection had not been conducted on the red 19 lb fire extinguisher that was located in the cab of the International Hough front-end loader. The last maintenance inspection was conducted in 1997....

Inspector Cardwell determined that the violation was not S&S and that it was the result of Barlow's high negligence. Section 56.4201(a)(2) provides, in part, that "at least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively." On July 12, 2000, Inspector Cardwell returned to the pit to see if the cited conditions had been abated. He issued Order No. 7986975 under section 104(b) of the Mine Act alleging that Barlow had not made any effort to inspect the cited fire extinguisher. The Secretary proposes a penalty of \$396 for this alleged violation.

There is no dispute that the fire extinguisher in the cab of the loader had not been inspected within the previous twelve months. The dial on the fire extinguisher indicated that it was charged. (Tr. 41). Mr. Barlow testified that there were two fire extinguishers in the loader. (Tr. 114-18). One was in the cab as observed by the inspector and one was mounted on the outside of the loader. (Ex. R-6 & R-7). Mr. Barlow testified that the mounted extinguisher had been inspected within the previous 12 months. (Ex. 114-18). He stated that the extinguisher in the cab was placed in the cab along with an axe for a specific job that he did for a neighbor. He believes that because the extinguisher mounted outside the loader complied with the safety standard, the citation should be vacated.

I find that the Secretary established a violation. All fire extinguishers at the pit must comply with this safety standard, even where there are two extinguishers in a vehicle. There is no indication that the cited extinguisher would not have functioned properly. I find that the violation was not serious. I also find that Barlow's negligence was low. I credit Mr. Barlow's testimony that the fire extinguisher was in the cab for work he performed off mine property. The citation was abated by removing the cited fire extinguisher following the issuance of a section 104(b) order. I increase the penalty from what I would have otherwise assessed because Barlow failed to abate the citation within the time set by Inspector Cardwell. I assess a penalty of \$110 for this violation.

**G. Citation No. 7986929**

Citation No. 7986929 alleges a violation of 30 C.F.R. § 56.14132(b)(1). At the hearing, the Secretary moved to vacate this citation. (Tr. 4-5). The motion is granted and the citation is vacated.

**H. Citation No. 7986931**

Citation No. 7986931 alleges a violation of 30 C.F.R. § 56.14131(c), as follows:

The seat belt in the yellow Kenworth haul truck ... did not meet the requirements of SAE J386, "Operator Restraint Systems for Off-Road Work Machines." The seat belt in the haul truck had a GM stamp on the seat belt buckle. The haul truck was not in use at the time of the inspection but it was available for use.

Inspector Cardwell determined that the violation was not S&S and that it was the result of Barlow's low negligence. Section 56.14131(c) provides, in part, that "[s]eat belts required under this section shall meet the requirements of SAE J386 ... which is incorporated by reference...." The Secretary proposes a penalty of \$55 for this alleged violation.

The truck at issue was manufactured in 1966 and Barlow bought it in 1981. (Tr. 123). It was equipped with a seatbelt designed for over-the-highway trucks. The MSHA safety standards require special off-road seatbelts. There is no dispute that the cited truck was not so equipped. Barlow maintains that this truck was out of service. Mr. Barlow testified that it had been used for a project for the city of Cave Junction and that when it was returned, the spring was broken and it had two flat tires. (Tr. 121). He stated that it could be operated and it had been moved from one place to another at the pit on one occasion but that it was out of service.

I find that the Secretary established a violation. The truck had not been tagged out and was available for use. Mr. Barlow's son, who worked at the pit, may not have known that the truck should not be used. (Tr. 45, 150). Although it is highly unlikely that anyone would have used this truck to haul heavy loads, it might have been used for other purposes. I find that the

violation was not S&S, was not serious, and that Barlow's negligence was low. I assess a penalty of \$20 for this violation.

#### **I. Citation No. 7986934**

Citation No. 7986934 alleges a violation of 30 C.F.R. § 56.12032, as follows:

The cover plate was not in place on the 110/120 volt pressure control switch for the green Speed Aire air compressor. The pressure control switch was approximately 3¾ inches wide and approximately 37 inches above the ground level. The bare electrical conductors were exposed where they were screwed onto the pressure control switch. Employees access the area on a regular basis when working in and around the shop area.

Inspector Cardwell determined that the violation was S&S and that it was the result of Barlow's high negligence. Section 56.12032 provides, in part, that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." The Secretary proposes a penalty of \$224 for this alleged violation.

The cited air compressor was by the door in the shop. (Tr. 48). The compressor was not operating. There is no dispute that the pressure relief valve did not have a cover plate on it. The pressure relief valve is at the front of the compressor about 37 inches above the ground. (Tr. 49; Ex. R-9). Inspector Cardwell testified that because there were bare conductors under the cover and the area was accessible, it was important to keep the cover on. (Tr. 50). He stated that the compressor is used on a regular basis and the employees would need to use the switch at that location on a regular basis. *Id.*

Mr. Barlow testified that the power for the compressor was turned off at the time of this inspection. (Tr. 126). Both the control box for the compressor and the control box for the shop were in the off position. Accordingly, he believes that the citation should not have been issued.

I find that the Secretary established a violation. It is not clear why the cover was not present. The standard requires such covers to be in place at all times, except when it is necessary to remove the plate for testing or repairs. Nothing in the record indicates that Barlow was testing or repairing the compressor. The fact that the power was off does not preclude my finding of a violation. The electrical control boxes were not locked out, so they could have been switched on at any time. The cover plate must remain in place at all times, except when necessary for testing or repairs. I find, however, that the violation was neither serious nor S&S. The power was off and the control boxes were immediately adjacent to the compressor. It was not likely that anyone would turn on the power while another employee was working at the compressor. I find that Barlow's negligence was moderate to low rather than high. There is no proof that bare wires were energized while the cover plate was off. I assess a penalty of \$50.

## II. APPROPRIATE CIVIL PENALTIES

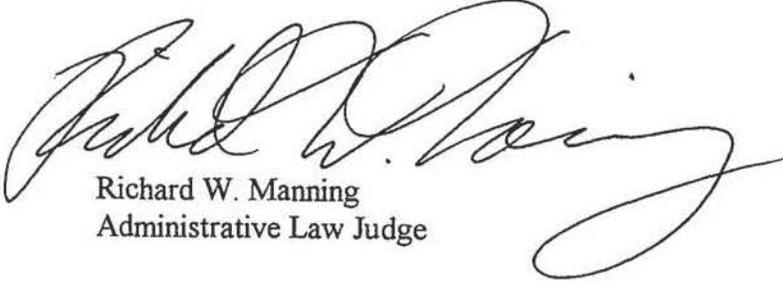
Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that five citations were issued at the plant during the 30 months prior to this inspection. (Ex. J-1). Barlow is a small operator that worked about 4,930 man-hours in the previous calendar year and employed five people. (Ex. J-1; Tr. 129). Except as noted above, the violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Barlow's ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate. The reduction in the penalties is based primarily on the small size of the operator and, where noted above, the gravity and negligence criteria.

## III. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
WEST 2000-585-M		
7986908	56.11002	Vacated
7986909	56.14107(a)	\$110.00
7986915	56.14107(a)	55.00
7986917	56.11002	110.00
7986923	56.14132(a)	140.00
7986924	56.4201(a)(2)	110.00
7986929	56.14132(b)(1)	Vacated
WEST 2000-586-M		
7986931	56.14131(c)	20.00
7986934	56.12032	50.00
	Total Penalty	\$595.00

Accordingly, the citations and section 104(b) orders contested in these cases are **AFFIRMED, MODIFIED, or VACATED** as set forth above and Melvin Barlow, doing business as Barlow Rock, is **ORDERED TO PAY** the Secretary of Labor the sum of \$605.00 within 40 days of the date of this decision, unless the parties agree upon an alternate payment schedule. The parties are hereby authorized to agree upon a delayed payment schedule. Upon payment of the penalty, these proceedings are **DISMISSED**.



Richard W. Manning  
Administrative Law Judge

Distribution:

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Mr. Melvin Barlow, P.O. Box 326, Cave Junction, OR 97523-0326 (Certified Mail)

RWM

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 16, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2000-188
Petitioner	:	A.C. No. 15-17360-03523
v.	:	
	:	
PREMIER ELKHORN COAL CO.,	:	
Respondent	:	PE Southern Pike County

## DECISION

Appearances: Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner;  
Billy R. Sheldon, Esq., Baird, Baird, Baird & Jones, Lexington, Kentucky 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 violations by Premier Elkhorn Coal Company (Premier) of various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice, a hearing was held in Louisa, Kentucky on December 13, 2000. On February 20, 2001, the parties filed post hearing briefs. On March 1, 2001, Premier filed a reply brief.

### Findings of Fact

#### **1. Introduction**

Nicholas Rasnick, an MSHA electrical inspector, testified that on January 24, 2000, he traveled along a roadway, that commenced at its intersection with highway Ky 3414, and extended until it intersected with another road known as the Green Road. According to Rasnick, the initial section of the road, from its intersection with Ky 3414 until the entrance to the Garrett Mine, a distance of approximately 1 ½ miles, was covered with snow and ice, and was very slick. He issued a citation alleging a significant and substantial violation of 30 C.F.R. Section 77.205(d) which provides as follows: “[r]egularly used travelways shall be sanded, salted, or cleared of snow and ice as soon as practicable.”

Premier does not contest the observations of Rasnick regarding the conditions of the surface of the travelway. It is, in essence, the position of Premier that it was improperly cited, as its employees did not contribute to the violation, nor were they exposed to its hazards. In contrast, in essence, the Secretary argues that the cited travelway was owned by Premier, and under its control.

## **2. Premier was Properly Cited**

Section 104(a) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. Section 814(a) provides that if upon inspection of a mine, the Secretary identifies a violation of the Act or of a health or safety standard promulgated under it, he is required to issue a citation “to the operator,” (Emphasis added.) The Act defines the term “operator” as “any owner, lessee, or other person who operates, controls, or supervises a ... mine ... .” 30 U.S.C. Section 802(d). Section 3h(1) of the Act defines a mine as follows: ... “(A) an area of land from which minerals are extracted ... (B) private ways and roads appurtenant to such area, ... .”

As stipulated to by the parties, Premier is an operator subject to the jurisdiction of the Act, and has a valid MSHA mine identification number for a coal pit, (job 21) located in part, immediately adjacent to the roadway at issue which was included within Premier’s surface mining permit.<sup>1</sup> Also, one of Premier settling ponds is located adjacent to the travelway. It thus is clear that the cited travelway is appurtenant to areas considered mines, and thus it fits within the definition of a mine set forth in Section 3H(1) of the Act, supra.

Premier argues, in essence, that it was an abuse of discretion for the Secretary to have cited it since (1) their employees did not cause or contribute to the violation, (2) their employees were not exposed to the hazards sited in the violation, (3) independent contractor were contractually obligated to maintain the cited road, (4) Premier had not performed maintenance on the road for two years and, (5) Premier provided alternate access to the contractor’s mines by way of a road it maintained.<sup>2</sup>

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<sup>1</sup>The pit, formerly had been assigned mine ID. No. 15-17360. At the date cited there were no ongoing coal removal operations at the site. When employees and equipment from Premier’s Burke Branch tippie, I.D. No. 15-16470, were assigned to job 21 site, to perform mine reclamation work, that site was included under mine ID No. 15-16470. On January 8, 1999, Premier notified MSHA that it was abandoning pit 21.

<sup>2</sup>Since Premier sets forth in its reply brief that it is not asserting that it was improperly cited based on the fact that the cited road was a county road, it is not necessary to evaluate the evidence regarding whether, in fact the road is a county road. In this connection I note that Premier’s witnesses testified that the roadway is a county road. However, no weight was accorded their testimony in the absence of a foundation to establish their personal knowledge of this fact. Premier also relies on a map, Premier Exhibit No. 5, which depicts a line under which

I have considered Premier assertions, but find, assuming these assertions are factually correct, that there is not any binding authority mandating a decision that the Secretary abused her discretion in citing Premier given these condition.

It is clear that the Secretary has "broad discretion" to cite either the operator or the independent contractor for violations committed at a mine (see, W. P. Coal Co., 16 FMSHRC 1407, at 1411 (July 1994)). In evaluating whether the Secretary abused her discretion in citing Premier, as an operator, I place most weight upon evidence in the record of Premier's involvement with the cited road, which is appurtenant to its pit and pond.

John David Blankenship, the director of safety and environmental affairs for TECO Coal Corporation, Premier's parent, testified that No Trespassing and Permit signs located on the road on question contain Premier's name, phone number, address and permit number. Further, two years ago, when the job 21 site was active and producing coal, Premier maintained, widened, and placed asphalt on the road in question. On the date cited, Premier was not longer removing coal from the pit at job 21, and had notified MSHA that it was abandoning the pit. However, when reclamation is required at that site it is performed by Premier's employees. In such an event, its certified personnel ensure that proper inspections are performed, and that the site is safe for employees. Further, once a quarter, Premier's employees access the pond appurtenant to the cited road to obtain samples.

I note the testimony of Blankenship that Premier entered into contracts with two non-related mines in the area, Garrett Mine and Ember Mining Company, who deliver their coal to Premier's preparation plant, requiring these corporations to clean and maintain the roads at issue.<sup>3</sup> The contractual obligation of these corporations are best evidenced by the specific language in the contracts. Neither of these contracts were proffered in evidence. Also, it is clear that an operator may not be relieved of its obligations under the Mine Act and regulations promulgated thereunder by virtue of any contract.

It also appears to be Premier's position that the regular means of access to job 21 is by way of approaching it by the road at issue from the opposition direction, thus avoiding the

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contain the following two words are set forth "bucklick fork", which according to the testimony of David Wilder, Premier's manager of safety and environmental affairs, indicates the road at issue which is a county road. There is nothing to indicate that this map is an official publication of Pike County. Nor is there any legend on the map to indicate whether the lines on the map are meant to represent state roads, county roads, or private thoroughfares. The best evidence as to whether the road is a county road, are official records. However, none were adduced by either party.

<sup>3</sup>Inspector Resnick did not issue a citation to Ember or Garrett because his primary concern was to get the road condition corrected as soon as possible. He felt that Premier had the ability and equipment to clear the road.

specific area cited. However, it is clear that the road which intersects with road KY 3414, provides access from that road to the pond, as well as to job 21.

