MARCH 2002

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

MARCH 2002

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

Secretary of Labor, MSHA v. Cougar Coal Company, Docket Nos. KENT 2000-133 and KENT 2000-277. (Judge Weisberger, February 14, 2002)

Secretary of Labor, MSHA v. Cactus Canyon Quarries of Texas, Inc., Docket No. CENT 2001-379-M. (Interlocutory Review of an Order Denying Certification issued by Chief Judge Barbour on January 30, 2002)

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

Secretary of Labor, MSHA v. Cactus Canyon Quarries of Texas, Inc., Docket Nos. CENT 2001-363-M and CENT 2001-364-M. (Interlocutory Review of an Order Denying Certification issued by Judge Schroeder on February 1, 2002)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 20, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2001-316-M
v.	:	A.C. No. 03-00791-05535
ROGERS GROUP, INCORPORATED	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On January 9, 2002, the Commission received from Rogers Group, Inc. ("Rogers") a request to vacate an Order of Default issued on December 4, 2001, by Chief Administrative Law Judge David F. Barbour. R. Mot. at 1. In the default order, the judge dismissed this civil penalty proceeding for the failure of Rogers to answer the Petition for Assessment of Penalty filed by the Secretary of Labor on August 13, 2001, or the judge's Order to Respondent to Show Cause issued on September 28, 2001. The judge assessed civil penalties in the sum of $1,500, proposed by the Secretary.

The judge's jurisdiction in this matter terminated when his decision was issued on December 4, 2001. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Rogers filed its request with the Commission on January 9, 2002, six days past the 30-day deadline. Because the Commission did not direct review on its own motion, the judge's default order became a final decision of the Commission 40 days after its issuance. *Id.*

When considering whether relief from a final Commission decision is appropriate, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

In its request, Rogers, apparently proceeding pro se, contends that it submitted a green card requesting a hearing but that, "due to reasons unclear to us at this time," it failed to answer the Secretary's petition for penalty assessment or the judge's show cause order. R. Mot. at 1.[1] Although Rogers does not explain in its request why it failed to appeal the default order to the Commission before the 30-day deadline, the record indicates that there may have been some confusion as to the correct address for the operator. The record shows that the default order was first sent by the Commission to Elliott at the address listed for Rogers on the Proposed Penalty Assessment but it was returned undelivered. In returning the undelivered envelope containing the default order to the Commission, the U.S. Postal Service stamped Rogers' new address on the front of the envelope. The Commission then sent the default order to Rogers' new address and the return receipt indicates that it was received by the operator on December 26, 2001, twenty-two days after the default order was first issued.

On January 14, 2002, the Commission received a motion from the Secretary opposing Rogers' request to vacate the default order. Sec'y Mot. at 1. She asserts that Rogers' request fails to establish that it satisfies one or more of the criteria required for relief under Rule 60(b). *Id.*

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[1] Safety manager Jerry Teeler, who submitted the letter seeking relief, wrote that "[i]t is unknown why I did not receive the associated paperwork for this citation until January 3, 2002." R. Mot. at 1. We note, however, that on the form the company returned to MSHA requesting a hearing on the civil penalty, the name "Ed Elliott" was written in the blank under "Company Official to Contact." The certificate of service on the Secretary's Petition for Assessment of Penalty states that the petition was sent to Elliott by certified mail. Similarly, the judge's Order to Show Cause states that it was sent by certified mail to Elliott and the return receipt from that order indicates that it was delivered on October 2, 2001, with an agent of the addressee signing for it.

Because of the confusion in the record, we are unable to evaluate Rogers' request. In the interest of justice, we hereby reopen this proceeding and remand it to the judge, who shall determine whether relief from default is warranted. If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

March 20, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEST 2002-199-M A.C. No. 02-02626-05522
v.	:	Docket No. WEST 2002-200-M A.C. No. 02–02626-05527
ASARCO, INC.	:	Docket No. WEST 2002-201-M A.C. No. 02-02626-05533

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On January 23, 2002, Asarco, Inc. ("Asarco") filed with the Commission a Fourth Motion to Reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On June 29, August 23, and October 18, 2001, Asarco had filed motions to reopen penalty assessments that had become final orders of the Commission in Docket Nos. WEST 2001-511-M, WEST 2001-512-M and WEST 2001-513-M. On October 31, 2001, the Commission issued an order remanding the matter to an administrative law judge to determine which citations were the subject of Asarco's motions, and whether relief from final order was appropriate. *Asarco, Inc.*, 23 FMSHRC 1136, 1138 (Oct. 2001).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its Fourth Motion to Reopen, Asarco asserts that it intended to contest the proposed penalties with respect to nine citations, but that it did not submit a request for a hearing ("green card") because it inadvertently paid the assessments. Mot. at 1-2, 4, 7. Asarco submits that the Department of Labor's Mine Safety and Health Administration ("MSHA") issued more than fifty citations to Asarco following an accident at Asarco's Mission Underground mine, and that it filed notices of contest as to all of those citations. *Id.* at 2. Asarco states that contests of a number of those citations have been stayed pending a criminal investigation; 5 contests have been the subject of summary decision; and 33 contests remain pending. *Id.* It states that in addition to handling the litigation related to those citations, it has been involved in three discrimination cases that broadly relate to the citations. *Id.* at 2-3. Asarco explains that on January 19 and 23, 2001, Asarco personnel mistakenly paid the penalties for "some (but not all)" of the citations at issue in the pending contests because they were unaware that Asarco management was pursuing the contests. *Id.* at 3, 5-7.

Asarco explains that the nine citations that form the basis of its fourth motion were derived from two orders by Administrative Law Judge Richard Manning issued on November 7, 2001 (an order detailing the judge's understanding of the status of the pending citations, and an order to file status report) and by its own investigation into the matter after the Commission's remand order. *Id.* at 7-8. It states that in his first order Judge Manning identified six citations that were paid but not yet the subject of a motion to reopen.[1] *Id.* at 7. It notes that in the order to file status report Judge Manning identified two other citations (Nos. 7945521 and 7945732) that had been the subject of a default order. *Id.* at 7-8. Finally, Asarco submits that it identified a ninth citation, No. 7945580, which had been paid in error. *Id.* Asarco attached to its motion the declaration of Irwin P. Graham, the General Mine Supervisor at the Mission Underground mine.

On February 13, 2002, Asarco filed with the Commission a Notice of Correction. In the notice, Asarco requests that the Commission disregard that portion of its motion that refers to Citation Nos. 7945580, 7934552, 7945521, and 7945732. Notice at 2-3. It explains that Citation Nos. 7945580 and 7934552 were the subject of earlier motions to reopen, while Citations Nos. 7945521 and 7945732 were the subject of a default order that Asarco does not wish to challenge. *Id.* at 2.

On February 15, 2002, the Secretary filed a response, stating that she does not oppose Asarco's motion to reopen. Letter from Christian Schumann, Counsel of MSHA's Appellate Litigation, to Richard Baker, Executive Director (Feb. 15, 2002). The Secretary further submits that her decision not to oppose Asarco's motion does not indicate that the Secretary believes that the operator has meritorious defenses to the citations in question, and that, in fact, the motion identifies no meritorious defenses. *Id.*

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[1] Asarco adds that three additional citations were identified in Judge Manning's order (Citations Nos. 7934689, 7945527, and 7945737) but that they had previously been addressed in the second and third motion to reopen and in the Commission's order of October 31, 2001. Mot. at 7.

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The record indicates that Asarco intended to contest the proposed penalty assessments, but that it failed to do so due to internal mismanagement. The declaration attached to Asarco's request appears to be sufficiently reliable and supports Asarco's allegations of mistaken payment. Thus, while Asarco does not deny receiving the proposed assessments, its failure to submit the green cards and payment of the proposed penalty assessments can be reasonably found to qualify as "inadvertence" or "mistake." *See Kaiser Cement Corp.*, 23 FMSHRC 374, 375 (Apr. 2001) (granting motion to reopen where operator's inadvertent payment of the proposed assessment was due to internal processing error and operator attached affidavit supporting its allegations); *Cyprus Emerald Res. Corp.*, 21 FMSHRC 592, 593-94 (June 1999) (granting motion to reopen where operator supported its allegation that it mistakenly paid proposed penalty assessment with an affidavit). Moreover, given the clarification provided by Asarco's Notice of Correction, it is sufficiently clear from the record which citations are the subject of Asarco's Fourth Motion to Reopen. *Cf. Asarco*, 23 FMSHRC at 1138 (remanding where it was unclear from record which citations were the subject of the motions to reopen because operator listed twenty-three citations, but apparently paid penalties for twenty-six citations).

Accordingly, in the interest of justice, we grant Asarco's request for relief, reopen the penalty assessments that became final orders with respect to Citation Nos. 7934549, 7934550, 7934551, 7934553, and 7934662, and remand these proceedings, which on remand shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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March 28, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 2001-379-M
CACTUS CANYON QUARRIES OF TEXAS, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER AND DECISION

BY: THE COMMISSION

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). Cactus Canyon Quarries of Texas, Inc. ("Cactus Canyon") has filed a document styled "Petition for Discretionary Review" challenging an order by Chief Administrative Law Judge David F. Barbour, denying Cactus Canyon's motion to certify for interlocutory review an earlier order by the judge. 24 FMSHRC 133 (Jan. 2002) (ALJ). In his earlier order, Judge Barbour permitted the Secretary of Labor to file the petition for penalty assessment late. The Secretary filed an opposition to Cactus Canyon's petition. For the reasons set forth below, we grant the petition, suspend briefing, and remand the proceeding to the judge.

I. Background

On August 14, 2000, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued one citation and one order to Cactus Canyon. Nearly one year later, on August 13, 2001, MSHA issued a proposed assessment of penalty for the citation and order. On August 29, 2001, MSHA received Cactus Canyon's notice contesting the citation, order and their related penalties. On October 30, 2001, the Secretary filed a petition for assessment of penalty and an accompanying motion to file petition out of time because she was 15 days late.[1] On November 7, 2001, Cactus Canyon filed an opposition to the late filing.

[1] Commission Procedural Rule 28(a), 29 C.F.R. § 2700.28(a), provides: "Within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty."

On December 13, 2001, the judge accepted the Secretary's late-filed penalty petition, reasoning that the Commission permitted late filing of petitions where the Secretary's request is "(1) based upon adequate cause, and (2) the operator has an opportunity to object to the late filing on the grounds of prejudice." Unpublished Order at 2 (citing *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714, 1716 (July 1981)). He determined that "clerical mishaps" have been considered adequate cause in the past when Secretarial delays have not been of significant length. *Id.* The judge found that the petition was "days not months late" and, as soon as the delay was discovered, the Secretary acted to immediately rectify the matter. *Id.* He also was not persuaded by the operator's assertion of prejudice "given the short extent of the delay." *Id.*

Cactus Canyon filed a motion to reconsider. Without waiting for the judge to rule, Cactus Canyon filed a motion requesting certification for interlocutory review, which the Secretary opposed. On January 30, 2002, the judge issued an order denying Cactus Canyon's reconsideration and certification motions. 24 FMSHRC 133. The judge reiterated his determination that the Secretary's misplacement of the file sufficed as adequate cause in light of the short duration of the delay. *Id.* at 135. Again, he found Cactus Canyon's prejudice claim unconvincing due to the shortness of the delay. *Id.* The judge noted, however, that "had the delay been lengthy, [his] disposition might have been different." *Id.*

II. Analysis

As a preliminary matter, although Cactus Canyon has styled its document as a "Petition for Discretionary Review," the petition meets the requirements for filing a petition for interlocutory review under Commission Rule 76(a)(1), 29 C.F.R. § 2700.76(a), and we therefore construe the petition accordingly. *Southmountain Coal Inc.*, 16 FMSHRC 28 (Jan. 1994) (construing a filing styled as a petition for discretionary review as a petition for interlocutory review).

The Commission has held that the 45-day period for filing petitions for assessment of penalty in Rule 28 is not a statute of limitations. *Rhone-Poulenc of Wyo. Co.*, 15 FMSHRC 2089, 2092-93 & n.8 (Oct. 1993), *aff'd,* 57 F.3d 982 (10th Cir. 1995); *Salt Lake*, 3 FMSHRC at 1716. The Commission recognized that "[s]ituations will inevitably arise where strict compliance by the Secretary [will] not prove possible." *Rhone-Poulenc*, 15 FMSHRC at 2093; *Salt Lake*, 3 FMSHRC at 1716. In order to balance considerations of procedural fairness against the "severe impact of dismissal of the penalty proposal," the Commission has adopted a two-part test with respect to late-filed petitions for assessment of penalty. *Rhone-Poulenc*, 15 FMSHRC at 2093; *Salt Lake*, 3 FMSHRC at 1716. The Commission permits late filing where (1) the Secretary demonstrates "adequate cause" for the delay and (2) the operator fails to demonstrate prejudice resulting from the delay. *Rhone-Poulenc,* 15 FMSHRC at 2093; *Salt Lake,* 3 FMSHRC at 1716. In explaining the test, the Commission reasoned that the requirement of a showing of adequate cause by the Secretary would likely guard against administrative abuse. *Salt Lake,* 3 FMSHRC at 1716. The Commission further held that, in the event the Secretary demonstrates adequate cause, justice may require that the case nevertheless be dismissed if the

operator can demonstrate that it was prejudiced in the preparation of its case by the stale penalty proposal. *Id.*; *Rhone-Poulenc*, 15 FMSHRC at 2093.

The Commission's two-part test requires a judge to weigh all of the relevant circumstances in determining whether a late filing should be permitted. *Rhone-Poulenc*, 57 F.3d at 985. In the instant case, the record reveals a significant circumstance that the judge did not consider. Not only did the Secretary delay 15 days in the filing of her petition for assessment of penalty, but 364 days passed before she issued the initial proposed assessment of penalty for the citation and order. *See* 30 U.S.C. § 815(a) (directing that the Secretary notify the operator "within a reasonable time" after the termination of the inspection or investigation of the civil penalty proposed to be assessed). This initial delay in the penalty proposal compounds the delay in the assessment of the penalty petition. Although the judge acknowledges that the inspection occurred in August 2000, well over a year before the penalty petition was filed in this case, he did not include the impact of this delay in his evaluation of whether Cactus Canyon was prejudiced in its case preparation. 24 FMSHRC at 135. Therefore, to the extent that the judge did not consider the Secretary's 364-day delay as well as her 15-day delay in his prejudice analysis, he erred.

Accordingly, we remand this matter to the judge to consider all of the Secretary's delays in proposing and assessing a penalty when reaching a determination of prejudice.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

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March 28, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. CENT 2001-363-M CENT 2001-364-M
CACTUS CANYON QUARRIES OF TEXAS, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: THE COMMISSION

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). Cactus Canyon Quarries of Texas, Inc. ("Cactus Canyon") has filed with the Commission a document styled "Petition for Discretionary Review" challenging an order by Administrative Law Judge Irwin Schroeder denying Cactus Canyon's motion to certify for interlocutory review an earlier order by the judge. 24 FMSHRC 247 (Feb. 2002) (ALJ). In his earlier order, Judge Schroeder permitted the Secretary of Labor to file petitions for penalty assessment late. The Secretary filed an opposition to Cactus Canyon's petition with the Commission.

Although Cactus Canyon has styled its document as a "Petition for Discretionary Review," the petition meets the requirements for filing a petition for interlocutory review under Commission Rule 76(a)(1), 29 C.F.R. § 2700.76(a), and we therefore construe the petition accordingly. *Southmountain Coal Inc.*, 16 FMSHRC 28 (Jan. 1994) (construing a filing styled as a petition for discretionary review as a petition for interlocutory review).

Upon consideration of the pleadings filed by Cactus Canyon and the Secretary, we have determined that the judge's order permitting the late-filing of the Secretary's petitions for assessment of penalty does not involve a controlling question of law and that immediate review of that ruling would not materially advance the final disposition of this proceeding. *See J. Davidson & Sons Constr. Co.*, 23 FMSHRC 1099, 1100 (Oct. 2001). Accordingly, we conclude

that Cactus Canyon has failed to establish a basis for granting interlocutory review and, therefore, we deny the petition.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 1, 2002

WESTERN INDUSTRIAL, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEST 2001-473-RM
	:	Citation No. 7943039; 4/24/01
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Mine: Portland Plant
	:	Mine ID No.: 05-00037 S19

DECISION

Appearances: Mark W. Nelson, Esq., Harris, Karstaedt, Jamison & Powers, P.C. Englewood, Colorado, for the Contestant; Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary.

Before: Judge Weisberger

This case is before me based on a Notice of Contest filed by Western Industrial Incorporated, ("Western") contesting the validity of a citation issued to it by the Secretary of Labor alleging a violation of 30 C.F.R. Section 56.11001. Subsequent to the filing of an Answer by the Secretary, a hearing was held in Colorado Springs, Colorado. Subsequent to the hearing the parties each filed proposed findings of fact and a brief.

FINDINGS OF FACT

In April 2001, Western was working as a subcontractor for CDK General Contractors, installing insulation and sheet metal on a vertical cyclone located at the Holnam Portland Cement Plant in Florence, Colorado. In order to perform this work, a series of work platforms (scaffolds) were constructed. Each work platform was at a different height above the ground, and encircled the outer perimeter of the cyclone.

On April 24, 2001 the lowest work platform, which was approximately 80 inches above a metal grating catwalk, had been in existence approximately a month, and was being used by Western's workers to install insulation on the cyclone, and cover it with sheet metal. A vertical ladder provided the only means of access to the platform. The horizontal distance between the outer edge of the ladder, and the outer edge of the work platform where a toe board was located, was 14 inches. However, due to the width of the toe board, the actual distance from the edge of

the ladder to the closest point on the work platform where a worker would place his foot, was more than 15 inches.

In accessing the work platform from the nearest ladder rung which was even with the platform, a worker would be required to bend under a horizontal I- beam, which supported another platform located approximately three feet above this ladder rung, then bend between the top rail of the platform and the mid- rail, a vertical opening of approximately 22 inches. At this point of access, the horizontal distance between the outer edge of the ladder and the mid-rail was approximately 15 inches.

On April 24, 2001, MSHA Inspector Jack Eberling inspected the Holnam facility. He issued a citation alleging that the access from the ladder to the work platform was in violation of 30 C.F.R. § 56.11001 which provides as follows: "[s]afe means of access shall be provided and maintained to all working places."