Within the above context, I conclude that it has not been established that it was an abuse of discretion for the Secretary to cite Premier. I also find that since Premier did not rebut or impeach the inspector's testimony regarding the condition of the road, it has been established that the road had not been sanded or cleared of snow and ice. Further, the record establishes that on the date cited the road was open to traffic, as it was not blocked by signs or any physical barrier. Also, Premier did not rebut or contradict the inspector's testimony that snow had fallen the day before his inspection, and on the date of inspection he had observed car tracks in the snow on the roadway. I thus find that the road was regularly used. I conclude that it has been established that Premier did violate Section 77.205 supra.

## 2. Significant and Substantial

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

According to the inspector, the violation was significant and substantial. Premier did not rebut or contradict the inspector's testimony that the roadway was not straight, that portions of it were at an incline, that it was covered with ice and snow, and was "very slick", that he observed tire tracks at a right angle to the road and debris in a ditch, and that portions of the road were wide enough to accompany vehicles traveling in opposite directions. He opined that due to the road conditions and the presence of ice and snow, an accident was reasonably likely to have occurred involving a collision between two cars or one car going off the embankment, causing injuries. Within the context of this record, and considering the specific nature of the cited conditions, I conclude that it has been established that the existent conditions satisfy the requirements set forth in Mathis supra. Accordingly, I find that the violation was significant and substantial.

### 3. Penalty

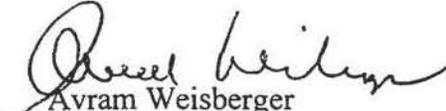
I find that the level of gravity of this violation was relatively high. I have considered Premier's claim that the roadway was a county road, but find that it did not adduce any evidence of sufficient probative value to establish ownership of the road by the county and the county's responsibility to clear the road. However, the level of Premier's negligence is mitigated by the following, there is no evidence as to how long the hazardous ice and snow on the road had been in existence; there is no evidence that Premier had notice of these conditions prior to the inspection; there is no evidence regarding the last time, prior to the inspection, that Premier's employees were at the site; that Premier had notified MSHA that job 21 was abandoned; and that, according to Blankenship's uncontradicted testimony, the only time Premier had been asked by MSHA to perform on site inspections of the cited road was when it had "people that are exposed" (Tr. 60). Taking into account the remaining factors set forth in Section 110(i) of the Act I conclude that a penalty of \$150.00 is appropriate.

### 4. Citation Nos. 7366499 and 7366498

At the commencement of the hearing the parties agreed that should the decision relating to Citation No. 7366374 sustain the position of the Secretary, then Premier would no longer contest the remaining two citations, and would consent to a judgment in favor of the Secretary regarding these two citations. Based upon this agreement, I find that citation Nos. 7366499 and 7366498 shall be affirmed, and that Premier pay a penalty of \$55.00, as assessed, for each of these violations.

**Order**

It is **ORDERED** that, within 30 days of this Decision, Premier shall pay a total civil penalty of **\$260.00**.

  
Avram Weisberger  
Administrative Law Judge

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/sct

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 21, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2000-65-M
Petitioner	:	A. C. No. 43-00196-05521
v.	:	
	:	Docket No. YORK 2000-66-M
VT UNFADING GREEN SLATE COMPANY,;	:	A.C. No. 43-00196-05522
INCORPORATED,	:	
Respondent	:	Blissville Quarry & Mill

**DECISION**

Appearances: David L. Baskin, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts, for Petitioner;  
Shawn Camara, *pro se*, Vermont Unfading Green Slate Co., Inc., Poultney, Vermont, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Vermont Unfading Green Slate Company, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 11 violations of the Secretary's mandatory health and safety standards and seek penalties of \$904.00. A hearing was held in Rutland, Vermont. For the reasons set forth below, I vacate four citations, modify and affirm two citations, affirm the five remaining citations and assess a penalty of \$470.00.

**Background**

The Vermont Unfading Green Slate Company operates the Blissville Quarry and Mill in Rutland County, Vermont. On January 19, 2000, MSHA Inspector Bret Budd and MSHA Inspector-trainee Robert Tango arrived at the Blissville Mill to conduct a required semi-annual inspection. They contacted Shawn Camara, the supervisor at the mill, to have someone accompany them on the inspection. Camara said that he was busy and requested that the inspection be conducted at a later date. When the inspectors informed him that that could not be

done, he told them to conduct the inspection without him and if they found any violations the three of them could go over them when Camara was free.

It was apparent from the testimony at the hearing that once the inspectors began showing the violations to Mr. Camara, relations between the parties became contentious. It also appears that both sides overreacted. The inspectors issued numerous citations that day. Eleven of them were contested at the hearing and will be discussed in order.

### **Findings of Fact and Conclusions of Law**

#### Citation No. 7720767

This citation alleges a violation of section 56.4201(a)(2) of the regulations, 30 C.F.R. § 56.4201(a)(2), because:

The 12 month maintenance inspection of the fire extinguisher located in the garage building adjacent to the entrance door and mounted near the electrical switch panels was not done. The inspection is to assure the proper function of the extinguisher if needed. The last dated annual inspection was done in 1997.<sup>1</sup>

(Govt. Ex. 1.) Section 56.4201(a)(2) requires that:

(a) Firefighting equipment shall be inspected according to the following schedules:

....

(2) At least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively.

There is no dispute that the fire extinguisher in question was found sitting, not "mounted," on top of some panel boxes by the garage door. Nor is there any dispute that the extinguisher had not been inspected within the past twelve months. Mr. Camara testified that it had been discovered the day before, noted that it needed to be inspected, and had been placed where it was for one of the men to take to be inspected.

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<sup>1</sup> The citation was subsequently modified to replace the words "and mounted near" with the words "standing on top of." (Govt. Ex. 1A.)

In view of the fact that the evidence indicates that the rest of the company's fire extinguishers were properly "mounted" and had been inspected, I conclude that the fire extinguisher in question had been removed from use so that it could be taken to be inspected. Since the company appears to have been in the process of complying with the regulation, I will vacate the citation.

Citation No. 7720768

This citation charges a violation of section 56.17001, 30 C.F.R. § 56.17001, because: "An area in the garage, adjacent to the entrance door, consisting of electrical switch panels, first aid kit, and other equipment had insufficient lighting. Proper lighting is necessary for a safe work area." (Govt. Ex. 2.) Section 56.17001 adjures that: "Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas."

The evidence on this citation is that there was no artificial lighting provided in the area at all, the only light being natural light that came in through the garage door. The inspector testified that the switch boxes were hard to see and that the area got darker as one went into it. Mr. Camara testified that he did not have any trouble seeing in the area.

The regulation specifically provides that "switch panels" must be sufficiently illuminated. The evidence is that there was no artificial lighting at all in the area and that the natural lighting was meager. Accordingly, I conclude that the company violated this regulation.

Citation No. 7720769

This citation asserts a violation of section 56.12008, 30 C.F.R. § 56.12008, because: "The insulated wires providing 180V power to the trimmer in the garage building were not properly bushed where the[y] pass through the switch box. This condition is 5 feet above ground level located at the main electrical panel area adjacent to the entrance door. This exposes a person to a possible shock hazard." (Govt. Ex. 3.) Section 56.12008 provides, in pertinent part, that: "Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. . . . When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings."

The inspector testified that a wire that he believed went from an electrical box to a trimming machine was not bushed where it came out of the electrical box. Mr. Camara testified that the wire in question had at one time gone to a push table, but now did not go anywhere. He said that the fuses had been removed from the electrical box and the wire coming out of it was not energized. He further related that the trimmer was operated from a plug on the wall by the trimmer. He agreed, however, that the wire was not bushed.

Based on this evidence, I find that the electrical box and wire were not being used, and could not be used. Since the system was inoperable, I conclude that the Respondent did not violate this regulation and will vacate the citation.

Citation No. 7720770

This citation alleges a violation of section 56.12034, 30 C.F.R. § 56.12034, in that: “Two florescent [*sic*] lights were found to be unguarded in a light fixture mounted approximately 3 feet over a work bench in the garage building. This location presents a possible cut, shock or burn hazard to a person if the lights are broken.” (Govt. Ex. 4.) Section 56.12034 provides that: “Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded.”

The inspector testified: “I don’t know if it actually was a workbench. I just assumed since they had parts lying on top of there, they do perform some kind of work at that spot.” (Tr. 61.) Mr. Camara testified that the area was not a workbench, but a counter with a telephone on it and that he put the light up so he could see to use the telephone when the main lights in the garage were out. Clearly, if this were a workbench, the unguarded light over it would present a shock or burn hazard. On the other hand, if this were just an area for using the telephone then it would not appear to come within the regulation.

Based on the evidence, I find that the Secretary has failed to prove that the light in question, by its location presented a shock or burn hazard and, therefore, had to be guarded. Accordingly, I conclude that the regulation was not violated and will vacate the citation.

Citation No. 7720771

This citation ascribes a violation of section 56.14107(a), 30 C.F.R. § 56.14107(a), because: “A machine guard was not provided to prevent accidental contact with the V-belt drive system, exposing the pinch points that are about 5 feet from ground level, located on the left side of the slate trimmer in the garage building and was not in use at the time of this inspection, but is used daily.” (Govt. Ex. 5.) Section 56.14107(a) states that: “Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, coupling, shafts, fan blades and similar moving parts that can cause injury.”

The slate trimmer was standing on a stack of pallets about five feet high. The trimmer blade is operated by an electric motor through a wheel and pulley system. The inspector testified that the small pulley was located down by the motor about even with the machine operator’s ankle and that the wheel was located between the waist and shoulder of the operator. He stated that neither the pinch point on the wheel nor the pinch point on the pulley were guarded to prevent the operator’s clothes or limbs from becoming caught in them.

The evidence presented by Mr. Camara on this citation addressed only whether someone standing on the ground would be susceptible to the pinch points. Since that was not at issue in this citation, I find the evidence irrelevant.

Hence, I find that the pinch points were not properly guarded and that the company violated the regulation.

*Significant and Substantial*

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

In Citation No. 7720772, which will be taken up next, MSHA charged that safe access was not provided to the trimmer and originally held that the violation was "S&S." The citation was subsequently modified to non-S&S because "the amount of exposure to the trimmer is minimal." (Govt Ex. 6A.) The inspector testified that the citation was modified because, "this was a temporary set-up, that really it wasn't being used every single day. So you know, for someone to be up there would be just once in a — whenever they needed that product, the exposure would be a lesser degree than someone being there every single day operating it." (Tr. 81-81.)

While it is not apparent how this rationale fits into the *Mathies* criteria, I find that if the failure to provide safe access to the trimmer was not a “significant and substantial” violation of the regulations because the amount exposure to the trimmer was minimal, then the failure to guard the pinch points should also not be “significant and substantial” for the same reason. In this connection, it is apparent that the statement in the citation that the trimmer “is used daily” is inaccurate. I will modify the citation accordingly.

Citation No. 7720772

This citation alleges a violation of section 56.11001, 30 C.F.R. § 56.11001, because: “Safe access was not provided to the working place on the slate trimmer located in the garage. The worker must climb up and over wooden pallets approximately 5 feet high that support the trimmer in order to access the trimming work station.” (Govt Ex. 6.) Section 56.11001 requires that: “Safe means of access shall be provided and maintained to all working places.”

Inspector Budd testified that when the inspectors asked Mr. Camara how the trimmer operator got up on the pallets to operate the trimmer, he told them that the operator climbed up the pallets. No steps, handholds or railings were provided for the ascent. Mr. Camara did not dispute, at the hearing, that this was how the trimmer was accessed.

Based on this, I find that a safe means of access was not provided to the trimmer. Accordingly, I conclude that the company violated the regulation as alleged.

Citation No. 7720773

This citation cites a violation of section 56.15004, 30 C.F.R. § 56.15004, because: “It was observed that the operator of the #2 slate saw in the mill was not wearing eye protection. This is an area of the mill where a hazard exists which can cause injury to unprotected eyes.” (Govt. Ex. 7.) Section 56.15004 provides that: “All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.”

There is no dispute that the sawyer was not wearing eye protection. The issue with this citation is whether there was a hazard to unprotected eyes. Inspector Budd stated that the sawyer works at a control station with the saw in front of him. The slate is brought into the mill, placed between the sawyer’s station and the saw and positioned for the cut. The saw, a circular saw about 28 inches in diameter, has a half hood over it, and cuts down into the slate and moves toward the sawyer. Water sprays onto the saw and slate to keep the dust down.

The inspector testified that eye protection was needed from chips coming from the saw, from slippage in adjusting the slate and from pieces of slate being thrown into dumpsters behind the sawyer. Mr. Camara said that sawyers never wear safety glasses and that “[y]ou would have a better chance of your hand getting caught in that fan [in the courtroom] than something coming

off there.” (Tr. 179.) In response to my question as to whether any chips were caused by the sawing, he stated: “How is a chip going to — if you ever looked at it, what’s a chip going to be — what is going to be chipped of the block?” (*Id.*)

Based on this evidence, I find that the sawyer should have been wearing eye protection. Therefore, I conclude that the company violated section 56.15004 in this instance.

*Significant and Substantial*

The inspector found this violation to be “significant and substantial.” However, I find his evidence on this issue to be insufficient. While his testimony was barely adequate to establish that a hazard existed, he did not describe what he actually observed, speculating only as to what the hazard could be. Thus, there is no evidence that he actually observed chips flying, how frequently that occurred, the proximity of the chips to the sawyer or any of the other hazards that he opined could occur. I find his speculation too tenuous to establish that the violation was “significant and substantial” and will modify the citation accordingly.

*Citation No. 7720774*

A violation of section 56.12019, 30 C.F.R. § 56.12019, is charged in this citation, which relates that: “In the storage shed, a tire, cardboard boxes and wooden pallets were stacked in front of the electrical panel boxes. Service areas must be kept neat and orderly.” (Govt. Ex. 8.) Section 56.12019 requires that: “Where access is necessary, suitable clearance shall be provided at stationary electrical equipment or switchgear.”

The inspector testified that he observed a Euclid truck size tire, cardboard boxes and pallets which prevented access to electrical panel boxes located at the rear of the mill storage shed. Mr. Camara testified with regard to this citation: “I don’t think there was a tire in that mill. There might have been a tire in that mill. Was it near the electrical boxes? It could have been, I don’t know. I can’t even argue this citation.” (Tr. 183.)

Based on this evidence, I conclude that the Respondent violated the regulation as alleged.