DISCUSSION

1. Violation of Section 56.11001, supra

A. Commission Case Law

Western concedes that the work platform in question was a "working place" but argues, in essence, that since Section 56.11001, supra, is broadly worded, it (Western) did not have notice that Section 56.11001, supra, applied to the cited conditions.

The Commission has held that in determining whether an operator has notice of the applicability of a broad standard to a cited condition, the test is "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). Subsequent to Ideal Cement, supra, the Commission held that the "reasonably prudent person test, is an objective standard." BHP Minerals International Inc. 18 FMSHRC 1342, 1345 (Aug. 1996).

In evaluating whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard at issue would have recognized the applicability of the standard to the cited facts at issue, the Commission has analyzed a number of factors including the ordinary definition of the terms of the text of the regulation at issue, the consistency of the Secretary's enforcement, and whether MSHA has published notices regarding its interpretation of the standard in question. (See Secretary v. Allen Lee Good, supra, at 1005, citing Island Creek Coal Company, 20 FMSHRC 14 at 24-25; Morton International Inc., 18 FMSHRC 533, 539 (Apr. 1996); U.S. Steel Mining Co. 10 FMSHRC 1138, 1141, 1142 (Sep. 1988); and Alabama By-Products. Corp., 4 FMSHRC 2128, 2131-32 (Dec. 1982). Additionally, the Commission has

considered the testimony of the inspector[1] and the operator's employees as to whether certain practices affected safety (see, Allen Lee Good, id., citing Ideal Cement Co. 12 FMSHRC at 2416), as well as considerations unique to the mining industry and the circumstances at the operators mine. (Allen Lee Good, id., citing BHP Minerals International Inc., supra, 18 FMSHRC 1342, at 1345.)

B. Further Discussion

Webster's Third New International Dictionary (1993 Ed.) defines "safe", as pertinent, as "... 2 (a) not exposed to danger ... 3; affording protection from danger ... ." (Webster's at 1998.) Webster's defines danger, as pertinent, as " ... 3 the state of being exposed to harm: liability to injury, pain, or loss: peril, risk ... ." (Webster's at 573.) Hence, the crucial analysis of Section 56.11001, supra, regarding the wording and applicability of the text of Section 56.11001, supra, necessitates an inquiry as to whether a reasonably prudent person, as defined in Ideal Cement Co., supra, at 2416, would have realized that the cited conditions exposed a miner to danger, i.e., liability to injury.

Neither side has adduced any evidence that MSHA has published any notice regarding its interpretation of Section 56.11001, supra, as it applies to the cited conditions. Additionally, since safety regulations promulgated by the Occupational Safety and Health Administration, 29 C.F.R. Section 1926.451, regulate access from ladders to work platforms or scaffolds in industries other than mining, it is clear that the cited conditions are not unique to the mining industry.

In its brief, Western argues, in essence, that its evidence established that it had made a "thorough and thoughtful" determination that the ladder provided safe access to the work platform. In this connection, Western cites the videotaped deposition of Michael Howell, who was its industrial safety director during the period at issue, and who indicated that he had inspected the area of the scaffold, including the ladder and work platform at issue, on a daily basis for approximately one month prior to April 24, 2001. He indicated that he did not conclude that this access was unsafe. However, he did not provide any basis for this opinion, nor did he explain it. Western also relies on Howell's hearsay statement that both Luis Ibarra, Western's foreman who had constructed the access to the platform, and German Carchure, a construction crew member had told him (Howell) that "it was safe". (Tr. 42) However, neither Ibarra nor Carchure testified, nor did Howell state that either of these two had provided any basis or explanation for their opinions.

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[1]In a recent split decision, Secretary v. Allen Lee Good, d/b/a Good Construction, 23 FMSHRC 995, all Commissioners agreed that since the proper test to be applied was an objective standard, relying solely on the inspector's testimony in determining whether an operator had fair notice of the regulation's requirement, transforms the analysis "into a subjective inquiry based on the views on an MSHA inspector." Id. at 1004, 1005.

Western also cites Howell's statement that CDK General Contractors "spent daily inspections ... in these areas everyday" (sic.). (Tr. 30-31.) However, no agent of CDK testified or related to Howell any opinion regarding safe access to the work platform. Lastly, Western relies on the testimony of David Aldridge, its Industrial President, who was the Project Manager of the work Western performed at the Holnam facility. Aldridge testified that he had observed the location and dimensions of the access from the ladder to the work platform, and concluded "[t]hat it was totally within providing safe access. (Sic.) There was no other way to build it any safer, and this was totally safe enough." (Tr. 71) Beyond this statement, he did not elaborate any further, or explain or provide any basis for his opinion that, considering the conditions at issue, access was safe.

Lastly, relating to the issue of the consistency of the agency's enforcement, Western relies on Howell's videotaped deposition, wherein Howell was asked whether MSHA Inspector Eberling, "... ever passed any judgement or lent any criticism to this condition prior to April 24, 2001." (Emphasis added.) (Tr. 30.). He answered as follows: "No, sir" id. However, Howell's deposition does not establish that Eberling had, at any time prior to April 24, actually inspected or observed the specific access in question that was specifically cited. In this connection, in the deposition, after Howell testified in response to a series of questions regarding dimensions of the ladder, its distance from the work platform, and the length of time the ladder and work platform had been in existence prior to April 24, he was then asked "... had Mr. Eberling inspected this area before?" (Tr. 29.) In response, Howell testified as follows: "He inspected the raw mill several times." (Tr. 30) This answer was not responsive to the question asked. Hence, at most, Howell's testimony establishes that Eberling had inspected the "raw mill", but falls short of establishing that he had, prior to April 24, observed the specific cited conditions. In this connection, it is significant, that Eberling testified at the hearing, but Western did elicit from him, nor did he so testify on direct examination, that he had observed the cited conditions at any time prior to April 24. Thus, I find that it has not been established that there have been any inconsistencies in the agency's enforcement.

In contrast to Western's witnesses, Eberling, who climbed scaffolds frequently as an inspector and in his previous jobs, testified that even a casual observer would have recognized that the access at issue was dangerous, and that he had never seen such restricted clearance.

In analyzing whether a reasonably prudent person would have realized that the cited access was unsafe, i.e., exposed a worker to possible injury, (see Webster's, supra), and thus would have had notice of the applicability of Section 56.11001, supra, most weight is place upon the specific circumstances at issue. (See Island Creek, supra, and BHP Minerals, supra.) In this connection, I note that although the horizontal distance from the edge of the ladder to the edge of the work platform was 14 inches at the level of the work platform, in accessing the platform from the ladder, due to the width of the toe board on the work platform, a worker would have had to place one leg on the ladder and reach out 15 inches horizontally with the other leg, in order to place that foot down on the platform. It is clear, as explained by Eberling, that this maneuver is unsafe, because in extending a foot horizontally over the void between the ladder and the work

platform located at least 15 inches away, a person's weight is shifted to this foot before it is placed on the platform. Additionally, in accessing the platform, a person would have had to squeeze himself between the top and mid-rails of the work platform, a distance of only 22 ½ inches, and reach the platform by bending under a I-beam, allowing a vertical clearance of approximately 36 inches. Accordingly, based on Eberling's uncontradicted testimony, I find that this awkward maneuvering would have subjected a worker accessing the platform to a risk of suffering injury by losing his balance and falling over six feet to the grating floor below.

Considering all the above, I conclude that the Secretary has established that a reasonably prudent person would have recognized that the cited access at issue was unsafe, i.e., exposed a worker to possible injury (see Webster's, supra), and thus would have recognized that it did not conform with the requirements of Section 56.11002, 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)(l). 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).

As discussed above, the evidence establishes that Western did violate a mandatory standard, and that this violation did contribute to the hazard of an employee falling six and a half feet, and injuring himself. Since the cited access was the only means of access to the work platform, which was being used by employees, and would have so continued to be used during the continuation of normal operations, I conclude that an injury was reasonably likely to have occurred. Further, based on Eberling's testimony, which was not contradicted or rebutted, I find that an upper torso or head injury as the result of falling due to the cited condition and hitting the grating floor below, would have been reasonably likely to have occurred. Thus, I find that it has been established that the violation was significant and substantial.

3. Unwarrantable Failure

According to Eberling, the violation was as the result of Western's unwarrantable failure inasmuch as the cited condition was obvious, had been in existence for a month, had been examined daily, and that Howell had observed persons accessing the area.

As discussed above, the evidence establishes that Western should reasonably have known that the access was unsafe. Thus, the issue for resolution is whether the level of its negligence in this regard reached the level of "aggravated conduct", so as to be equated with unwarrantable failure (See Emery Mining Corp., 9 FMSHRC 1997, 2004 (1987)). I find that the degree of Western's negligence is mitigated to some degree, based on the uncontradicted testimony of Howell that the two persons who had built the work platform had told him that it was safe. Further, Howell indicated that he saw the records of CDK, the main contractor, which indicated that the area had been inspected by CDK on a daily basis, and that he (Howell) never thought that the access was unsafe. Further, Aldridge, the project manager at the site, indicated that the contract that Western had with CDK, the main contractor, required Western to follow CDK guidelines, and that Western's policy regarding safe access is normally to use OSHA guidelines. In this connection, he noted that OSHA guidelines require that horizontal access from another surface to a scaffold be no more than 14 inches. 29 C.F.R. § 1926.451(e)(8). The parties appear in agreement that the horizontal distance from the ladder to the work platform, at a point level with the platform, was approximately 14 inches. Although someone accessing the platform would be required to step out at least 15 inches from the ladder to reach the platform, access was within substantial compliance with the OSHA regulation. (Id.) Thus, I find that although the level of Western's negligence was more than moderate, it did not reach the level of aggravated conduct, and hence was not the result of its unwarrantable failure. (See Emery, supra)

ORDER

It is **ORDERED** that the Notice of Contest be partially sustained in that the unwarrantable failure allegation in Order No. 7943039 be vacated. It is **ORDERED** that in all other aspects the Notice of Contest not be sustained.