*Citation No. 7720775*

This citation asserts a violation of section 56.13021, 30 C.F.R. § 56.13021, in that:

A 3/4 inch inside diameter, high pressure air hose used to supply air to the jack hammer located in the slate packing shed was not provided with safety chains or other suitable locking devices at the connection of the jack hammer. This presents a possible “whipping” hazard that could cause injuries from an uncontrollable

air hose if the connections break. The air line was charged indicating the jackhammer has currently been used.

(Govt. Exs. 9 & 9A.)<sup>2</sup> Section 56.13021 stipulates that:

Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high-pressure hose lines of 3/4-inch inside diameter or larger, and between high-pressure hose lines of 3/4-inch inside diameter or larger, where a connection failure would create a hazard.

Inspector Budd testified that the jack hammer was observed lying in the door-way of the packing shed. While no one was operating the jack hammer at that time, it appeared that the air hose was pressurized so that it could be operated. Budd further testified that activities were being conducted at the mill which would have necessitated the use of the jack hammer. The inspector stated that, “at the jack hammer connections there were no safety pins and/or like a whip check device, to prevent the connection at the jack hammer to the hose from coming apart and causing a whipping action of a pressurized air hose.” (Tr. 104.)

Based on this evidence, I conclude that the company was in violation of section 56.13021.

*Significant and Substantial*

This violation is alleged to have been “significant and substantial.” Inspector Budd testified that the jack hammer is used to break up pieces of slate which are too large to take into the mill. Therefore, although the jack hammer was not actually being used at the time the citation was issued, it could reasonably be expected to be used during continued normal milling operations. Accordingly, I conclude that it was reasonably likely that someone would use the jack hammer, that the pressurized air hose would become disconnected resulting in a whipping action which would result in a reasonably serious injury. Thus, I conclude that the violation was “significant and substantial.”

*Citation No. 7720776*

This citation charges a violation of section 56.12008 because: “Exposed and energized 110V wires with uninsulated [*sic*] ends were observed extending from the roof of the slate packing shed, to approximately 8 feet from the floor level. This presents a possible shock hazard to a person.” (Govt. Ex. 10.) For the purposes of this violation, the regulation specifies that:

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<sup>2</sup> The narrative is the language of the citation after it was modified. (Govt. Ex. 9A.)

“Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments.”<sup>3</sup>

The inspector testified that the wires came out of a junction box on the ceiling, about 15 feet off of the ground, and that the ends of the wires, which were about eight feet off of the ground, were not insulated. The only issue contested at the hearing was whether the wires were electrified or not.

Since there is no evidence concerning whether the wires were adequately insulated *where they passed into or out of* the junction box, it is not necessary to determine whether or not the wires were “live.” Section 56.12008 clearly does not cover the facts alleged in this citation. Consequently, I will vacate it.

Citation No. 7720778

This final citation alleges a violation of section 56.18010, 30 C.F.R. § 56.18010, because: “A person was not trained in first aid, to be able to provide medical assistance in the event a person is injured at the mine site. At least one such person is to be available on all shifts.” (Govt. Ex. 11.) Section 56.18010 requires that: “An individual capable of providing first aid shall be available on all shifts. The individual shall be currently trained and have the skills to perform patient assessment and artificial respiration; control bleeding; and treat shock, wounds, burns, and musculo-skeletal injuries.”

The evidence on this citation is undisputed. The individual capable of providing first aid had been sent to another site. Mr. Camara argued that this did not make any difference because the medical center was only 1.3 miles from the mill. That, however, misses the point. The purpose of first aid is exactly what it says — “first” aid, performed before trained medical personnel arrive. Accordingly, I conclude that the Respondent violated section 56.18010.

**Civil Penalty Assessment**

The Secretary has proposed penalties of \$684.00 for the seven violations being affirmed in this decision. However, it is the judge’s independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7<sup>th</sup> Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the Assessed Violation History Report shows that the Blissville Quarry and Mill was assessed only 11 violations during the two years preceding

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<sup>3</sup> For the full text of section 56.12008 see the discussion under Citation No. 7720769, *supra*.

these violations. (Govt. Ex. 12.) Based on this, I find that the operator has a relatively good history of previous violations.

The information furnished by the Secretary in the pleadings indicates that the Blissville Quarry and Mill is a small operation and the slate company is a small company. Accordingly, I will consider that this is a small business in arriving at an appropriate penalty.

The inspector found the operator's negligence with regard to these violations to be either "low" or "moderate." I concur in those findings.

The Respondent did not claim that payment of the assessed penalties in these cases would adversely affect its ability to remain in business. Nor is there any evidence in the record which would support such a claim. Therefore, I find that the company's ability to continue in business will not be affected by the penalties assessed.

With the exception of Citation No. 7720775, none of the violations in these cases were serious violations. I find that the violation in Citation No. 7720775 was moderately serious.

The Secretary did not present any evidence that the operator failed to demonstrate good faith in attempting to achieve rapid compliance after notification of the violations. Accordingly, I find that the Respondent did demonstrate good faith.

Taking all of these factors into consideration, I assess the following penalties for the violations in these cases:

**Docket No. YORK 2000-65-M**

<u>Citation No.</u>	<u>Penalty</u>
7720767	Vacated
7720768	\$ 55.00
7720770	Vacated
7720774	\$ 55.00
7720776	Vacated

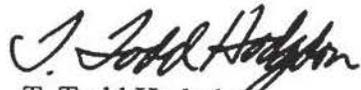
**Docket No. YORK 2000-66-M**

7720769	Vacated
7720771	\$ 55.00
7720772	\$ 55.00
7720773	\$ 55.00
7720775	\$140.00
7720778	<u>\$ 55.00</u>
Total	\$470.00

**Order**

Citation Nos. 7720767, 7720770 and 7720776 in Docket No. YORK 2000-65-M and Citation No. 7720769 in Docket No. YORK 2000-66-M are **VACATED**. Citation Nos. 7720771 and 7720773 in Docket No. YORK 2000-66-M are **MODIFIED** by deleting the "significant and substantial" designations and are **AFFIRMED** as modified. Citation Nos. 7720768 and 7720774 in Docket No. YORK 2000-65-M and Citation Nos. 7720772, 7720775 and 7720778 in Docket No. YORK 2000-66-M are **AFFIRMED**.

Vermont Unfading Green Slate Co., Inc., is **ORDERED TO PAY** a civil penalty of **\$470.00** within 30 days of the date of this decision.

  
T. Todd Hodgdon  
Administrative Law Judge

Distribution: (Certified Mail)

David L. Baskin, Esq., Office of the Solicitor, U.S. Department of Labor, E-375, John F. Kennedy Federal Bldg., Boston, MA 02203

Shawn Camara, Vermont Unfading Green Slate Company, P.O. Box 210, Poultney, VT 05764

nt

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 22, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2000-49-M
Petitioner	:	A. C. No. 37-00181-05515
v.	:	
	:	
CONSTRUCTION MATERIALS CORP.,	:	
Respondent	:	Construction Materials Corp.

**DECISION**

Appearances: Kathryn A. Joyce, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts, for the Petitioner;  
Jeffrey A. Douglas, President, Construction Materials Corporation, Tiverton, Rhode Island, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Construction Materials Corporation. The petition seeks to impose a total civil penalty of \$334.00 for three alleged violations of the mandatory safety standards in 30 C.F.R. Part 56 of the Secretary's regulations governing surface mines. One of the three alleged violative conditions was characterized as significant and substantial (S&S) in nature.<sup>1</sup> This matter was heard on February 27, 2001, in Providence, Rhode Island.

At the beginning of the hearing, the parties were advised that I would defer my ruling on the three citations pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. The parties waived the filing of briefs. This written decision formalizes the bench decision issued with respect to the contested citations. This decision contains an edited version of the bench decision issued at trial with added references to pertinent case law. The bench decision vacated the citation designated as S&S and affirmed the two non-S&S citations. A total civil penalty of \$110.00 was imposed.

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

## **I. Pertinent Case Law and Penalty Criteria**

The bench decision applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. In determining the appropriate civil penalty to be assessed, Section 110(i) provides, in pertinent part:

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

Construction Materials Corporation is a small mine operator that is subject to the jurisdiction of the Mine Act. The evidence reflects that Construction Materials Corporation has a good compliance history with respect to previous violations in that, although it was cited for 22 violations of mandatory health and safety standards during the previous two years preceding the issuance of the citations in issue, half of the cited conditions were designated as non-S&S (Gov. Ex. 6); that Construction Materials Corporation abated the cited conditions in a timely manner; and that the \$334.00 total civil penalty initially proposed by the Secretary in these matters will not effect Construction Materials Corporation's ability to continue in business.

## **II. Findings and Conclusions**

Construction Materials Corporation is a family run quarry located in Tiverton, Rhode Island. The facility is a small quarry with approximately 25 employees. There are 12 varieties of stone products that are extracted and crushed on site. Construction Materials Corporation operates several trucks that it uses to deliver its product to customers. Some customers use their own trucks which are loaded on site. The citations that are the subject of these proceedings were issued on February 2, 2000, by Mine Safety and Health Administration (MSHA) Inspector John Newby. The citations were issued during the course of Newby's regular bi-yearly inspection of Construction Materials Corporation's quarry facility.

### **A. Citation No. 7726955**

Inspector Newby arrived at the Tiverton, Rhode Island quarry at approximately 9:00 a.m. on February 2, 2000. Newby reported to the scale house in an effort to locate Construction Materials Corporation's President, Jeffrey Douglas, so that Douglas could accompany him during the inspection. Newby was informed that Douglas was unavailable and that mechanic Roger Branin would be the company representative participating in the inspection.

Newby proceeded with Branin from the scale house to the garage. Upon entering the garage, Newby noted several fire extinguishers that were kept inside. Section 56.4201, 30 C.F.R. § 56.4201, contains the Secretary's mandatory safety standards with respect to the inspection of firefighting equipment. Section 56.4201(a)(1) requires fire extinguishers to be visually inspected at least once a month to determine that they are fully charged and operable. Section 56.4201(a)(2) further provides that more thorough maintenance checks of fire extinguishers to check mechanical parts, the amount and condition of the extinguishing agent and expellant, and the condition of the hose, nozzle and vessel must be performed annually. Section 56.4201(b) requires certifications documenting the monthly visual checks as well as the more thorough annual maintenance checks to be recorded on inspection tags located on each fire extinguisher.

Newby inspected the fire extinguisher tags and determined that, although all of the fire extinguishers had been visually inspected on a monthly basis as required by the mandatory safety standard, with respect to two fire extinguishers, more than 18 months had elapsed since the last documented physical inspection in June 1998. Consequently, Newby issued Citation No. 7726955 citing a non-S&S violation of the annual inspection requirements of section 56.4201(a)(2). Newby considered the violation to be non-S&S in nature because there were other fire extinguishers in the garage that had been currently inspected that could have been used in the event of a fire.

In defense of the citation, Douglas testified that he never personally observed the outdated tags in issue. Douglas contended that he has a full-time employee that is responsible for ensuring that the fire extinguishers are inspected annually as required. Douglas stated that he believed the subject fire extinguishers were only in service approximately 10 months. However, he could not explain why the inspection tag reflected they had been placed in service in June 1998.

The bench decision noted that, as a threshold matter, the Secretary has the burden of proving, by a preponderance of the evidence, that a violation of the cited mandatory safety standard has occurred. *Southern Ohio Coal Co.*, 14 FMSHRC 1781, 1785 (November 1992) (citations omitted). Section 56.4201(a)(2), the cited standard, requires annual physical inspection of fire extinguishers. The only way this standard can be enforced is by the MSHA inspector's reliance on the notations on the fire extinguisher inspection tags. It is the responsibility of the mine operator to ensure that these tags accurately reflect the fire extinguisher's maintenance history. Although, Douglas maintains the cited fire extinguishers were placed in service only 10 months prior to Newby's February 2000, inspection, Douglas could not explain why the inspection stickers reflected the fire extinguishers had last been physically inspected in June 1998. Consequently, Construction Materials Corporation has failed to rebut the Secretary's *prima facie* case. Accordingly, the Secretary has met her burden of proof and **Citation No. 7726955 shall be affirmed.**

However, given the fact that all other monthly and annual fire extinguisher inspections were current, as well as the fact that there was no evidence that the cited fire extinguishers were not in good working condition, Citation No. 7726955 shall be modified to reflect that the violation was attributable to a low degree of negligence and that the cited conditions were not likely to result in any lost workdays. Construction Materials Corporation shall pay the \$55.00 civil penalty sought to be imposed by the Secretary. (Tr. 74-80).

B. Citation No. 7726956

Upon arriving at the garage, Newby observed a Mack D2 haulage truck parked in the western portion of the gravel area outside the garage. The bed of the truck normally rests on framework that extends the length of the truck on both sides. The outer perimeter of the truck bed extends approximately two feet beyond the truck frame. Newby noted that the truck bed was raised in the fully extended position at an angle of approximately 87 degrees. Newby observed that the truck driver apparently was performing his pre-shift inspection. Newby saw the driver standing outside the outer perimeter of the raised truck bed extend his arm under the bed to check the tread on the rear tires. Newby estimated the driver's arm was extended under the truck bed for approximately 10 seconds. (Tr. 121). Newby also observed the driver extend his upper torso over the truck frame and under the raised truck bed to observe the condition of the hydraulic cylinder that raises the truck. Newby estimated the driver was in this position for "maybe 10 seconds, 10, 15 [seconds]" *Id.* Thus, Newby estimated the sum total of exposure was 20 seconds - - 10 seconds by the rear tires, and 10 seconds leaning over the frame at the location of the hydraulic cylinder. *Id.*

The truck is equipped with a locking mechanism that is utilized to block the raised truck bed against motion. This locking mechanism consists of a steel bar that is located between the center of the truck frame. To engage the steel bar requires leaning under the raised truck bed to dislodge the steel bar from the steel frame and engage it in a hole in the bottom of the raised truck bed. Newby testified that it would only take "3, 4, 5 seconds" to dislodge the bar stored in the frame and place it in position. (Tr. 129). Newby also testified that, if the hydraulic line broke, "the bed would fall like a rock." (Tr. 84-85, 97).

As a result of his observations, Newby issued Citation No. 7726956 citing an alleged significant and substantial violation of the mandatory safety standard in section 56.14211(a), 30 C.F.R. § 56.14211(a). This mandatory standard provides:

**Persons shall not work on top of, under, or work from mobile equipment in a raised position until the equipment has been blocked or mechanically secured to prevent it from rolling or falling accidentally. (Emphasis added).**

At the hearing, the Secretary agreed that the purpose of section 56.14211(a) is to limit exposure to unblocked, raised equipment. Consequently, the Secretary admitted that, under these circumstances, the act of blocking the truck bed may result in greater exposure to raised equipment than the momentary exposure observed by Newby in this case. Understandably uncomfortable by this dilemma, the Secretary explained that when applying mandatory safety standards, “sometimes logic does not seem to prevail.” (Tr. 133-135).