Avram Weisberger
Administrative Law Judge

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March 1, 2002

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

ORDER DENYING MOTION TO RECONSIDER DECISION

A decision on the merits of this case was issued January 15, 2002, holding that the prevailing party below, Pronghorn Drilling Company (Pronghorn), was entitled to an award of fees and expenses pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504, the "EAJ Act." That decision was interlocutory awaiting a final application for fees and expenses. On February 1, 2002, the Secretary filed a motion for reconsideration of the January 15 decision. The Applicant filed a response on February 19, 2002.

The Secretary first alleges in her motion that the decision did not "address the Secretary's evidence and argument demonstrating the Secretary had a reasonable basis for interpreting the statute to cover the milling of uranium at the Smith Ranch Project." The form and content required of a Commission judge's decision in an EAJ Act case is set forth in Commission Rule 307, 29 C.F.R. § 2704.307. That rule provides, in relevant part, as follows:

> In all decisions on applications, the administrative law judge shall include written findings and conclusions on the applicant's eligibility, and an explanation of the reasons for any difference between the amount requested and the amount awarded. As to applications filed pursuant to § 2704.105(a), the administrative law judge shall also include findings on the applicant's status as a prevailing party and whether the position of the Secretary was substantially justified; if at issue, the judge shall also make findings on whether the applicant unduly protracted or delayed the underlying proceeding or whether special circumstances make the award unjust.

The material issues presented in this EAJ Act case were (1) whether the Secretary's position in the underlying civil penalty proceeding was substantially justified and (2) whether special circumstances existed to make an award unjust. The January 15 decision provided the requisite findings, conclusions and the reasons for those findings and conclusions regarding those material issues. A party may reasonably infer that if its arguments have not been adopted in a decision then those arguments have been rejected.

The Secretary next alleges that the January 15 decision did not address her purported argument that fees and expenses incurred prior to November 1, 2000, should be denied because Pronghorn did not challenge MSHA's jurisdiction before that date.[1] She argues that even if her position "was ultimately found to have been unjustified, it was reasonably justified at least until the defendant pointed out to the government the evidence or defense that made it justified." The Secretary now claims that this argument was presented in footnote 3 on page 7 of its "Answer" filed December 5, 2001. That footnote reads as follows:

> As late as October 2000, Pronghorn admitted, in its answer to the Petition for Assessment of Civil Penalty, that the Smith Ranch "mine" was "subject to the provisions of the Act." See Petition, Paragraph 2 (September 20, 2000), and Answer, Paragraph 2 (October 13, 2000) (West 2000-537-M) (see also Pronghorn's Answer, Paragraph 4 in WEST 2000-538-M) (October 3, 2000). The entire first year of the fees and expenses listed in the application therefore had nothing to do with the rationale for the decision and the position of the Secretary that Pronghorn now claims was without substantial justification.

This somewhat ambiguous statement, secreted in a footnote to the Secretary's "Answer," was not previously understood to have raised the precise assertion now presented, i.e., that her position in the civil penalty case was reasonably justified until the jurisdictional issue was raised by Pronghorn and that therefore Pronghorn is not, in any event, entitled to fees and expenses of $26,718.00, incurred before that date. This is, however, essentially the same argument - - i.e., that the Secretary was "substantially justified" to proceed in the underlying case because Pronghorn did not challenge her jurisdiction until litigation had commenced - - that was specifically rejected in the January 15 decision.

In any event, the Secretary's argument is without merit. The EAJ Act does not on its face limit the award of fees and expenses to only periods after the government has been formally notified by the opposing party that the government's position is not substantially justified. Nor does the EAJ Act require, as a condition precedent to an award, that the prevailing party must raise a specific objection in the underlying proceedings on the grounds that the government's position is not substantially justified. The cases cited by the Secretary for the proposition that

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[1] The Secretary does not claim for this reason that an award for periods before November 1, 2000, would be unjust or that Pronghorn unduly protracted or delayed the underlying proceedings.

partial awards under the EAJ Act may be appropriate in certain circumstances, *Lion Uniform, Inc. v. NLRB*, 905 F.2d, 125 (6th Cir. 1990) and *Leeward Auto Wreckers, Inc. v. NLRB*, 841 F.2d 1143, 1148-49 (D.C. Cir. 1988) are clearly distinguishable in that they involved the withholding by the opposing party of specific defenses and evidence, exclusively within the knowledge of the opposing party until the late stages of the proceedings. The *Lion Uniform* case did not, moreover, result in a partial award - - the principle it was cited for.

The underlying civil penalty cases herein, on the other hand, involved only a question of whether the Secretary had jurisdiction to proceed under the fundamental organic statute - - an issue the Secretary must always examine herself to determine whether she can proceed with litigation. In the civil penalty cases below there was never any doubt that the mineral at issue was being mined in liquid form with no workers underground and, because of the clear statutory language, that well know fact should have led the Secretary to immediately question her jurisdictional authority.

Pronghorn also notes that even if it had raised the jurisdictional issue from the beginning, the requested fees and expenses would in any event have reasonably been incurred. Pronghorn argues that it could not have known the outcome of a jurisdictional challenge in any event and it was prudent and necessary therefore to take prompt measures to defend the case on the merits and thereby incur the noted expenses.

ORDER

The Secretary of Labor's Motion to Reconsider Decision is hereby denied. A final decision awarding fees and expenses will accordingly be issued forthwith.

Gary Melick
Administrative Law Judge
(703) 756-6261

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March 4, 2002

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

FINAL DECISION AWARDING FEES AND EXPENSES

The decision on the merits in this Equal Access to Justice proceeding was issued January 15, 2002, and amended on February 14, 2002. A Motion to Reconsider Decision filed by the Secretary was denied on March 1, 2002.

Applicant Pronghorn Drilling Company (Pronghorn) is seeking an award of fees and expenses in this proceeding. (a) For the period through September 2001, in the amount of $50,942.45. For the reasons set forth in the Order Denying Motion to Reconsider Decision, the Secretary's challenge to a portion of this amount is denied. (b) For the period from October 1, 2001, through January 31, 2002, in the amount of $5,258.97. Of this amount, $488.13, is disputed by the Secretary. Pronghorn acknowledges that it cannot "justify the expense." In an amended application filed February 25, 2002, Pronghorn also seeks reimbursement for $923.92, for "Westlaw charges." Accordingly the award for this period is adjusted to $5,714.76. (c) For the period from February 1, 2002 to February 21, 2002, Pronghorn seeks fees and expenses of $1,757.92. These amounts are not disputed.

ORDER

The Secretary of Labor is hereby directed to pay to Pronghorn Drilling Company, an award of $58,395.13, in fees and expenses within 40 days of the date of this order.

Gary Melick
Administrative Law Judge

Distribution: (By Certified Mail)

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March 4, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of LEONARD M. BERNARDYN, Complainant	:	DISCRIMINATION PROCEEDINGS Docket No. PENN 99-158-D PENN 99-129-D
v.	:	WILK CD 99-01
READING ANTHRACITE COMPANY, Respondent	:	Wadesville Pit Mine ID 36-01977

ORDER

Appearances: Troy E. Leitzel, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Complainant;
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, Pottsville, Pennsylvania, for the Respondent.

Before: Judge Weisberger

On February 1, 2002, I issued a partial decision, in this matter, based on the Commission's remand, 23 FMSHRC 924 (2001), and found, based on the law of the case as set forth by the Commission, that the Secretary had established that Bernardyn was discharged in violation of Section 105(c) of the Act. The partial decision indicated that it would not be final until a further Order is issued regarding the scope of Bernardyn's relief and the amount of civil penalties to be assessed against the Respondent.

1. Relief Due to Bernardyn

The parities submitted a series of stipulations regarding the scope of relief due Bernardyn and, based upon the stipulations, which I adopt, it is **ORDERED** as follows:

a. Bernardyn is due back wages in the gross amount of $14,870.32 in principle, plus

interest less legal deductions.[1]

b. Bernardyn is due reimbursable health benefits in the amount of $571.80 in principle plus interest.

c. Reading Anthracite Company will purge the personnel file of Leonard Bernardyn of any reference to his termination on November 10, 1998.

d. Bernardyn is due a credit in vacation hours earned in the amount of $507.04 plus a $25.00 Christmas bonus in principle plus interest.

2. Assessment of Penalty Against Reading

Inasmuch as it has been found that Reading violated Section 105 of the Act, a penalty must be assessed pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977. Section 110(i) of the Act provides that the following factors are to be considered by the Commission in accessing a civil monetary 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.