The bench decision noted the concept that where the language of a regulatory provision is clear, the terms of the provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning. See, e.g., *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989) (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984)). It is only when the meaning is doubtful or ambiguous that the issue of deference to the Secretary’s interpretation arises. See *Pfizer Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984).

Ordinarily, an administrative law judge should not substitute his interpretation of a regulatory provision for the Secretary’s interpretation unless the Secretary’s interpretation is clearly erroneous or otherwise leads to an absurd result. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 462 (D.C. Cir. 1994), relying on *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987) citing *In re Trans Alaska Pipeline Rate Case*, 436 U.S. 631 (1978). In the current case, the Secretary’s application of section 56.14211(a) is illogical.

Section 56.14211(a) does not strictly prohibit persons from going under unblocked, raised equipment. Rather, section 56.14211(a) prohibits persons from “working” under equipment in a raised position unless the equipment is blocked. Here, under the circumstances of this case, the Secretary’s asserted meaning of the term “work” to include any act, regardless of how *de minimis*, thwarts the purpose of a regulation that seeks to minimize exposure to raised equipment where blocking and unblocking the equipment results in as much, or more, exposure than the act sought to be prohibited. In this instance, the acts of the truck driver observed by Newby of momentarily leaning under, and, extending an arm under, an unblocked truck bed resulted in less exposure to the hazards of a hydraulic failure than the time required to go under the raised truck bed to block and unblock the truck. In this regard, I cannot credit Newby’s testimony that the acts of blocking and unblocking the truck bed would only take “3, 4, 5 seconds”

Moreover, whether a particular act constitutes “working” under raised equipment as contemplated by section 56.14211(a) must be evaluated on a case-by-case basis since the regulations do not define “work.” The dictionary definitions of the term “work” include an “activity in which one exerts strength or faculties . . .” and “sustained physical or mental effort . . . [to] . . . achieve an objective.” *Webster’s Third New International Dictionary (Unabridged)* (1993). Thus, the term “work” contemplates activity that is more than fleeting or momentary in

nature. For example, reaching under raised equipment to retrieve a fallen glove would not be considered work. *But cf. Root Neal & Company*, 22 FMSHRC 94 (January 2000) (ALJ) (failure to block a front-end loader bucket during installation of a scale connected to the hydraulic lift system violated section 56.14211).

In the final analysis, a mandatory safety standard, as applied, cannot be “so incomplete, vague, indefinite or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application. *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982). Thus, whether the acts observed by Newby in this case fit within the term “work” should be resolved based on the Commission’s reasonably prudent person test. *See Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). Whether application of section 56.14211(a) to the facts of this case provides adequate notice must be determined by considering whether a reasonably prudent person familiar with the quarry industry, and the protective purposes of section 56.14211(a), would have recognized that the blocking and unblocking of a raised truck bed, given the exposure incidental to such acts, was required to protect against a total exposure of less than 20 seconds in duration. I think not. Accordingly, **Citation No. 7726956 shall be vacated.**

In reaching this conclusion, I am not trivializing the hazards associated with working under unblocked, raised equipment. While we routinely take for granted the reliability of hydraulic systems in equipment such as automobiles and airplanes, of course, as expressed by Newby, there is a possibility that hydraulic systems can fail without warning. Obviously, going under unsecured hydraulically raised equipment is not prudent. However, the result in this case is dictated by the evidence presented by the Secretary. Surely section 56.14211(a) cannot be construed to require greater exposure to the risk of unblocked equipment through the act of blocking than the purported prohibited conduct. In this regard, the result in this case would be different if the driver observed by Newby had a screw driver or grease gun in hand, or, if there was other evidence of more than momentary exposure. (Tr. 140-151). Thus, I emphasize, the results in this case should be strictly limited to the evidentiary facts.

#### C. Citation No. 7726957

At the gravel area immediately outside and south of the garage, in the vicinity where Newby observed the truck driver performing his pre-shift examination, Newby observed five additional parked haulage trucks. The gravel area was graded with a decline in a northerly direction towards the garage. Newby noted two of the trucks had chock blocks on the wheels with snow around the wheels indicating these trucks had been parked for a significant period. Across from these trucks, Newby observed two other trucks that were not chocked against movement because the area where they were parked did not have a significant grade. Newby noted the remaining truck was parked on an approximate eight percent grade without the wheels being chocked. The gears of this truck were in the parked position and the parking brake was set.

As a result of his observations, Newby issued Citation No. 7726957 citing an alleged violation of the mandatory standard in section 56.14207, 30 C.F.R. § 56.14207, that requires that, when parked on a grade, wheels of mobile equipment must be chocked or turned into a bank. Newby testified that, since there was no bank in the gravel area outside the garage, the cited mandatory standard required the wheels to be chocked. Newby characterized the cited condition as non-S&S because, although the gravel was frozen, it was unlikely that the truck would roll because the parking brake was engaged and the gears were in park. Newby attributed a low degree of negligence to Construction Materials Corporation since the other trucks in the area that were parked on a grade were chocked.

In defending against the cited violation, Douglas indicated that it is company policy to chock unattended vehicles that are parked on grades. However, Douglas asserted the parking area south of the garage is a zero percent grade. Moreover, he contended the truck was parked in ruts in the gravel and could not roll. Douglas stated the truck was not unattended. Rather, he maintained the driver of the truck was in the process of bleeding the brakes and waxing the truck when the parked vehicle was observed by Newby.

The Bench decision noted that the condition precedent to application of section 56.14207 is that the truck be parked on a grade. As previously noted, the Secretary has the burden of proving the facts supporting the cited violation. *Southern Ohio Coal Co., supra*. Here, Newby has testified that the truck was parked on an eight percent grade. Moreover, Construction Materials Corporation was on notice that the subject area was alleged to be graded by virtue of the subject Citation No. 7726957 that states, “. . . [the] haul truck was left unattended on an approximate 8 degree grade without the wheels . . . chocked or blocked against movement. (Gov. Ex. 7). Thus, the burden shifts to Construction Materials Corporation to rebut the Secretary’s *prima facie* case.

In response, Douglas failed to present any independent evidence, such as photographs, to support his self-serving assertion that the gravel area south of the garage observed by Newby was not graded. Moreover, Douglas’ assertion that the gravel area had a zero grade is inconsistent with Newby’s un rebutted testimony that other trucks parked in the immediate vicinity of the cited truck were chocked. In addition, Douglas’ testimony that the truck driver was in the vicinity of the truck waxing it and bleeding the brakes illustrates the importance of chocking the tires. If the truck had rolled down the grade toward the garage it could have pinned the truck driver between the truck and the garage. Finally, Douglas’ assertion that his company was never cited for a similar violation in the past is not a defense to liability. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421 (June 1981); accord *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416-17 (10<sup>th</sup> Cir. 1984).

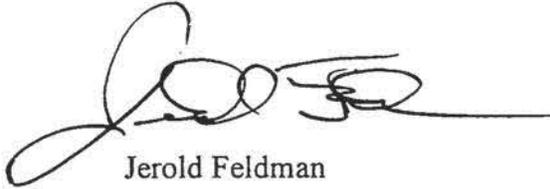
Accordingly, **Citation No. 7726957** citing a non-S&S violation of the mandatory standard in section 56.14207 that requires the wheels of vehicles parked on grades to be chocked against movement **shall be affirmed**. The \$55.00 civil penalty sought to be imposed by the Secretary against Construction Materials Corporation shall be assessed.

**ORDER**

Consistent with this Decision, **IT IS ORDERED** that Citation Nos. 7726955 and 7726957 **ARE AFFIRMED**.

**IT IS FURTHER ORDERED** that Citation No. 7726956 **IS VACATED**.

**IT IS FURTHER ORDERED** that Construction Materials Corporation **shall pay a total civil penalty of \$110.00** in satisfaction of Citation Nos. 7726955 and 7726957. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, Docket No. YORK 2000-49-M **IS DISMISSED**.



Jerold Feldman  
Administrative Law Judge

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# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 28, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-182-DM
on behalf of DILLARD PETTUS,	:	SC MD 99-14
Complainant	:	
v.	:	
	:	
ALCOA ALUMINA & CHEMICAL, L.L.C.,	:	Bauxite Facility
Respondent	:	Mine ID No. 03-00257

## DECISION

Appearances: Richard M. Muñoz, Esq., Janice H. Mountford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of the Secretary of Labor;  
Lee Garrett, United Mine Workers of America, Benton, Arkansas, on behalf of Dillard Pettus;  
Harold J. Engel, Esq., Arent, Fox, Kintner, Plotkin & Kahn, P.L.L.C., Washington, D.C., on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor, on behalf of Dillard Pettus, under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (1994) *et seq.*, the "Act." The Secretary alleges in her complaint that Alcoa Alumina and Chemical, L.L.C. (Alcoa) violated Section 105(c)(1) of the Act, when it suspended Mr. Pettus on June 15, 1999, for three days for his participation in unspecified protected activity.<sup>1</sup>

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<sup>1</sup> 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

In his initial complaint to the Department of Labor's Mine Safety and Health Administration (MSHA) filed July 2, 1999, Mr. Pettus alleged that "I was discriminated by Alcoa management for stating safety concerns[sic] while performing my job at Alcoa." In an amended discrimination complaint filed August 16, 2000, the Secretary seeks a civil penalty of \$5,000.00, for Alcoa's alleged discriminatory conduct in suspending Pettus.

### Background

The tabular operator job at Alcoa's Benton Arkansas facility includes the functions of crusher operator, screener and converter operator. In 1998 Alcoa's management decided to cross-train employees designated as tabular operators in all three functions to reduce the amount of overtime worked. The tabular operators had been frequently working overtime because most had not been trained to perform all of the job functions.

Complainant Pettus had been employed by Alcoa for 30 years and had worked as a tabular operator performing the crusher function from 1989 through June 2000. As a crusher operator Pettus worked in a ten-story building that contained a computer control room, and various other equipment including a gyro disc, transfer devices and large bins. Pettus' job as a crusher operator required him to operate the computer equipment in the control room, walk around the building several times each shift to visually examine the operations and take samples for quality control testing. Pettus testified that his job as a crusher operator was "very complex."

Pettus had also trained several other employees to perform the crusher job. The trainees were taken to the top (tenth) floor of the crusher and examined the equipment while walking to the ground level. During the walk-around examinations of the crusher, Pettus showed the trainees the location of the crusher components, the operation of the components and the testing methodology. During the examinations, the trainees questioned Pettus about the operation of the crusher and they would engage in running dialogues about the crusher operation. Pettus acknowledged that the walk-around examinations and related questioning by the trainees were important parts of the training process. Indeed, Pettus acknowledged that the trainees could not learn the crusher operator's job without participating in the walk-around examinations. None of the persons Pettus trained to operate the crusher ever refused to participate in a walk-around examination.

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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 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 the Act.

On January 7, 1999, Alcoa supervisor Mike Swinderman informed Pettus that he was to be trained as a converter operator.<sup>2</sup> Pettus admitted that he did not want to be trained as a converter operator and told Swinderman that he did not want to participate. Pettus also told some of his fellow employees that he did not want to be trained as a converter operator. Pettus initially argued that, pursuant to the union contract with Alcoa, he was not required to take the converter training because of his seniority as a crusher operator. He asserted that he was exempt from training by a "grandfather clause" in the union contract. He also argued that he was not required to accept the training because he never signed a notice indicating that he wanted to be trained as a converter operator. After notification that he was to be trained as a converter operator, Pettus decided that he would take any measures to avoid such training.

Pettus nevertheless started training on January 7, 1999. He stopped however after a few hours on January 8, after becoming ill, and his training remained on hold until February 3 as he sought his union's support for his claim that he did not have to accept the training. The union ultimately told Pettus that his claim regarding the contract was wrong and that he was required to take the converter training. Neither Pettus nor the union filed a grievance regarding this issue. Pettus remained unhappy about the required training and was admittedly angry at Swinderman,

On February 3, 1999, Pettus and two union representatives, including union president Dan Henry, met with Alcoa supervisors Eddie Black and Travis Porter to discuss Pettus' converter training. During the meeting the management representatives reiterated that Pettus would have to be trained as a converter operator and Porter asked Pettus if he would give a good faith effort to learn the converter job. In response Pettus stated only that he wanted to talk to his union representatives before he responded. Pettus in fact never responded to Porter or any other Alcoa supervisor that he would make a good faith effort to learn the converter job. While Pettus subsequently resumed his converter training, Porter opined that Pettus never gave a good faith effort to learn the job.

Pettus admitted that there were many times during his converter training that he did not walk around with his trainer, Jimmy Chism as Chism conducted inspection tours of the converter. He also admitted that it was important to do so as often as possible to see Chism perform his tasks. During the training Pettus also refused to answer supervisor Swinderman's

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<sup>2</sup> Mike Swinderman has a college degree and additional experience in the industry as a production foreman, maintenance mechanic and lab technician. As a tabular shift supervisor his job was to ensure the proper operation of the tabular building and maintain production schedules while directing an eight to ten man crew. As a certified MSHA training instructor he also provided required safety training to his employees. Swinderman had been trained by the process engineer in the operation of the converter and had on-the-job training in converter operations. He was also trained to operate the computer consol in the converter control room by both the process engineer and several supervisors. Through this training he learned to use the computer screens and the various buttons associated with them."

questions and appeared to avoid contact with Swinderman. Swinderman found Pettus' conduct during training to have been insubordinate so on February 16, 1999, Swinderman began documenting Pettus' actions (Resp. Exh. 11-16).

After more than two months' training Pettus first operated the converter by himself on April 30, 1999. He continued to operate the converter by himself until May 21, 1999. He acknowledged that he was able to perform the converter job and did not tell any supervisor that he felt unsafe performing the job during this period. When a fire started in one area of the converter on May 7, 1999, Pettus took appropriate action to identify the location of the fire and to bring it under control. He did not contribute to the cause of the fire.