The parties stipulated that Reading has an annual coal production of approximately 231,564 production tons per year, that the Wadesville Pit Mine produces approximately 29,151 tons of coal per year, that the imposition of the proposed civil penalties will have no affect on Reading's ability to remain in business, that Reading was accessed approximately 27 violations over 82 inspection days during the 24 months preceding the issuance of the subject 105(c) violation, and that Reading was assessed three previous 105(c) violations.

The remaining factors of gravity, negligence and good faith have not been agreed to be the parties.[2]

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[1]Interest is to be calculated using the Short-Term Federal Underpayment Rate as explained by the Commission in Secretary v. Clinchfield 10 FMSHRC 1493, 1504 (1998).

[2]The 110(i) factors of gravity, negligence, and good faith will be analyzed as they relate to Reading's violation of Section 105 of the Act, i.e., unlawfully discharging Bernardyn. In contrast, Reading's brief analyzes these factors as they relate to physical conditions which provided the basis for Bernardyn's protected activity. Inasmuch as Reading's brief does not discuss negligence, gravity, and good faith as they relate to Reading's violative discharge of Bernardyn, the arguments set forth in the brief need not be discussed.

a. Gravity

In evaluating the gravity of a Section 105 violation, the Commission has held that the proper analysis is whether the discharge had a chilling effect on other miners. (See Jim Walter Resources, Inc., 18 FMSHRC 552, 558-559 (Apr. 1996). In the case at bar, Bernardyn was discharged after he had informed Reading's superintendent that he had been driving cautiously due to slippery road conditions. Hence, it can be concluded that his discharge could reasonably tend to discourage other miners from driving slowly in slippery conditions. Also, Bernardyn's discharge occurred after he had contacted his safety representative on a C.B. radio. It thus can be found that the discharge of Bernardyn, would reasonably discourage other miners from contacting their safety representative on a C.B. radio. Thus it concluded that the gravity of the violation was high.

b. Negligence

The decision that Reading failed to establish its affirmative defense, and did discharge Bernardyn in violation of Section 105(c) of the Act, was based upon findings made by the Commission, 23 FMSHRC, supra, which led to a conclusion, based on the law of the case, that Bernardyn was disparately treated by Reading. In this connection, the following were found to be the law of the case: that there was no evidence in the record of prior difficulties Reading may have had with Bernardyn swearing; that Reading violated its policy in terminating Bernardyn; that there was no substantial evidence to support a finding that Bernardyn's broadcast of his cursing over the C.B. radio materially distinguished his cursing episode from previous cursing incidents; and that there was not substantial evidence to support a decision that Bernardyn was not subject to disparate treatment based on a finding that other individuals made a profane remark only once, whereas Bernardyn had used profanity unstop for approximately eight to ten minutes. Hence, in light of these findings, it is concluded that Bernardyn was subject to disparate treatment by Reading, which defeats Reading's affirmative defense. Thus, it must be concluded that the level of Reading's negligence with regard to the violation herein was high.

c. Good Faith

The violative act herein, i.e., discharging Bernardyn on November 10, 1998, in violation of Section 105 of the Act, was initiated and executed by Reading. Reading did not make any attempt to abate this violation by reinstating Bernardyn until March 19, 1999, when it was ordered to do so in a decision issued on that date ordering Reading to reinstate Bernardyn subsequent to a hearing initiated by the Secretary's Application for Temporary Reinstatement (21 FMSHRC 339 (Mar. 1999)). Subsequently, on July 26, 1999, Reading terminated Bernardyn upon the issuance of an order dissolving the initial order of temporary reinstatement (21 FMSHRC 819 (July 1999)). Reading did not reinstate Bernardyn until September 1, 1999, when the Commission vacated the initial dissolution of the temporary reinstatement order (22 FMSHRC 298 (Mar. 2000)). Within this context, I find that Reading was lacking in some good

faith attempt to abate the violative discharge of Bernardyn.

d. Penalty Amount

Considering all the above factors, and giving considerable weight to the high level of gravity and negligence, I conclude that a penalty of $5,000 is appropriate.

e. Order

It is **Ordered** that, within 30 days of this Decision, Reading shall pay a civil penalty of $5,000.

It is **Further Ordered** that this Order become incorporated in the Partial Decision issued on February 1, 2002, and that the Partial Decision is now Final.

Avram Weisberger
Administrative Law Judge

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March 15, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-394-M
Petitioner	:	A.C. No. 41-01684-05508
v.	:	
	:	
BILBROUGH MARBLE DIVISION,	:	
TEXAS ARCHITECTURAL AGGREGATE,	:	
Respondent	:	Roper Quarry

DECISION

Appearances: Ronald M. Mesa, Conference & Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Dallas, Texas, on behalf of Petitioner;
David M. Williams, Esq., San Saba, Texas, on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges that Bilbrough Marble Division, Texas Architectural Aggregates ("TAA"), is liable for two violations of mandatory safety and health standards applicable to surface metal and nonmetal mines. A hearing was held in Austin, Texas. The parties submitted briefs following receipt of the transcript. The Secretary proposes civil penalties totaling $110.00 for the alleged violations. For the reasons set forth below, I find that Bilbrough did not commit the alleged violations and vacate the citations.

Findings of Fact - Conclusions of Law

On April 11, 2001, MSHA inspector Jerry Anguiano conducted an inspection of Bilbrough Marble's Roper Quarry. The quarry produces a buff-colored dolomite marble known as "DeMarco Botticino." It has been operated only intermittently since April, 2000, when TAA lost its contract with the major consumer of the uniquely colored marble. In April of 2001, work at the quarry was limited to the reclaiming of existing stock, which was done only on weekends.

At about 8:00 a.m., on Wednesday, April 11, 2001, Bilbrough Marble's General Manager, Joe R. Williams, Jr., drove Anguiano to the quarry and opened the locked gate

admitting them to the facility. In the course of the inspection, Anguiano observed a CAT 950 front end loader that had a severely cracked windshield. He requested that Williams start it up and move it forward to check the brakes. When Williams placed the transmission of the loader into reverse to return it to its parked location, the back-up alarm did not function. Anguiano issued citations based upon the condition of the windshield and the inoperable back-up alarm.

Citation No. 6206421

Citation No. 6206421 alleged a violation of 30 C.F.R. § 56.14103(b), which provides, in pertinent part: "If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed." Anguiano described the violation in the "Condition or Practice" section of the citation as follows:

> Front end loader #140 has the windshield cracked. There were (5) vertical cracks. The cracks range approximately 30 inches to 35 inches. The glass was flexing and could break in the operator's face while operating the loader. The operator could sustain severe eye injury and/or cuts, lacerations to the face. The loader was not operating at the time of the inspection.

He determined that it was unlikely that the violation would result in an injury, but that an injury could reasonably be expected to be permanently disabling, that one person was affected, and that the operator's negligence was moderate.

As Anguiano noted, the loader was not being operated at the time of the inspection, and no miners were at the site who could have operated it. As he reviewed records of operations at the quarry, he noted a sheet of paper referred to as a truck and bucket count sheet that purported to show that a number of truck loads and bucket loads had been processed on March 31, and April 7 and 8, 2001. (Ex. R-4). Because the loader had a bucket and normally would have been used to load the crusher hopper and the haul truck, he concluded that the loader had been operated in its defective condition on April 8, 2001.[1] (Tr. 54-55).

Anguiano also concluded that the loader was readily available for use by miners. Though not mentioned in his notes, he testified that the loader was parked "where it seemed to be at a ready-to-use line" (Tr. 43), a term that had been used by his supervisor in earlier testimony.[2]

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[1] Anguiano recorded his conclusion that the loader had been operated on April 8, 2001, in the companion citation. (Ex. S-8).

[2] Anguiano's supervisor, Ralph Rodriguez, testified that a "ready line" is an area where mobile equipment that is ready to be used by any miner is parked. At small operations such an area is typically not formally posted with signs but is understood by employees to be a place where equipment available for use is located. He had inspected the Roper quarry some five or six years earlier and stated that there was a "ready line" area at the quarry where two haul

Anguiano explained, in reference to his use of the term "ready-to-use line," that when equipment is parked and not tagged-out, it is ready for an employee to operate. (Tr. 43). He did not further describe the area or the basis of his conclusion that the loader was parked on what appeared to be a ready-to-use line. There were no signs stating that equipment in the area was not available for use and there was no tag or other marking on the loader stating that it could not be used. Based upon his conclusions that the loader had actually been used in its defective condition on April 8, 2001, and that it was available for use by a miner, he issued the subject citation.

Bilbrough's defense to the alleged violation is that the loader had not been used in its defective condition, was not available for use, and would not have been used before the windshield was replaced. Williams testified, based upon conversations with miners and a review of records, that the loader was last used on Saturday, April 7, 2001. A crack in the windshield was noted during a pre-shift inspection that day, but was not thought to be hazardous. Toward the end of the shift, the crack "spider-webbed," and the loader was taken out of service until the windshield was replaced. A "Yard Dump Driver's Report," dated April 7, 2001, noted a crack in the loader's windshield and that the windshield needed to be replaced. (Ex. R-1). The loader was parked in a back area, out of the way of traffic. (Tr. 137-39). According to Williams, employees of Bilbrough who might work at the quarry understood that equipment parked in that area was effectively out of service and also understood that the loader was not to be used because of the cracked windshield. (Tr. 165-66).