On June 12, 1999, Swinderman informed Pettus that he would be operating the converter on the "C" shift and for the remainder of the week because the regular operator, Jimmy Chism, was on vacation. Pettus admitted that he was not happy with this news because he did not want to run the converter and told Swinderman that Swinderman could not assign him to work on the converter because of his seniority within the department. Pettus admitted, however, that he then knew that seniority in the department was not a basis for job assignments and that he raised this claim only in another attempt to avoid operating the converter. Pettus nevertheless began operating the converter on June 12.

Two days later, on June 14, during the regular pre-shift meeting Swinderman asked Pettus how the converters were running and if there were any problems. Pettus responded "I don't know why don't you tell me." Pettus admitted that when he made that comment he was not sincere. Swinderman documented these and the other events that occurred on June 14 and 15, 1999. (Resp. Exh. 20).

### The Alleged Protected Activity

Pettus began working as a converter operator on the June 14, 1999, "C" shift. During the same shift, around 2:15 a.m. on June 15, 1999, Swinderman began checking the converter settings on the computer in the control room by scrolling through the computer screens.<sup>3</sup> While standing outside the control room Pettus observed Swinderman scrolling through the screens. Pettus admitted that he was "probably angry" and decided to confront Swinderman.

According to Pettus, sometime during the previous "C" shift an incident occurred in which a converter operator had pushed the wrong button in the control room causing alumina balls to overflow onto the floor. When Pettus started his shift on June 14<sup>th</sup> he was helping to

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<sup>3</sup> Scrolling through the screens" is the procedure of viewing data (settings) on the different pages that appear on the computer monitor. It does not have any effect on the converter settings. This is a routine procedure performed by all the supervisors up to eight times a shift to make sure they are operating in compliance with the settings established by the process engineer.

clean up the these balls. Pettus testified that he did not feel safe working on the converter with Swinderman at the controls because he purportedly believed Swinderman could change the settings on the converters and he believed that Swinderman was not trained to operate the converter. Rather than explain these specific concerns to Swinderman however, Pettus confronted Swinderman and told him, "If you want to operate the job then I'll do something else." According to Pettus, Swinderman responded, "I can scroll anything I want to." Pettus testified that he then explained "I don't feel safe . . . with me being outside and you inside doing that." According to Pettus, Swinderman then told him that if he did not feel safe he could go home. Pettus claims that he responded that he was not going home and that he was going to do his job, then walked out of the control room and continued working.

Pettus' co-worker, Lewis Grant, was in the control room at the time eating breakfast with another co-worker Michael Halpin. According to Grant, Swinderman was at the control panel bringing up graphs for about six or seven minutes before Pettus entered the room. Grant explained at hearing what happened when Pettus entered the room:

Q. Would you please, tell the Judge what happened when Mr. Pettus entered the room?

A. Mr. Pettus entered the room, he asked Mr. Swinderman did he want him to run the job or want him to run another job. Mr. Swinderman said, all I'm doing is pulling up graphs. Pettus said, I don't feel safe with you pulling up graphs and me outside working. Mr. Swinderman says, I can do anything I want to do. So Pettus said, well, I don't feel safe because I'm outside and you're in here pulling up graphs. And Pettus said that he knew that Mr. Swinderman didn't know how to run the job, because he couldn't help the night before or some night. Mr. Swinderman said, well, I know that you don't know how to run the job, but you should with all the hours that you've had to train. And Pettus said, well, I still don't feel safe with you here. And Mr. Swinderman said, well, if you don't like it, you can go home. Mr. Pettus said, no, I don't want to go home, I want to run my job, but I don't want you here mashing buttons with me outside working, I don't feel safe. Mr. Pettus left the room. Mr. Swinderman sat back down, he started drawing up graphs for four or five minutes, and then he left.

By Mr. Muñoz

Q. Okay. Do you recall where Mr. - - Mr. Pettus first entered the room, where he was standing?

A. He was standing behind Mr. Swinderman. Mr. Swinderman's chair would rotate around, and he rotated around and they was talking face to face.

Q. Do you recall how long Mr. Pettus stood behind Mr. Swinderman before Mr.

Swinderman turned around?

A. It was almost automatic.

Q. Do you recall - -

The Court: When you say "automatic," that doesn't reflect the time sequence. What time period are we talking about?

The Witness: Well, as soon as Pettus started talking to him, he turned around.

The Court: How long was Pettus standing there before he started talking to him?

The Witness: Maybe he was standing there a little bit. I don't know the exact time, but it was a little bit.

By Mr. Muñoz

Q. How would you define "a little bit?"

A. Maybe a minute, minute or two. I think he was standing there a minute or two.

The Court: A minute or two did you say?

The Witness: I'm not sure . It's been a year ago, you know.

By Mr. Muñoz

Q. I understand. Do you recall how close Mr. Pettus was standing to Mr. Swinderman before he started talking to Mr. Swinderman?

A. Foot, two feet.

(Tr. I 222-224).

According to Grant the conversation lasted three to five minutes and both Pettus and Swinderman were speaking loudly. Grant had seen Swinderman as well as the other supervisors over the previous 14 years scrolling through the computer screens and testified that it was not unsafe for them to do so. He confirmed that scrolling through the screens has no effect on the converter settings. Grant uses the same computer for his work.

Co-worker Michael Halpin was also in the converter control room at the time of the confrontation. He also uses one of the computer screens to check temperatures and fill out reports. According to Halpin, in order to start or stop equipment you must push a minimum of

six buttons in a proper sequence. Halpin described the events following Pettus' arrival at the control room in the following colloquy:

By Mr. Muñoz

- Q. Okay. What was Mr. Pettus doing when you first saw him?
- A. He walked into the shack, into the control room, and walked over to the supervisor.
- Q. Okay. And who was the supervisor he walked over to?
- A. Michael Swinderman.
- Q. Where was Mr. Swinderman at this time?
- A. He was sitting at the far north control panel in the control room.
- Q. Okay. Which direction was he facing now?
- A. Mr. Swinderman would have been facing east.
- Q. Could you see where Dillard Pettus' hands were?
- A. No, sir.
- Q. Did you see any gestures that Mr. Pettus made?
- A. No, sir.
- Q. Do you recall what Mr. - - do you recall whether there was a conversation between Mr. Pettus and Mr. Swinderman?
- A. Do I recall the conversation?
- Q. Do you recall whether there was one?
- A. Yes.
- Q. Okay. Do you recall what Mr. Pettus said or - - I'm sorry.
- A. Yes.

Q. Would you tell this Court what you heard?

A. What I had heard was Dillard Pettus had walked into the control room and asked Mike Swinderman what he was doing. Mr. Swinderman said that he was pulling graphs up, charts on the graph.

Q. Okay.

A. Mr. Pettus then said that he felt unsafe with him not being in the control room with him when he's pushing buttons because of a mess-up that had been earlier that night in a piece of equipment that had functioned improperly.

Q. Would you explain what you mean by "mess-up" earlier that night?

A. Okay. An operator on the previous shift had pushed the wrong button and it caused a piece of equipment to overflow into the floor.

Q. Okay. What did Mr. Swinderman say in response?

A. Mr. Swinderman said that he was only pulling up graphs, he wasn't operating any machinery. Dillard asked him - - Dillard Pettus asked him, well - - wanted to know whether he was doing the job or was Mr. Pettus going to be doing the operation of the job.

Q. What did Mr. Swinderman say in reply?

A. He said, no, all that he was going - - he was doing was pulling up graphs, and that if Mr. Pettus did not like that, then he could go home.

Q. Did Mr. Swinderman say anything about his ability to pull graphs.

A. No.

Q. Did Mr. Swinderman say he could - -

The Court: I don't think you should lead the witness here. You can ask him what he heard him say, but don't lead the witness.

By Mr. Muñoz:

Q. Was anything else said by Mr. Pettus at this time?

A. He kept emphasizing that he felt unsafe with him doing this and he would rather

he be in there with Mr. Swinderman when he was pulling the graphs.

Q. Okay. Was anything else said by Mr. Swinderman at this time?

A. No.

Q. Okay. How long did this conversation between Mr. Swinderman and Mr. Pettus last?

A. Five to 10 minutes.

Q. What happened next?

A. Okay. After Mr. Swinderman said that, if you did not like this, that you could go home, Mr. Dillard said - - Mr. Pettus said that, no, sir, I'm not going to go home, I'm going to do my job, I just feel unsafe with you pushing buttons in here without me in here. And then at that time, Mr. Pettus turned and walked back out.

Swinderman testified that he, as well as all of the other supervisors, were required to use the computer in the control room to scroll through the screens and examine graphs which provide data for the basic operating parameters of the converters. Each day the process engineer prepares instructions regarding gas settings, dryer temperatures, combustion information, the air-gas ratio, etc., and Swinderman has to verify, sometimes as many as eight times a shift, that the actual performance of the converters is within the parameters established by the process engineer. If a change in settings has to be made Swinderman discusses it with the converter operator who makes the actual changes. These were the established procedures understood by Pettus and the rest of his crew. It was indeed customary for all the tabular supervisors to scroll through the computer screens several times during a shift.

According to Swinderman, Pettus had seen him scrolling through the screens on a number of occasions before June 14. Pettus had never before asked him to refrain from scrolling through the screens. Swinderman testified that it is obvious when one is just scrolling through the screens because the screens then show only the graphs and the operating status of the converters.

Swinderman described the confrontation with Pettus in the following colloquy at hearing:

Q. Now, let's go to the night of June 14<sup>th</sup>, C shift, 1999. Were you working that evening?

A. Yes, I was.

Q. And what time does the C shift run from and to?

- A. C shift runs from 11:00 p.m. to 7:00 a.m.
- Q. So it would have started at 11:00 p.m. June 14<sup>th</sup> and ended 7:00, June 15<sup>th</sup>.
- A. That's correct.
- Q. Did you hold one of your pre-shift meetings June 14<sup>th</sup>?
- A. Yes, I did.
- Q. Did you have a discussion with Mr. Pettus during that meeting?
- A. Yes. Basically we lined out assignments and his assignment was to run the converters and at one point I asked him how they were running and he snapped back at me and said, "I don't know. Why don't you tell me?" I sort of sloughed that off and continued lining out my crew.
- Q. Did you respond to his snapping back at you?
- A. Not at that time, no. Basically the C shift -- everybody -- everybody can be irritable here and there and I sort of let that go.
- Q. Then did there come a time later in the C shift around 2:00 in the a.m. that you had another conversation with Mr. Pettus?
- A. Yes.
- Q. First of all, can you tell us where that occurred?
- A. That occurred in the 6<sup>th</sup> floor control room.
- Q. And before that conversation began, what were you doing?
- A. I was scrolling through the screens checking the different settings on the converters and dryer levels and things of that nature.
- Q. Who else was, if anybody, present in the control room as you were doing that?
- A. I believe Lou Grant and Mike Helman [sic] were present.
- Q. And where were they sitting in relationship to the control panel?

- A. I was sitting facing the control panel and they were to my right.
- Q. Do you know what they were doing?
- A. They were on break. They were eating.
- Q. Did there come a time while you were sitting at the control panel that Mr. Pettus entered the room?
- A. Yes.
- Q. Can you please tell us what happened after he came into the room.
- A. Basically he came up real close to the chair and put his finger in my face and said, "You have no right to scroll through my screens or look in my screens for operation."
- Q. What did you say at this time?
- A. I basically said I had every right to look at the operation of the converters at that time.
- Q. Did you indicate to him what you were doing?
- A. Yes.
- Q. What did you tell him you were doing?
- A. I told him I was basically checking the settings on the converters and seeing where the dryers levels were - - doing my normal routine.
- Q. How close was Mr. Pettus to you?
- A. He was actually leaning up against the arm of the chair that I was sitting in?
- Q. You were sitting in.
- A. Yes.
- Q. Was he sitting or standing?
- A. He was standing.

- Q. And you said he spoke in a loud voice. Does he normally speak in a loud voice or have a loud voice?
- A. Yes. Dillard normally has a loud voice, but in working with him for over a year - - year and a half at this point, I know the difference between his normal conversation and when he's raising his voice.
- Q. And how would you characterize what he did at 2:00 a.m. on the C-shift?
- A. Very threatening at that time.
- Q. Did you feel intimidated in any way?
- A. Yes, I did.
- Q. I want to show you what has been marked - - well, let's back up. After you told Mr. Pettus what you were doing, then what happened?
- A. Basically I told him what I was doing. He was upset and basically accused me of changing numbers on the screen without his knowledge, which I denied. Which I would never do. And then he basically left the room.
- Q. When you say something you would never do, you mean you would never do, you mean you would never change numbers on the settings on the screen?
- A. No.
- Q. Did Mr. Pettus say that you were lying to him when you denied changing the settings?
- A. Not at that point, no.
- Q. Did he ever accuse you of lying about changing the settings?
- A. No . . . .
- Q. And what actions do you consider insubordinate?
- A. Threatening gestures with the finger and loud voice and the accusations and just down right disrespect.

Q. When we talked about threatening - - was the place where he was standing part of what you considered?

A. Yes.

Q. About how far from you was he?

A. He was leaning right up against me in the chair.

Q. The chair that you was sitting in?

A. That I was sitting in?

Q. Okay . . . .

By Mr. Engel:

Q. So you have a clear recollection that Mr. Pettus was touching your chair?

A. Yes. . . .

Q. After you left Mr. Pettus up in the control room, what did you do?

A. That's when I decided to send him home for insubordination and I made my way through the building to contact Paula Higgs, who was our Human Resources person.

Q. About what time was this?

A. Approximately 2:00 or 2:15.

Q. And what did you tell Paula Higgs? Where did you get her?

A. I got her at home and I talked to her and she thought I had grounds to send him home for insubordination.

Q. What did you tell her?

A. I told her about the threatening gestures and the loud voice and just insubordination of the incident.

Q. Did you at all mention Mr. Pettus' comments about safety at all?

A. No, I did not.

Q. Did Mr. Pettus's comment about safety play even the smallest - -

Hearing Officer Melick: What comment are you talking about?

By Mr. Engel:

Q. What did Mr. Pettus say that was related to safety? That you understood related to safety?

A. It was in the Exhibit. He said he felt unsafe operating the converter. . . .

Hearing Officer Melick: What else happened during this meeting?

Witness: During this time he claimed that he was - - felt unsafe running the converters.

Hearing Officer Melick: These are his words. "I feel unsafe running the converter"?

Witness: That's correct.

Hearing Officer Melick: Were you running the converters?

Witness: No. Himself.

Hearing Officer Melick: And is this after he pointed the finger at you and a loud voice told you that you had no right to scroll through the screen?