Ollie Conely, who had been the foreman of the quarry when it was operating on a full-time basis, was one of four or five Bilbrough employees who worked at the mine on April 7 and 8, 2001. He operated a Link-Belt excavator – a tracked vehicle that was also equipped with a bucket. On April 8, 2001, he used the excavator to load the crusher hopper and the haul truck. Normally those tasks would have been performed with the loader, but it was unavailable due to the cracked windshield, and the excavator was the only other operable piece of equipment at the site that had a bucket and was capable of performing those operations. (Tr. 176-77). Conely described the area where the loader was parked as the "dead zone," an area where equipment that was not available for use was placed. The loader was parked next to an excavator that had no engine and had been parked there for several years. (Tr. 184). He had telephoned Marble Falls Glass & Mirror, Inc. on Monday, April 9, 2001, and ordered a replacement windshield for the loader. That firm had been routinely used by Bilbrough for such tasks, and replacements were usually done on the day they were ordered or within a day or two thereafter. Respondent's exhibit R-2 includes a bill for replacement of the windshield on April 11, 2001, and a statement signed by the owners that the order had been placed by phone on April 9, 2001.

In an enforcement proceeding under the Act, the Secretary has the burden of proving an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd., Secretary of Labor v.*

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trucks and two front end loaders were generally parked. He did not further describe the area or identify where it was located. (Tr. 16, 24-25, 28, 31).

Keystone Coal Mining Corp., 151 F.3d 1096 (D.C.Cir. 1998); *ASARCO Mining* Co., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources Inc.*, 9 FMSHRC 903, 907 (May 1987). I find that the Secretary has not carried her burden with respect to this citation.

As to actual use, I find that the loader had not been used while in a defective condition on April 8, 2001. The only evidence suggesting that it had been used is the reference to "buckets" on the count sheet for that date. Respondent's unrebutted evidence established that that reference was to the excavator's bucket, not the loader's, and that the loader was not used after the windshield crack "spider-webbed" on April 7, 2001. Even though not actually used in a defective condition, however, Respondent would have violated the standard if the defective equipment had not effectively been taken out of service.

The standard at issue, like other safety standards applicable to mobile equipment, is intended to protect miners from being exposed to hazards caused by the operation of defective equipment. In general, such standards must be complied with even though the equipment is not actually being used or is not intended to be used during a particular shift. *Allen Lee Good*, 23 FMSHRC 995 (Sept. 2001); *Mountain Parkway Stone, Inc.*, 12 FMSHRC 960 (May 1990). In *Mountain Parkway*, the term "used" was interpreted broadly to include equipment that was "parked in the mine in turn-key condition and had not been removed from service." *Id.* at 963. The Commission relied on *Ideal Basic Industries, Cement Division*, 3 FMSHRC 843 (April 1981), which held that "the fact that the equipment was located in a normal work area, was capable of being used, and had not been removed from service" meant that it had been "used" within the meaning of the standard there at issue.[3] In *Good*, the Commission reiterated that "[a]s long as the cited equipment is not tagged out of operation and parked for repairs" a standard requiring that braking systems be maintained in functional condition was fully applicable. These cases make clear that the operator could properly be cited for any defective conditions unless the loader had been effectively taken out of service.

The Secretary relies on *Mountain Parkway* and argues that the loader was parked in the mine in a turn-key condition,[4] did not bear a tag noting that it had been taken out of service, and the claimed "dead zone" was not posted. However, being "tagged-out" or placed in a posted area are not the exclusive means of removing equipment from service. The applicable standard, 30

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[3] The standard at issue in that case, 30 C.F.R. § 56.9-2 (1978), required that defects be corrected "before the equipment is used."

[4] Williams testified that, in addition to the ignition switch, the master switch was also turned off. The master switch was located in a covered compartment on the floor of the loader's cab. Conely, however, testified that when he operated the loader, the normal procedure was to turn off the master switch, in addition to the ignition switch. The key to the master switch was left in the switch to avoid loss. Consequently, the loader was in a turn-key condition when it was inspected.

C.F.R. § 56.14100(c), also provides that equipment can be taken out of service by use of some "other effective method of marking the defective items." Respondent contends that it employed an effective method of prohibiting further use of the loader because it was parked in an area that was understood by all of the miners who might work at that site to be a "dead zone." Additionally, it contends that all of its employees knew that the loader was not to be used until the windshield had been repaired.

I find that the loader had been effectively taken out of service. The area where the loader was parked was understood by Bilbrough's small number of employees to be a place where equipment was not available for use and they actually knew that the loader could not be operated until the windshield was repaired. The Secretary's attempt to characterize the area as a "ready line" must be rejected. Her witnesses provided no description of the area and the only other piece of equipment located in the area was an excavator that had no engine and had been parked there for years.

Because the loader had not been used in a defective condition and had been effectively taken out of service, Bilbrough did not violate the standard at issue.[5] Accordingly, Citation No. 6206421 is dismissed.

Citation No. 6206422

Citation No. 6206422 alleged a violation of 30 C.F.R. § 56.14132(a), which provides: "Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." Anguiano described the violation in the "Condition or Practice" section of the citation as follows:

> The back-up alarm on the #140 front end loader was not operating. The loader was not operating at the time of the inspection. The loader is used to haul rock and feed the hopper. The plant was not in operation and no miners were in the area at the time of the inspection. According to the crusher operator truck count list, the loader was last operated on April 8, 2001.

He determined that it was unlikely that the violation would result in an injury, but that an injury could reasonably be expected to be fatal, that one person was affected by the violation, and that the operator's negligence was moderate.

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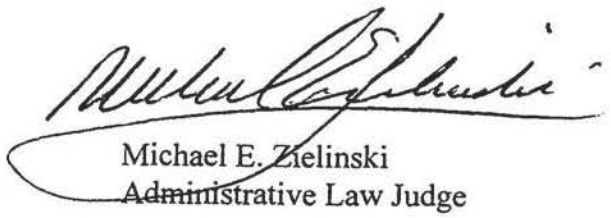
[5] Respondent's defense that the loader's windshield would have been repaired prior to any potential use also carries considerable weight. A similar defense was rejected in *Mountain Parkway* because there was no evidence that repairs to the equipment were being made or had been scheduled. Here, Bilbrough introduced unrebutted evidence that it had called its regular repair company on the first work day following discovery of the defect, and that it had a reasonable expectation that the windshield would be replaced prior to the next potential use of the equipment the following weekend.

There is no dispute that the loader's back-up alarm did not operate when Williams placed the transmission in reverse to back the loader into its parking place. When the malfunction occurred Williams telephoned the plant to request that a mechanic come out and repair or replace the alarm. Conely and a mechanic went to the quarry that afternoon. Anguiano observed them working on the loader and noted the presence of a replacement alarm. He assumed that the alarm had been replaced when he terminated the citation the following day. However, the alarm had not been replaced. When the mechanics attempted to diagnose the malfunction, they were unable to do so because the alarm functioned properly. It appears that the malfunction of the back-up alarm during the inspection was an isolated occurrence.

As noted above, Commission precedent is clear that standards like § 56.14132(a) must be complied with for all equipment located on mine property that might be used. Only if equipment has been effectively taken out of service can an operator avoid the consequences of defective conditions. The conclusion that the loader had been effectively taken out of service at the time of the inspection dictates that this citation also be dismissed. While the loader had not been taken out of service because of an inoperable back-up alarm, there was no reasonable possibility that it would be used, and the apparently isolated failure of the alarm while the equipment was out of service was not a violation of the standard.

ORDER

Citation Nos. 6206421 and 6206422 are hereby **VACATED** and the petition for assessment of civil penalties is **DISMISSED**.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

March 15, 2002

PAMELA BRIDGE PERO,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 97-154-D
v.	:	DENV CD 96-21
	:	
CYPRUS PLATEAU MINING CORP.,	:	Star Point No. 2
Respondent	:	Mine ID 42-00171

REMAND DECISION APPROVING SETTLEMENT

Before: Judge Cetti

This proceeding was originally initiated by a complaint by Pamela Bridge Pero (hereinafter "Pero") under the provisions of Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802 *et seq.*, the "Act."

Om December 22, 2000, the Commission remanded the Judge's decision of September 1998 for further consideration, consistent with the Commission decision of December 2000. Although Pero and Respondent Cyprus Plateau Mining Corporation had every opportunity to present additional evidence, they decided to settle the case without further litigation. The joint motion for settlement, signed by all parties and their respective attorneys, was filed on March 11, 2002. The parties agree that this settlement agreement constitutes a final disposition of all issues in this case.

The settlement agreement contains provisions concerning consideration, release of claims, and other matters that the parties also wish to remain confidential.

I reviewed the motion and settlement agreement and conclude that the proposed settlement is reasonable and in the public interest. The motion to approve settlement is **GRANTED**, and the parties are **ORDERED** to comply with the terms and conditions in the settlement agreement.

The terms of the settlement are to remain **CONFIDENTIAL**. Consequently, the envelope in the official file that contains confidential documents PLACED UNDER SEAL, is subject to review by the Commission only or other appellate bodies.

August F. Cetti

August F. Cetti
Administrative Law Judge

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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 20, 2002

DANIEL HERNANDEZ,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 2001-308-DM
	:	RM MD 01-03
	:	
ASARCO INCORPORATED,	:	Mission Complex
Respondent	:	
	:	Mine ID 02-00855

DECISION

Appearances: Daniel Hernandez, Complainant, Perris, California, *pro se*;
Willa B. Perlmutter, Esq., Patton Boggs LLP, Washington, DC, for Respondent.

Before: Judge Bulluck

This proceeding is before me on a Complaint of Discrimination filed by Daniel Hernandez against ASARCO, Incorporated ("ASARCO"), under section 105(c) of the Federal Mine Safety and Health Act of 1977("the Act"), 30 U.S.C. § 815(c). The complaint alleges unlawful discharge from employment in retaliation for having made safety complaints to ASARCO.

Hernandez filed his discrimination complaint with the Mine Safety and Health Administration ("MSHA") pursuant to section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2), on October 31, 2000 (Ex. R-8).[1] On March 1, 2001, MSHA notified Hernandez that, based on its investigation of the allegations, it had concluded that a violation of section 105(c) had not occurred (Ex. R-11). Hernandez, *pro se*, initiated this proceeding before the Commission on March 30, 2001, under section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3).[2]

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

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

A hearing was held in Tucson, Arizona. The parties presented testimony and documentary evidence, and filed post-hearing briefs. For the reasons set forth below, I conclude that Hernandez failed to prove that he engaged in activity protected by the Act and that, assuming, *arguendo,* that he had, ASARCO discharged him for reasons that are unrelated to any protected activity.

I. Stipulations

The parties stipulated to the following facts:

1. On August 15, 1995, the Complainant was hired to work at ASARCO Mission underground mine.

2. On February 26, 1997, the Complainant voluntarily left his job at ASARCO mission underground mine for personal reasons.

3. On September 2, 2000, the Complainant was rehired by ASARCO Mission underground mine.

4. The Complainant was fired from his job on October 18, 2000.

5. When the Complainant was fired from his job at ASARCO Mission underground mine, he was still in the probationary period.

II. Factual Background

ASARCO's Mission Complex is an underground copper mine. Daniel Hernandez worked at the Mission mine as a driller from August 15, 1995, until February 26, 1997, when he quit his job for personal reasons (TR. 6). Hernandez sought employment with ASARCO a second time, was rehired as a jumbo (underground drill) operator at the Mission mine, and worked in a probationary status from September 2, 2000, until October 18, 2000, when he was discharged, according to ASARCO, for "improper workplace inspection and unacceptable drilling pattern" (Tr. 354; Ex. R-26).

Hernandez last worked during the swing shift of October 17, 2000, under the charge of shifter (underground shift supervisor) Roger Sparby, who made routine rounds to his crew's individual headings every hour or so, to ensure that work was progressing smoothly and to assist his workers where necessary (Tr. 11-16, 313-15). Hernandez started the shift working in one heading, then later drilled in the 197 East/18 West heading with Sparby (Tr. 321, 335-36). While in the process of drilling, a misfire was found behind the heading, approximately 100 feet from Hernandez's location on the jumbo, which was blasted later at the end of the shift when blasting

is typically performed (Tr. 321-25, 336-37). Two hours before the end of the shift, Sparby last checked Hernandez's heading where, because Hernandez was in the process of rattling down prior to drilling, there was "a lot of loose," and Sparby summoned a mechanic to assist Hernandez with problems he was having with the jumbo's hydraulic system (Tr. 327-29, 335, 338, 341-43). When the following crew reported at midnight, graveyard shift supervisor Louis Marrujo dangered-off Hernandez's heading, prohibiting further entry pending investigation by senior underground supervisor Gary Torres during the day shift (Tr. 295, 370-72). Based on Marrujo's report and accompanying diagram of unsafe conditions and improper drill pattern, Torres and day shifter Dennis Dippel inspected the physical condition of the dangered-off heading (Tr. 285, 287-92, 373-75, 387-88; Ex. R-25). Consequently, in close proximity to the on-coming swing shift at 4:00 p.m. on October 18th, Torres submitted his notes and photographs of the heading to mine manager Pete Graham (Tr. 388; Ex. R-26, R-27). When Hernandez reported for duty on the swing shift, Torres summoned him to the office, showed him the photographs of his work area, and discussed its unsafe condition (Tr. 55, 388). Hernandez denied having left his heading as depicted in the photographs and alleged that Marrujo's graveyard crew had "set him up" by sabotaging his heading (Tr. 17-19, 92-93, 389-90). According to Torres, it was then that he decided to fire Hernandez (Tr. 390).

III. Findings of Fact and Conclusions of Law

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

The operator may rebut the *prima facie* case by showing that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula,* 2

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[3]Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "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 (4) he has exercised "on behalf of himself or others . . . any statutory rights afforded by this Act."

FMSHRC at 2799-800. If the operator cannot rebut the *prima facie* case in this manner, it, nevertheless, may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette,* 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC,* 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Const. Co.,* 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC,* 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

Hernandez has failed to meet the first step in establishing a *prima facie* case of discrimination. He has not established that he engaged in protected activity, despite alleging at different stages in this proceeding that he had made safety complaints to management concerning working around misfires, rattling (checking ground) and scaling (bringing down loose ground) with the jumbo drill, moving heavy hoses underground, and drug usage by miners underground.

Looking first to Hernandez's discrimination complaint of October 31,2000, he described having drilled "across the drift from a misfire half the night" on the swing shift of October 17th, but admits that he "never got the chance to express [himself]" because on October 18th, Gary Torres confronted him with evidence that he had left his heading in an unsafe condition and failed to drill the burn[4] properly, then fired him (Ex. R-8). In essence, Hernandez alleged that the graveyard crew had sabotaged his heading "to make it look like [he] had left bad ground for the next shift" (Ex. R-8). It was not until well after his termination, when forwarding his Complaint to the Commission pursuant to section 105(c)(3), that Hernandez alleged in his cover letter of March 26, 2001, that he had been required to "bar down" (scale) with the jumbo, despite complaints to his supervisor that that method of ground control endangered his safety. Later still, during his deposition, Hernandez raised for the first time the complaint of having been required to carry heavy hoses underground (Tr. 99-103).

At hearing, Hernandez testified that he had first complained about working around misfires to day shifter Dennis Dippel and alleviated the problem himself rather than refusing to drill in that environment, but was unable to specify when this incident occurred and admitted that he had failed to document it (Tr. 7-11, 20-21; see 85-86). Dennis Dippel testified that he did not remember Hernandez ever working under his supervision during Hernandez's second stint at Mission underground, that Hernandez had never made any safety complaints to him, and that he had no involvement in the decision to terminate Hernandez (Tr. 275, 293, 298-301). Respecting Hernandez's last shift on October 17th, Gary Torres testified that, when confronted with having left a dangerous heading, Hernandez accused other miners of deliberately making it unsafe, and that Hernandez never complained about a misfire or any other safety issue (Tr. 389-92, 403). Hernandez, himself, conceded in testimony that he had never spoken to Torres about misfires

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[4]The "burn," a series of holes in a drill pattern, is where the explosives start to "pull" or break out the center rock, causing surrounding rock to break into the center, so that the face breaks down in an orderly fashion (Tr. 180-84).

(Tr. 51-56). Swing shift supervisor Roger Sparby, on duty October 17th, testified that the misfire never posed a danger because it was discovered a safe distance of 100 feet away from where Hernandez was drilling and no one else was working in the area, and that the misfire was blasted at the end of the shift to avoid exposing the crew to dust and smoke in the middle of the shift (Tr. 321-325). Sparby further testified that Hernandez had not made any safety complaints to him (Tr. 326). Hernandez produced no evidence that would substantiate a misfire incident involving Dippel, and he failed to prove that his involvement in discovering and detonating the misfire on Sparby's watch amounted to a complaint of unsafe working conditions. Moreover, in light of the fact that Hernandez never refused to work under the alleged unsafe conditions, never documented the conditions in personal notes or on time cards,[5] nor complained to Torres when the shift ended or any reasonable time thereafter, his testimony falls substantially short of rebutting the credible cumulative testimony of ASARCO's witnesses, including the union steward, safety engineer and human resource manager, that Hernandez never complained about misfires or any other safety issues while he was working in the probationary status.

Hernandez, save his bare allegation in responses to ASARCO's discovery requests, has failed to establish that he made safety complaints about rattling and scaling with the jumbo drill prior to his termination (Tr. 70-82). Furthermore, he conceded, through deposition and hearing testimony, that he had never complained to management about being required to haul heavy hoses around the mine (Tr. 100-03). Similarly, Hernandez has failed to establish that he raised a safety complaint respecting drug usage underground, prior to his termination. The evidence indicates that he faxed a complaint to the Arizona State Mine Inspector on October 19, 2000, implicating, among others, Marrujo's crew in illegal sales and on-the-job cocaine and methamphetamine usage, but he admitted in testimony that he had not become aware of this activity until after he was fired (Tr. 104-06).