Witness: This was before he approached me in the - -

Hearing Officer Melick: Well, let's start it from the top. He first came into the control room and what did he say?

Witness: The first thing he talked about is me scrolling through the screen.

Hearing Officer Melick: What exactly was his first - - what were his words to the best of your recollection?

Witness: His words were, "I don't" - - "What are you doing scrolling through my screen?" And I said, "Well, I'm checking, you know,

the settings on the converter and whatever.” He said, “I don’t feel comfortable with you changing the settings on my screen.” I said, “Well, I’m not changing the settings on your screen. I’m reviewing what the operation of the converters are at right now.” And he said, “Well, I don’t feel safe running converters and I don’t feel safe running converters and I don’t feel comfortable with you scrolling through the screen.” I said, “If you feel uncomfortable, you can go home.”

At that point - - I gave him the option if he didn’t feel comfortable at that point running the converter safely then he could go home. And basically it’s in Article 19 contract.

Hearing Officer Melick: Now, what point in time did he use a loud voice?

Witness: That was after that.

Hearing Officer Melick: After what?

Witness: After he said he wasn’t refusing to run the converters. He stepped up and - - you know, it was during that time period when all that discussion was taking place.

Hearing Officer Melick: But his voice didn’t get loud until - -

Witness: Well, it was - -

Hearing Officer Melick: What was the conversation?

Witness: It was loud right from the get go - - right from the start.

Hearing Officer Melick: When did he point his finger at you?

Witness: Right when he came in and was talking about me going through the screens.

Hearing Officer Melick: And he continued to point his finger at you the entire conversation?

Witness: Through a majority of it and then he would back off and talk about him being uncomfortable running the converters.

(Tr. II, 159-174).

At the end of the June 15 "C" shift, Swinderman and Paula Higgs, Alcoa's human resources expert, met with supervisors Dave Balok and Travis Porter to discuss Pettus' conduct. Higgs and Balok decided that Pettus should be given a three-day disciplinary lay-off because of his comments during the pre-shift meeting at 11:00 p.m. on June 14, his insubordinate conduct later that shift during his confrontation with Swinderman, his conduct throughout his training during which he did not show willingness to learn how to operate the converter; and his prior disciplinary history of insubordination. The latter incident occurred on August 29, 1997, when Pettus threatened Swinderman and slapped a placard on Swinderman's chest. Swinderman had issued a written warning to Pettus on that date for insubordination.

### Legal Analysis

It is the well established law 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. Consolidated Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on grounds, *sub nom. Consolidated Coal Co. v. Marshall*, 663 F.2d 1211 (3<sup>rd</sup> 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, 642 (4<sup>th</sup> Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6<sup>th</sup> Cir. 1983) (specifically approving the Commission's *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.)

Respondent first argues that because Pettus' complaints to Swinderman about scrolling through the computer screens and his declaration that he did not feel safe with Swinderman working at the computer consol, were not reasonable good faith safety complaints, they were not protected under the Act. While there is indeed significant credible evidence that Pettus knew that scrolling through the computer screens, the procedure he observed Swinderman performing, was not an unsafe procedure, and that his confrontation with Swinderman, that is the basis for his claims herein, was made not to promote safety but was a continuation of a patten of disrespectful and insubordinate behavior toward Swinderman, the law is not at all clear that safety complaints, not incorporating a work refusal, must be reasonable or be made in good faith in order to be protected under the Act.

In any event, even assuming, *arguendo*, that Pettus' complaints were protected activities I find, based on the credible evidence, that Alcoa would have rebutted any *prima facie* case by showing that the adverse action (the three-day suspension) was in no part motivated by the protected activities. In this regard I find for the reasons stated below that the adverse action was

clearly based on Pettus' opprobrious and insubordinate conduct and not on any safety content of his speech. Opprobrious conduct is not protected under the Act. *Secretary on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC at 521 (March 1984).

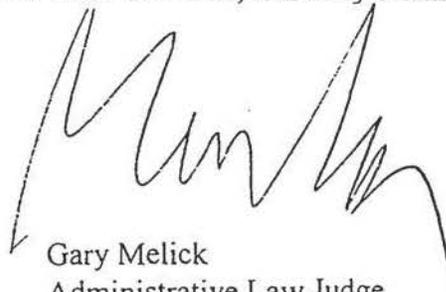
First, I find credible Swinderman's testimony evidencing Pettus' disrespectful and insubordinate behavior. At the pre-shift meeting on June 14, when Swinderman asked Pettus in the presence of the work crew how the converters were running, Pettus "snapped back" with the response "I don't know. Why don't you tell me?" Then, later on the shift while Swinderman was in the control room performing the routine procedure of scrolling through the computer screens checking the converter settings Pettus, in a threatening and intimidating manner "came up real close to" Swinderman, leaned up against the arm of his chair, put his finger in Swinderman's face and in an abnormally loud voice told Swinderman his supervisor "you have no right to scroll through my screens or look in my screens for operation."

Second, since the alleged safety complaint required no action to resolve, i.e., since no repairs or interruption of production was required to remedy any safety hazard, no retaliatory motive based on safety would reasonably be expected. Third, Pettus had a documented history of insubordinate and disrespectful behavior. Fourth, the testimony of Paula Higgs, one of the two persons who decided to suspend Pettus, provided a credible non-protected business justification for the suspension. Fifth, the temperate and relatively moderate response of management to Pettus' behavior, i.e., to impose only a three-day suspension, suggests an absence of hostility to any safety-related aspects of his complaint.<sup>4</sup>

Under all the circumstances this discrimination complaint must be dismissed.

### **ORDER**

Discrimination Proceeding Docket No. CENT 2000-182-DM, is hereby dismissed.



Gary Melick  
Administrative Law Judge

---

<sup>4</sup> It is noted that the analysis set forth in the preceding paragraphs would also provide an affirmative defense by Alcoa that it would have taken the adverse action in any event on the basis of Pettus' unprotected activity alone.

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ADMINISTRATIVE LAW JUDGE ORDERS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 2, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 2001-7
Petitioner	:	A. C. No. 44-06975-03503
v.	:	
	:	
CLINCHFIELD COAL COMPANY,	:	
Respondent	:	Roaring Fork #3 Mine

**ORDER DENYING MOTION TO COMPEL DISCOVERY**

Respondent Clinchfield Coal Company filed on February 21, 2001, a Motion to Compel Discovery seeking from the Secretary of Labor the full unredacted field notes of Inspector Gary Jessee. The Secretary filed her response to the motion on March 1, 2001, asserting that she has produced for Respondent a redacted version of the field notes of Inspector Gary Jessee and maintains that the redacted portion is subject to the deliberative process privilege.<sup>1</sup> The Commission *In re: Contest of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 990-93 (June 1992) in addressing the deliberative process privilege quoted from *Jordan v. United States Department of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978) as follows:

This privilege protects the ‘consultative functions’ of government by maintaining the confidentiality of ‘advisory opinions, recommendations and deliberations compromising part of the process by which governmental decisions and policies are formulated.’ (Citations omitted). The privilege attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy. To be covered by the privilege, the material must be both “pre-decisional” and “deliberative.” *Id.* Purely factual material that does not expose an agency’s decision making process is not covered by the privilege, unless it is so inextricably intertwined with deliberative material that its disclosure would not compromise the confidentiality of the deliberative information that is entitled to protection. It is the Secretary’s burden to prove that the privileges applies to the material it seeks to protect from disclosure.

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<sup>1</sup> On March 2, 2001, the Secretary provided Respondent and the judge with a revised redaction disclosing additional information. This ruling is based upon the revised redaction.

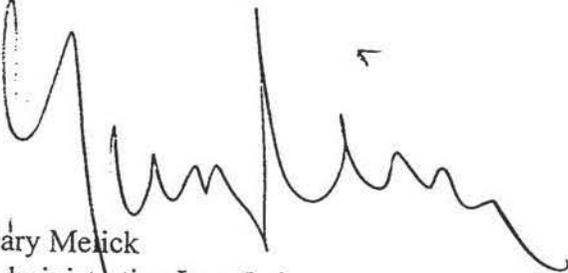
In determining whether to recognize the privilege, a court must balance the public interest in protecting the information with the litigant's need for it. *United States v. Nixon*, 418 U.S. 683 (1974); 8 *Wright and Miller*, Federal Practice and Procedure § 2019 at 167-169 (1970). The Court considers such factors as the relevance of the information sought, its availability elsewhere, the nature of the case, and the degree to which disclosure would hinder the government's ability to hold frank discussions about contemplated policy. If the government can demonstrate that its interest in non-disclosure outweighs the litigant's need for the information, a claim of deliberative process privilege will be accepted by a court. *Lundy v Interfirst Corporation*, 105 FRD 499 (D. D.C.).

The undersigned has been provided with both the unredacted and redacted notes and has performed an *in camera* review of the documents. As the Secretary correctly notes in her response to the motion she has redacted only a small portion of the field notes from the inspector who issued the citation at bar and the redacted portion refers to internal conversations between Inspector Jessee and a supervisor at the Mine Safety and Health Administration (MSHA). As the Secretary also correctly observes the redacted portions relate to a decision-making process and do not contain any factual material relevant to the case. Indeed, I find that the redacted portion of the inspector's notes are neither relevant nor relate to matters that would either be admissible evidence or likely to lead to the discovery of admissible evidence. See Commission Rule 56, 29 C.F.R. § 2700.56(b). I further find that the information sought from the redacted portion of the inspector's notes does not appear to be reasonably calculated to lead to the discovery of admissible evidence. Rule 26(b)(1), Fed.R.Civ.P.

Under all the circumstances the deliberative process privilege claimed by the Secretary is hereby sustained.

### **ORDER**

The Respondent's Motion to Compel Discovery of Redacted Portions of Inspector Jessee's notes on April 4 and 5, 2000, is hereby denied.

  
Gary Melick  
Administrative Law Judge  
703-756-6261

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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DENVER, CO 80204-3582  
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March 15, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-231-M
Petitioner	:	A.C. No. 04-04785-05553
	:	
	:	Docket No. WEST 2000-232-M
	:	A.C. No. 04-04785-05554
	:	
	:	Docket No. WEST 2000-239-M
v.	:	A.C. No. 04-04785-05555
	:	
	:	Docket No. WEST 2000-240-M
	:	A.C. No. 04-04785-05556
	:	
	:	Docket No. WEST 2000-241-M
	:	A.C. No. 04-04785-05557
	:	
MARIPOSA AGGREGATES,	:	Docket No. WEST 2000-520-M
Respondent	:	A.C. No. 04-04785-05560
	:	
	:	Docket No. WEST 2000-521-M
	:	A.C. No. 04-04785-05561
	:	
	:	Mariposa Aggregates Quarry

**ORDER TO MARIPOSA AGGREGATES**  
**TO SHOW CAUSE WHY ITS CONTEST OF THE CITATIONS, ORDERS,**  
**AND PENALTIES AT ISSUE IN THESE CASES SHOULD NOT BE DISMISSED**

These cases commenced when the Secretary of Labor filed petitions for assessment of civil penalty against Mariposa Aggregates under the authority of section 105(a) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C § 815(a) and the Commission's Procedural Rules at 29 C.F.R. §§ 2700.25 & 2700.28. These petitions assessed penalties for the 107 citations and orders issued by MSHA against Mariposa Aggregates. In response, Mariposa Aggregates stated that it disputed the "purported claim of debt." It further stated that it "discharged and canceled [the 'erroneous purported debt'] in its entirety by operation of law, without dishonor, on the grounds of breach, false representation, and fraud..." It also raised jurisdictional issues. It implied that neither MSHA nor this Commission has jurisdiction over private property outside of the District of Columbia and U.S. Territories. Mariposa Aggregates raised other issues related to the Uniform Commercial Code, the Fair Debt Collection Practices

Act, and other statutes. Its response, however, did not deny the allegations contained in the citations, orders, or the penalty petitions. The Commission's Procedural Rules provide that an "answer shall include a short and plain statement responding to each allegation of the petition." 29 C.F.R. § 2700.29.

On January 19, 2001, the Secretary filed a motion for summary decision under the Commission's Procedural Rule at 29 C.F.R. § 2700.67. In the motion the Secretary states that there is no material issue of fact as to the jurisdictional issues raised by Mariposa Aggregates and that she is entitled to summary decision on the jurisdictional issues as a matter of law. The Secretary also maintains that, because Respondent did not deny the allegations set forth in the individual citations and orders, she is entitled to summary decision on the merits of these cases.

Mariposa Aggregates filed several documents in response to the Secretary's motion. In a document entitled "Notice of Return of Erroneous Presentments," Mariposa Aggregates denies that it owes the Secretary any money citing the requirements of the Uniform Commercial Code.

I also received a "Petition for Redress of Grievances" from Mariposa Aggregates. It is styled as a "Private International Administrative Remedy" brought against the undersigned, the Commission's Chief Administrative Law Judge and two employees of the Department of Labor. The document contains a series of "Statements of Fact." In these statements, Mariposa Aggregates maintains that its quarry is "within the boundaries of Mariposa County in the Republic of California" and the quarry is "outside the exclusive legislative jurisdiction of the United States." It also states that it "is not the operator of the quarry" and that there are no employees at the quarry. The document contains numerous other "statements of fact" relating to the UCC and previous correspondence with representatives of the Secretary.

By order issued on March 15, 2001, I held that, at all pertinent times, the Secretary had jurisdiction to conduct warrantless inspections of the Mariposa Aggregates quarry, to issue citations and orders for violations of her safety and health regulations, and to propose civil penalties for those violations.

In order to contest the merits of the citations, orders, and civil penalty amounts in these cases, Mariposa Aggregates was required to provide a "short and plain statement responding to each allegation of the petition." (29 C.F.R. § 2700.29). Mariposa Aggregates failed to comply with this requirement in these cases. None of the documents it submitted include such a "short and plain statement." Mariposa Aggregates only raised jurisdictional issues and numerous irrelevant arguments, which I rejected in my order of March 15 referred to above.

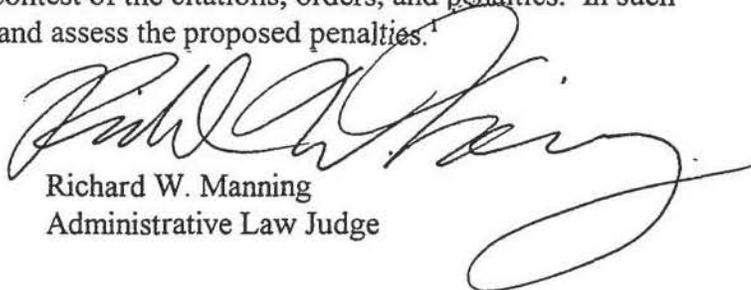
I cannot grant summary decision on the merits in these cases because the Secretary's motion is not supported by affidavits or other verified documents. The declarations attached to the motion do not reach the substantive issues. The Secretary's motion for summary decision is actually a motion, filed under 29 C.F.R. §§ 2700.10 and 2700.66, requesting that the contests filed by Mariposa Aggregates be dismissed. The Secretary is alleging that Mariposa Aggregates

did not comply with the Commission's Procedural Rules because it failed to answer the allegations contained in her petitions for penalty. In her motion, the Secretary states: "Not only has the Respondent failed to raise any legally-recognizable defenses or objections to either the citations themselves or the assessed penalties therefor, he has further stated in his Notice: 'I don't contest the citations.'" (Motion 10-11). The Secretary is referring to a document filed by Mariposa Aggregates entitled "Notice of Fraud; Notice: Certified Demand to Cease and Desist Collection Activities Prior to Validation of Purported Debt." The Commission construed this document as Mariposa Aggregates' answer in these cases. On the first page of this notice, Mr. Bevan states "I deny requesting a hearing before your commission."

Based on the above and the complete record in these cases, the Secretary's motion to dismiss Respondent's contests of the citations, orders, and proposed penalties appears to have merit. It is not at all clear that Mariposa Aggregates intended to contest the individual citations and orders. Under 29 C.F.R. § 2700.66(a), however, I am required to issue an order to show cause before dismissing a party's case.

Consequently, Mariposa Aggregates is **ORDERED TO SHOW CAUSE** on or before **April 20, 2001**, why its contest of the citations, orders, and proposed penalties in these cases should not be dismissed. To satisfy the requirements of this order, Mariposa Aggregates must state whether it contests the allegations set forth in the individual citations and orders. If it does intend to contest some or all of the citations and orders, it must set forth the facts upon which it is relying in its contest. That is, Mariposa Aggregates must specify the factual basis for its belief that the specific condition or practice described in each citation and order is incorrect. Its response need not be elaborate, but it must indicate its position on the allegations contained in each contested citation and order and the proposed penalty.

If Mariposa Aggregates fails to timely respond to this order or if its response does not address the conditions or practices alleged in the citations and orders, I will grant the Secretary's motion to dismiss Mariposa Aggregates' contest of the citations, orders, and penalties. In such case, I will affirm each citation and order and assess the proposed penalties.<sup>1</sup>



Richard W. Manning  
Administrative Law Judge

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<sup>1</sup> On March 2, 2001, the Secretary filed a motion for clarification of Respondent's position and for leave to formally reply. In light of this order and my order granting the Secretary's motion for summary decision on the jurisdictional issues, the Secretary's motion is denied.

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
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March 15, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-231-M
Petitioner	:	A.C. No. 04-04785-05553
	:	
	:	Docket No. WEST 2000-232-M
	:	A.C. No. 04-04785-05554
	:	
	:	Docket No. WEST 2000-239-M
v.	:	A.C. No. 04-04785-05555
	:	
	:	Docket No. WEST 2000-240-M
	:	A.C. No. 04-04785-05556
	:	
	:	Docket No. WEST 2000-241-M
	:	A.C. No. 04-04785-05557
	:	
MARIPOSA AGGREGATES,	:	Docket No. WEST 2000-520-M
Respondent	:	A.C. No. 04-04785-05560
	:	
	:	Docket No. WEST 2000-521-M
	:	A.C. No. 04-04785-05561
	:	
	:	Mariposa Aggregates Quarry

**ORDER GRANTING SECRETARY OF LABOR'S MOTION  
FOR SUMMARY DECISION ON THE ISSUE OF JURISDICTION**

These proceedings involve 107 citations and orders issued by the U.S. Department of Labor's Mine Safety and Health Administration (MSHA) against Mariposa Aggregates at its quarry in Mariposa County, California. The Secretary proposes a total civil penalty of \$108,067 for these 107 alleged violations.

These cases commenced when the Secretary of Labor filed petitions for assessment of civil penalty against Mariposa Aggregates under the authority of section 105(a) of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C § 815(a) and the Commission's Procedural Rules at 29 C.F.R. §§ 2700.25 & 2700.28. These petitions proposed penalties for the 107 citations and orders issued by MSHA against Mariposa Aggregates. In response, Mariposa Aggregates stated that it disputed the "purported claim of debt." It further stated that it "discharged and canceled [the 'erroneous purported debt'] in its entirety by operation of law, without dishonor, on the grounds of breach, false representation, and fraud...." Mariposa

Aggregates also raised jurisdictional issues in its response. It implied that neither MSHA nor this Commission has jurisdiction over private property outside of the District of Columbia and U.S. Territories. Mariposa Aggregates raised other issues related to the Uniform Commercial Code, the Fair Debt Collection Practices Act, and other statutes. Its response, however, did not deny the allegations contained in any of the citations and orders. The Commission's Procedural Rules provide that an "answer shall include a short and plain statement responding to each allegation of the petition." 29 C.F.R. § 2700.29.

On January 19, 2001, the Secretary filed a motion for summary decision under the Commission's Procedural Rule at 29 C.F.R. § 2700.67. In the motion the Secretary states that there is no material issue of fact as to the jurisdictional issues raised by Mariposa Aggregates and that she is entitled to summary decision on the jurisdictional issues as a matter of law. The Secretary also maintains that, because Respondent did not deny the allegations set forth in the individual citations and orders, she is entitled to summary decision on the merits of these cases.

Mariposa Aggregates filed documents in response to the Secretary's motion. One set of documents was received by my office on January 29, 2001. The primary document is entitled "Notice of Return of Erroneous Presentments." Attached to this document are the cover pages of the Secretary's motion and the attachments for the motion. Handwritten across each of these pages are the words, "Returned, Erroneous, January 25, 2001, Wayne R. Bevan." The Notice of Return of Erroneous Presentments states:

I am returning your erroneous presentments WITHOUT DISHONOR,  
UCC 3-501. You have sent me incomplete instruments. UCC 3-115.  
These documents are returned timely, in according to all applicable rules.

This notice, signed by Wayne R. Bevan, makes additional references to the Uniform Commercial Code and demands that the Secretary provide "proof of your claim that you maintain a security interest, UCC 1-102(37)(A)."

My office also received a "Petition for Redress of Grievances" from Mariposa Aggregates. It is styled as a "Private International Administrative Remedy" brought against the undersigned, the Commission's Chief Administrative Law Judge and two employees of the Department of Labor. The document contains a series of "Statements of Fact." In these statements, Mariposa Aggregates maintains that its quarry is "within the boundaries of Mariposa County in the Republic of California" and the quarry is "outside the exclusive legislative jurisdiction of the United States." It also states that it "is not the operator of the quarry" and that there are no employees at the quarry. The document contains numerous other "statements of fact" relating to the UCC and previous correspondence with representatives of the Secretary. The document also contains a series of inquiries directed to these same individuals. For example, it asks whether the United States is a municipal corporation, whether California is a republic, and whether the persons to whom it is addressed are "willing participants in aiding or abetting in carrying out a deceptive, false and fraudulent scheme to extort contracts, signatures, funds and/or securities from the citizens of the several united States."

For the reasons set forth below, I find that the Secretary established that she is entitled to summary decision on the issues raised by Mariposa Aggregates, in accordance with 29 C.F.R. § 2700.67. A brief history of the Secretary's enforcement activity at the quarry is instructive. In 1995, MSHA inspectors attempted to inspect the Mariposa Aggregates quarry, but were denied entry. Later that year, the Secretary filed a Motion for Summary Judgment and Permanent Injunction with the United States District Court for the Eastern District of California. By order signed September 4, 1996, the District Court granted the Secretary's motion. The court rejected the arguments made by Mariposa Aggregates, which are substantially the same as the arguments here. (Declaration of Jan M. Coplick, Exhibit A). The court reviewed the evidence and determined that the Secretary established that MSHA had jurisdiction to inspect the quarry. The court permanently enjoined Mariposa Aggregates "from interfering in any way with the Secretary of Labor or his authorized representatives in carrying out any of the provisions of the Act...." *Id.* at 21. The court stated that Mariposa's arguments were "without merit," were "frivolous," were made in "bad faith." *Id.* at 15 and 18. Mariposa Aggregates is collaterally estopped from relitigating the same issues in these proceedings.

I also find that the Secretary established that MSHA has jurisdiction at the quarry without reference to the District Court decision. The Secretary's motion is supported by the declaration of Jaime A. Alvarez, a duly authorized representative of the Secretary with personal knowledge of the subject quarry and MSHA's inspections of the quarry. He stated that the mine was operating at the time of the inspections. He observed at least four individuals engaged in mining activities that are typical for this type of quarry. He also observed that the crusher and mill were operating. When Wayne R Bevan, President of Mariposa Aggregates, was notified that MSHA inspectors were on the property, he ordered that all operations be shut down and that everyone working at the facility go home. The MSHA inspectors were advised that the people working at the mine were not employees, under an agreement entered into between them and the mine. Mr. Bevan told Mr. Alvarez that MSHA did not have jurisdiction because his operation was in the "Republic of California" and it did not have any employees.

Mr. Alvarez stated that whenever MSHA attempted to inspect the quarry, Mr. Bevan ordered all operations to cease and the workers were sent home. Mr. Alvarez was attempting to conduct a silica dust survey, but he could not do so unless the facility continued operating. By shutting down the quarry whenever MSHA inspectors arrived, Mr. Bevan violated the terms of the 1966 District Court decision. Mr. Alvarez also stated that he has been informed that the quarry has "subsequently been shut down by the state and local governments for its refusal to comply with such laws and with orders of state court judges." (Alvarez Declaration at 9). Finally, he states that at the time the disputed citations and orders were issued, "Respondent was actively operating his mine...." *Id.* Mariposa Aggregates did not offer any evidence in opposition to the declarations of Mr. Alvarez or of Ms. Coplick. Consequently, I find that there is no genuine issue of material fact with respect to the issues raised by Mariposa Aggregates.

It appears that, as part of its argument, Mariposa Aggregates contends that the quarry is outside the exclusive legislative jurisdiction of the United States. This argument is flawed. The Secretary is not claiming exclusive jurisdiction. Article I, Section 8, Clause 17 of the United

States Constitution provides a mechanism for the federal government to exercise exclusive legislative jurisdiction over the District of Columbia and, with the consent of the state legislature, specified lands within a state. The Secretary is not asserting that she has exclusive jurisdiction under the Constitution or any statute.

The Secretary was granted nonexclusive jurisdiction over mines located on private property under the commerce clause of the Constitution: Article I, Section 8, Clause 3. That provision states that “Congress shall have power to ... regulate commerce with foreign nations, and among the several states, and with the Indian Tribes....” As stated in section 4 of the Mine Act, the Mine Act was enacted under the authority of the commerce clause. Since the early 1940s, the commerce clause has been interpreted very broadly by the Supreme Court and the inferior courts. For example, in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), the Supreme Court held that the federal government’s power to regulate private economic activities under the commerce clause is not confined to the regulation of commerce between the states, but extends to a local activity if “it exerts a substantial economic effect on interstate commerce....” “Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States....” *Fry v. United States*, 421 U.S. 542, 547 (1975).

Congress and the courts have determined that mines, including quarries, exert a substantial economic effect on interstate commerce. In *Donovan v. Dewey*, 452 U.S. 594, 602 (1981), the Supreme Court stated:

As an initial matter, it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the nation’s underground and surface mines. In enacting the statute, Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce.

The Court relied upon the legislative history and the preamble to the Mine Act in reaching this conclusion. The Court determined that MSHA had the authority to conduct a warrantless inspection of a stone quarry that was located on private property in Wisconsin.

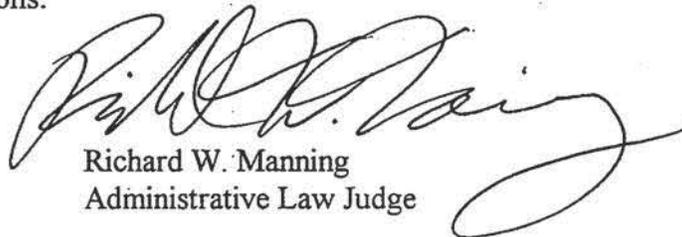
The federal courts have uniformly recognized MSHA’s authority to inspect mines under the commerce clause. For example, in *U.S. v. Lake*, 985 F3d 265, 268 (6<sup>th</sup> Cir. 1993), the court of appeals held that “the language of the [Mine] Act, its broad remedial purpose, and its legislative-history combine to convince us that Congress intended to exercise its full power under the Commerce Clause.”

I also reject the arguments made by Mariposa Aggregates under the Uniform Commercial Code, the law of commercial transactions, and the laws governing the relationship between debtors and creditors. Those statutes are not relevant in these cases. All other arguments

presented by Mariposa Aggregates in these cases are similarly rejected. These arguments have no merit because they are frivolous and do not relate to the issues presented in these cases.

I find that, at all pertinent times, Respondent's quarry in Mariposa County, California, was a mine and that its operations affect commerce. A coal or other mine is defined in section 3(h)(1) as "(A) an area of land from which minerals are extracted ..., (B) private ways and roads appurtenant to such area, and (C) lands, excavations, ... structures, facilities, equipment, machines, tools, or other property ... on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits, ... or used in, or to be used in, the milling of such minerals...." 30 U.S.C. § 802(h)(1). The quarry clearly fits within this definition.

Section 4 of the Mine Act, entitled "Mines Subject to Act," provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803. The record demonstrates that the quarry affects interstate commerce. I conclude that the Secretary established the quarry is subject to the provisions of the Mine Act and that she is entitled to summary decision as a matter of law. I hold that, at all pertinent times, the Secretary had the authority to conduct warrantless inspections of the quarry, to issue citations and orders for violations of her safety and health regulations, and to propose civil penalties for those violations.<sup>1</sup>



Richard W. Manning  
Administrative Law Judge

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<sup>1</sup> As stated above, the Secretary's motion also seeks summary decision on the merits of these cases. She states that the answers and other documents filed by Mariposa Aggregates do not challenge the individual citations, orders, or penalties at issue. On this date, I am issuing an order requiring Mariposa Aggregates to show cause why all of the citations, orders, and civil penalties at issue in these proceedings should not be affirmed. That order addressed the issues raised by the Secretary's motion with respect to the merits of these cases.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 20, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-162-M
Petitioner	:	A.C. No. 35-03297-05511
	:	
v.	:	
	:	J. Davidson & Sons
J. DAVIDSON & SONS CONSTRUCTION	:	
COMPANY, INC.,	:	
Respondent	:	

**ORDER DENYING MOTION FOR A SHOW CAUSE ORDER**

J. Davidson & Sons Construction Company, Inc., (“Davidson”) requested a hearing on the citation, orders, and the \$16,000 penalty proposed in this case, in accordance with the provisions of Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (“Mine Act”) and 29 C.F.R. § 2700.25 *et seq.* Davidson moved for an order compelling the Secretary to produce evidence establishing good cause for its failure to timely answer Davidson’s notice of contest of citation and penalties. The Secretary opposes the motion. For the reasons set forth below, Davidson’s motion is denied.

On May 4, 2000, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued one citation and two orders to Davidson under section 104(d)(1) of the Mine Act. Under section 105(d) of the Mine Act, Davidson was afforded the right to contest the citation and orders (the “citations”) within 30 days of receipt thereof. Davidson did not notify the Secretary that it wished to contest the citations.

Davidson received the Secretary’s proposed assessment of penalties for the citations on November 27, 2000. Davidson returned the proposed assessment form on December 22, 2000, and stated on that form that it wished to contest all of the citations. On that same date, Davidson also submitted a document entitled “Notice of Contest of Citation and Penalties.” The Secretary received these documents on or about December 26, 2000. On February 12, 2001, the Secretary filed her petition for assessment of penalty with the Commission.

Davidson maintains that 29 C.F.R. § 2700.20(f) required the Secretary to file an answer responding to each allegation contained in Davidson’s notice of contest within 20 days of service. Thus, the Secretary was required to file her answer on or before January 15, 2001. Davidson believes that the Secretary’s failure to file an answer should result in the dismissal of this case and it asks that I issue an order to show cause under section 2700.66(a).

The Secretary opposes Davidson's motion. She states that because Davidson failed to contest the citations within 30 days after it received them, the provisions of 29 C.F.R. § 2700.20(f) do not apply. Consequently, the Secretary maintains that she was not required to file an answer to Davidson's notice of contest. She states that Davidson's rights are fully protected because, by contesting the Secretary's proposed penalties, Davidson can also dispute the validity of citations in this civil penalty case.

In reply to the Secretary's response, Davidson maintains that if the Secretary believed that Davidson did not timely contest the citations, she was required to file a motion to dismiss its notice of contest. Second, Davidson contends that the Secretary's position is contrary to the provisions of section 105(a) of the Mine Act. It believes that the 30-day period to contest a citation only begins to run after the operator's receipt, via certified mail, of notification from the Secretary of the proposed penalty assessment and the operator's right to contest either the citation or proposed penalty within 30 days. The critical date, under the statutory framework, is the date the operator receives certified mail notification of its right to contest the citation within 30 days. In order to be valid and enforceable, the phrase "within 30 days of receipt by the operator of the contested citation" in 29 C.F.R. § 2700.20(f) must be interpreted to mean "receipt via certified mail of notice of its right to contest the citation within 30 days." (Reply at 7). Finally, it argues that 29 C.F.R. § 2700.21, which allows an operator to challenge a citation in a penalty case, is limited in its application to cases in which only the penalty has been contested. Davidson argues that it directly contested the citations in this case and that the Secretary was obligated to file an answer to its notice of contest within 20 days.

The arguments of Davidson are rejected. Section 105(a) of the Mine Act concerns contests of citations and civil penalties after the Secretary has issued her proposed assessment of penalties. Under that section, the Secretary must notify the mine operator by certified mail of the civil penalty she proposes to be assessed under section 110(i) of the Mine Act. This notice must advise the mine operator that it has 30 days from receipt of the proposed penalty assessment to notify the Secretary that it wishes to contest the citation or proposed civil penalty. The Commission's procedural rules that implement this provision are 29 C.F.R. § 2700.25 and 2700.26. Although section 2700.26 does not explicitly state that by contesting the penalty an operator is also contesting the citation, the form that the Secretary sends by certified mail to notify a mine operator of its contest rights asks the operator to designate which "violations" it wishes "to contest and have a formal hearing on." It is this form, designated as "Exhibit A," that operators use to contest penalties and citations under section 2700.26.

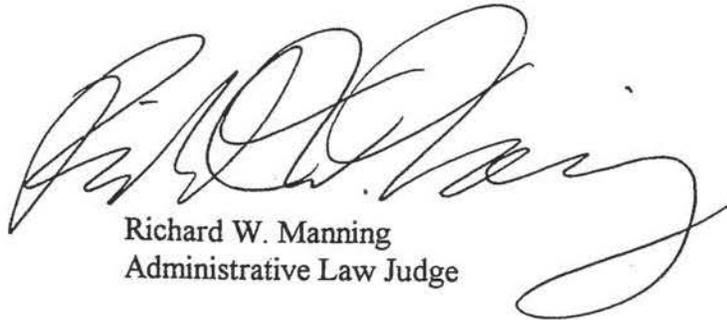
After a mine operator files this contest, the Secretary files the petition for assessment of penalty under section 2700.28. The operator must file its answer within 30 days of service of this petition for penalty under section 2700.29. The answer must contain a short and plain statement responding to each allegation in the petition. Each petition alleges that the operator violated a mandatory safety or health standard as described in the citation and that the specified penalty proposed under section 110(i) should be assessed. The citation is attached to the petition along with information concerning the calculation of the proposed civil penalty. The operator must state in its answer whether it is contesting the citation, the penalty, or both.

Normally, the Secretary does not propose penalties until the citation has been terminated. As a result, the proposed penalty assessment is not sent by certified mail to the operator until the condition described in the citation has been abated. There are circumstances under which a mine operator may wish to contest a citation before a penalty has been proposed. The citation may cite a condition that exists at numerous locations throughout a mine where the operator believes that the condition does not violate the cited safety standard. Abating the condition throughout the mine may be very expensive or may require that the mine be shut down for a lengthy period of time. Under these circumstances, the operator may desire a hearing solely on the citation before abatement of the condition or before a penalty has been proposed. Often operators request an expedited hearing under such circumstances. *Getchell Gold Corp*, 21 FMSHRC 507 (May 1999) is an example of such a case.

Section 2700.20 of the Commission's procedural rules are applicable only in such pre-penalty contests of citations. Section 2700.20 does not apply to civil penalty cases, such as this case. Section 2700.20 implements section 105(d) of the Mine Act, not section 105(a) as alleged by Davidson. The notice of contest sent by Davidson on December 22 was not a notice of contest filed under section 2700.20 because it was not served within 30 days after receipt of the citations. Instead, it was a notice of contest filed under section 2700.26 because it was served within 30 days after receipt of the Secretary's proposed penalty assessment. Since Davidson also served "Exhibit A" on the Secretary, the Commission's docket office construed the notice of contest as Davidson's answer under 2700.29, even though it was received before the petition for penalty was filed under 2700.28.

Section 2700.21 of the Commission's procedural rules makes clear that an operator's failure to contest a citation under section 2700.20 does not preclude the operator from challenging the citation in a civil penalty case. In addition, section 2700.27 provides that an operator does not waive its right to contest a citation or penalty unless it fails to contest the Secretary's proposed penalty assessment. A citation becomes a final order of the Commission by operation of law only if the operator fails to contest the proposed penalty under 2700.26. The fact that Davidson did not contest the citation under section 2700.20 has no legal consequences. All of its rights are preserved in this case.

Based on the above, I conclude that the Secretary was not required to file an answer, under section 2700.20(f), to Davidson's notice of contest dated December 22, 2000. Consequently, Davidson's motion for a show cause order is **DENIED**.



Richard W. Manning  
Administrative Law Judge

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 22, 2001

GLENN MAYHUGH,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
v.	:	Docket No. WEVA 2001-8-D
	:	MORG CD 2000-06
	:	
CONSOLIDATION COAL COMPANY,	:	Robinson Run No. 95 Mine
Respondent	:	Mine ID 46-01318

**ORDER DENYING MOTION FOR SUMMARY DECISION**  
**and**  
**NOTICE OF HEARING SITE**

On March 12, 2001, Respondent Consolidation Coal Company (Consol) filed a motion for a summary decision in this Discrimination Proceeding on the grounds that the Complaint pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, (1994) the "Act," does not, in essence, allege that it engaged in discriminatory or retaliatory acts against the Complainant Glenn Mayhugh.<sup>1</sup>

Under Commission Rule 67(b), 29 C.F.R. § 2700.67(b) "[a] motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to

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<sup>1</sup> 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 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 the Act.

interrogatories, admissions and affidavits, shows: 1) that there is no genuine issue as to any material facts; and 2) that the moving party is entitled to summary decision as a matter of law.”

Consol accepts that the facts alleged by Mr. Mayhugh, in his complaint to the Department of Labor’s Mine Safety and Health Administration on April 10, 2000, and in his statement of April 17, 2000, as true for purposes of its motion. Consol’s summary of the Complaint and statement is not disputed and is as follows:

In short, Mayhugh complained to his foreman, Mr. Roberts, (“Roberts”) about working in dusty conditions due to rock dusting taking place while they were changing out a pump. Mayhugh and Roberts both worked through the shift changing the pump under the same conditions. Mayhugh complained after the shift to the mine foreman, Mr. Tonkovich, who told Mayhugh he didn’t have to work inby the rockdusters. The next day, while Roberts and Mayhugh were getting ready to start the shift with the rest of the crew, one miner asked Roberts if it was straightened out about working inby the rockdusters. Roberts said it was taken care of and for the men to not kick up dust and get it on Mayhugh. Mayhugh told Roberts that he felt that comment was harassment and that he didn’t have to take it. The foreman said, “Yes, you’ll take it and you’ll like it you pussy lip son of a bitch.” Mayhugh said he wouldn’t take it and the foreman said, “Yes, you will.” Mayhugh felt ill and took his clothes off. Roberts came into the change room and tried to settle Mayhugh down and tried to talk to him, but Mayhugh told him to leave him alone and called Roberts “one of the most self-centered pompous people (he) had ever been around.” Roberts asked Mayhugh to get dressed and said they would work this out. Mayhugh said he was sick and wanted to go home. Roberts told Mayhugh he could go home if he wanted and would be excused.

Consol argues that the noted events did not constitute discriminatory action within the meaning of Section 105(c) because the term “discriminated against” is limited to retaliatory acts such as suspension without pay, onerous work assignments, and letters of reprimand placed in personnel files. Consol argues that Roberts never threatened Mayhugh, never discharged him, never assigned him to an undesirable job or took any other action recognized as discriminatory in nature.

However, subjecting an employee to humiliation and ridicule by management for engaging in activities protected by the Act and encouraging co-workers to also ridicule the employee for such protected activities may indeed constitute adverse action and discrimination within the meaning of Section 105(c)(1). In addition, if a causal connection can be medically established between such intentional ridicule and humiliation and subsequent physical illness resulting in lost work time, appropriate damages may be recoverable under Section 105(c).

As the Complainant correctly observes, whether the words spoken, and the manner and context in which they were spoken, by Foreman Roberts to the Complainant were inoffensive "kidding" or constituted actionable discrimination is a factual issue to be resolved at evidentiary hearings.

Under the circumstances Consol's Motion for Summary Decision must be, and is, denied. The hearings will accordingly proceed as scheduled at **9:00 a.m., on Thursday, March 29, 2001, at the Federal Correctional Institution, Training Center, Route 857, Greenbag Road, Morgantown, West Virginia.**



Gary Melick  
Administrative Law Judge  
703-756-6261

Distribution: (Facsimile and Certified Mail)

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\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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March 28, 2001

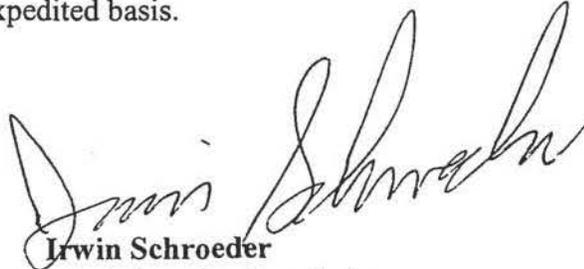
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. LAKE 2001-1
Petitioner	:	A.C. No. 33-0159-04153
	:	
v.	:	
	:	
THE OHIO VALLEY COAL CO.,	:	Powhatan No. 6 Mine
Respondent.	:	

**ORDER TO SHOW CAUSE**

This case is before me on a Petition by the Secretary to assess a Civil Penalty for the alleged violation of 30 C.F.R. § 75.220(A)(1). The Petition proposed a Civil Penalty of \$1,270.00. After an answer was filed, I issued a Prehearing Order to direct the parties to first confer concerning the possibility of settlement and, if settlement proved impossible, to report to me concerning their respective positions on the legal and factual merits. On March 15, 2001, I received a Joint Motion to Approve Settlement and Dismiss Proceedings. The settlement agreement explained in the Motion proposed a Civil Penalty of \$765.00. The only reason given for the reduction in the proposed Civil Penalty was the action of the Respondent in promptly abating the violation as instructed. A review of Exhibit A attached to the Petition indicates that the proposed Civil Penalty of \$1,270.00 was calculated by giving a credit of \$445.00 for promptly abating the violation as instructed.

The concepts articulated by Judge Merlin in Secretary of Labor v. Marc Bowers, etc., 21 FMSHRC 409 (Mar. 1999) would appear to make it inappropriate for me to approve a settlement which is not consistent with the criteria in Section 110 of the Federal Mine Safety Act. In this case it appears that the proposed settlement is calculated by double counting the abatement efforts of the mine operator. Double counting would not appear to be consistent with Section 110. Since my prospective is based on a review of less than the record available to Counsel, I consider this to be only a tentative conclusion. The parties should have the opportunity to explain and support their agreement. It is, therefore,

**ORDERED** that the parties are given until April 27, 2001, to Show Cause why the settlement agreement should not be disapproved and why the Motion to Approve Settlement should not be denied. The parties may file legal argument or factual information as they consider necessary. An opportunity for oral argument by telephone conference call will be granted upon request. In the absence of a showing of sufficient cause for approval of a settlement agreement, this case will be scheduled for hearing on an expedited basis.



**Irwin Schroeder**  
Administrative Law Judge  
703-756-5232

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/mh