ASARCO has consistently maintained that Hernandez never engaged in protected activity, and has sought to cast his character in a negative light and his claims as after-the-fact fabrications of a system-savvy litigant, designed to construct a cause of action. One glaring instance of Hernandez's lack of truthfulness and manipulation of the system is illustrated by the Order of February 29, 1996, wherein Commission Judge Richard Manning granted a continuance in the discrimination proceeding Hernandez had brought against American Girl Mine, based upon Hernandez's representation to the judge that his mother's recent death had prevented him from "turning his attention to his case" (Ex. R-1). It is clear from the instant record, including Hernandez's own testimony, that his mother is "alive and kicking" (Tr. 27-28). Moreover, Hernandez's discrimination complaint against American Girl, also regarding termination, makes it evident that he is knowledgeable as to his rights and protections under the Act and how to proceed with a claim (Tr. 57-60, 86-89). Judge Manning clearly explained miners' rights under

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[5]Hernandez's explanation for his failure to document the alleged safety complaints--that he was on probation and feared that "stirring up" things would get him fired--is totally implausible, since, according to him, fear of termination did not prevent him from rocking the boat by verbally complaining (see Tr. 85-86, 90-91).

the Act in his dismissal of Hernandez's discrimination claim for, in part, his failure to allege that he had engaged in protected activity (Ex. R-7). 18 FMSHRC 1182 (July 1996) (ALJ). While Hernandez's credibility has been seriously undermined by inconsistencies in his testimony and statements so far askew a plausible sequence of events as to be unworthy of credence, it is unnecessary to focus on his character because, other than the evolution of his bare assertions subsequent to MSHA's investigation of his Complaint, he has failed to produce any evidence supportive of his claim that he engaged in protected activity.

Assuming, *arguendo*, that Hernandez had established a *prima facie* case, ASARCO has rebutted his case by proving that Hernandez was discharged for legitimate, business-related reasons, entirely unrelated to any alleged protected activity. Credible evidence, unrebutted by Hernandez, clearly establishes that Hernandez had problems maintaining his heading in a safe condition and following ASARCO's required drill pattern during his first period of employment, which persisted without improvement after he was rehired. Union Steward Fred Ambrose testified that Hernandez had been known to leave his heading in need of scaling--unsafe for Ambrose to drill on the subsequent shift, and that other miners had complained that Hernandez's holes were drilled crooked and out of line ((Tr. 171, 176-78, 185, 189). Dennis Dippel testified that among his crew, Hernandez had a reputation of leaving his headings unsafe, and that Hernandez's drill pattern was "really bad" (Tr. 276-84). Roger Sparby testified that Hernandez left bad ground conditions in his headings, not conducive to safe drilling, and that Hernandez would not drill the right pattern (Tr. 315-17). Furthermore, Sparby testified that, in his opinion, Hernandez was trying to get too much done without taking care of his surroundings, and that while he had spoken to Hernandez on several occasions about workplace inspections and following the company's standard drill pattern, he had seen no improvement (Tr. 318-20, 330-31). Gary Torres testified that Hernandez was rehired under the condition that he would adhere to standard operating procedures by performing adequate workplace inspections and drilling according to the mandated pattern, but that he personally observed Hernandez's non-compliance in both areas (Tr. 350-52, 356-69, 373-75; see 122-27; Ex. R-21). Torres noted that Hernandez persisted in drilling the rounds "his way," despite the fact that Torres had drawn him a diagram of the company's standard drill pattern which Hernandez carried around in his pocket (Tr. 370; see 108-117; Ex. R-25). Safety engineer George Zugel testified that engineering support and management input are involved in planning the specific drill pattern for a particular mine, and that there is no deviation from the standard drill pattern at Mission underground (Tr. 232-33). Zugel also attested to personally observing unsatisfactory performance by Hernandez, including failure to take down loose rock (Tr. 237-43; Ex. R-25).

By his own testimony, Hernandez admitted some responsibility for ground conditions in his heading on October 17th, by suggesting that appropriate discipline would have been time off, but concluded that "being that [he] was on probation, they didn't care–they were happy to see [him] leave" (Tr. 97). It is clear, based on the record in its entirety, that Hernandez's persistent non-conformance with standard operating procedures was the sole motivation for ASARCO's decision to terminate his employment, and that he would have been terminated for performance deficiencies irrespective of any protected activity.

ORDER

Accordingly, inasmuch as Hernandez has failed to establish, by a preponderance of the evidence, that he was discharged for engaging in activity protected under the Act, it is **ORDERED** that the Complaint of Discrimination of Daniel Hernandez against ASARCO, Incorporated, under section 105(c) of the Act, is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

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March 27, 2002

LOUIS W. DYKHOFF, JR., Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 2001-409-DM
	:	WE MD 01-03
v.	:	
	:	Boron Operations
U. S. BORAX, INCORPORATED, Respondent	:	Mine I.D. 04-00743

DECISION

Appearances: Neil H. Herring, Esq., Sebastopol, California, for Complainant; Matthias H. Wagener, Esq., O'Melveny & Myers, Los Angeles, California, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Louis W. Dykhoff, Jr., against U.S. Borax, Incorporated ("U.S. Borax") under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). The complaint alleges that
Dykhoff was subjected to a number of retaliatory actions because he complained to the Department of Labor's Mine Safety and Health Administration ("MSHA") about the condition of a concrete slab in front of the truck docks at the main sack room in the shipping department at Respondent's Boron Operations. The primary retaliatory action complained of was that he was sent home on December 21, 2000, until he could climb the stairs to the lunch room in the shipping department. Dykhoff has not worked at the Boron Operations since that date. An evidentiary hearing was held in this case in Lancaster, California. The parties filed post-hearing briefs. For the reasons set forth below, I find that Mr. Dykhoff did not establish a violation of section 105(c) of the Mine Act and I dismiss his complaint of discrimination.

I. SUMMARY OF THE EVIDENCE

U.S. Borax is the operator a large mining, processing, and shipping facility in Kern County, California, called the "Boron Operations." Mr. Dykhoff worked at the Boron Operations from January 1979 until December 2000. At all relevant times, Mr. Dykhoff worked in the shipping department. The shipping department operates in two areas, the boric acid sack room and the main sack room, which are at opposite ends of the processing plant (the "plant"). The

main sack room is sometimes referred to as the Plant 9 sack room. Different products are shipped out from the two sack rooms. The employees at Boron Operations are represented by the International Longshore and Warehouse Union, Local 30 (the "union"). Mr. Dykhoff has held a number of union positions at the mine, including chief steward and union safety representative.

Mr. Dykhoff has a number of medical problems, including a degenerative joint disease in his right hand and both of his knees. He must wear bilateral knee braces at work at all times so that, if his knees give out, he does not fall over. (Tr. 27). Dykhoff also suffers from lower back problems.
Mr. Dykhoff was off work most of 1999 because of his back problems.

On December 14, 1994, Dr. Robert R. Lawrence, an orthopedic surgeon, filled out a U.S. Borax "Medical Evaluation Report – Work Limitations" form ("work limitations form") on behalf of Dykhoff so that he could return to work after having been off for medical reasons. (Tr. 28; Ex. C-2). Among other limitations, the form states that Dykhoff has a major permanent limitation with respect to climbing stairs and ladders. A note at the bottom of the form states "no prolonged ascending or descending stairs." On the same date, Dr. Lawrence executed a "Disability Certificate" which states: "No hauling, no lifting over 35 lbs, no stooping or squatting – no ladder climbing, no stair climbing." (Tr. 29; Ex. C-3).

On January 31, 1995, R. Wesley Ing, the U.S. Borax Safety Supervisor at that time, wrote Dr. Lawrence asking for clarification of the restrictions with respect to the ascending and descending of stairs. (Ex. 29-30; Ex. C-4). The letter asked the doctor for more specificity such as the number to times Dykhoff can ascend and descend stairs per shift. In a letter dated February 16, 1995,
Dr. Lawrence responded as follows:

> Thank you for your letter dated January 31, 1995, in which you asked that I define the limitation of no prolonged ascending or descending stairs. It is my orthopedic opinion that during an 8-hour shift the patient may ascend or descend flights of stairs approximately four (4) times, or as tolerated.

(Ex. C-5). The letter further states that Mr. Ing may contact Dr. Lawrence for further information.

At the boric acid sack room there is only one 4-step staircase that Dykhoff would need to use. (Tr. 31). At the main sack room there are two sets of stairs. The stairs that lead to the lunchroom contain two flights of 25 steps each that are rather steep. (Tr. 32). The stairs that lead to the foreman's office contain about 30 to 35 steps.

On March 1, 1995, Dr. Lawrence visited the boric acid sack room. On March 8, he sent a letter to Mr. Ing describing his findings as follows:

> After inspecting Mr. Dykhoff's workplace at U.S. Borax, and reviewing the patient's medical file again, the restrictions placed in my letter of February 16, 1995, remain unchanged. However, there is one thing that I would like to say, under no circumstances should the patient carry sacks of borax while going up or down stairs. If further clarification is needed, please do no hesitate to contact me.

(Ex. C-6). Dr. Lawrence did not visit the main sack room. (Tr. 35).

Dykhoff returned to work in the boric acid sack room in 1995 after the work limitations form had been submitted. He started on the super bag crew, but after a few months he was transferred to the truck crew. On the truck crew he loaded pallets of bagged product, including super bags, into trucks from conveyors or a storage area using a fork lift.

Dykhoff was off work for a period of time in early 1997. When he returned to work, a return- to-work clearance form containing similar restrictions as the earlier work limitations form was signed by Darryl Caillier of U.S. Borax's Human Resources Department and by representatives of the company's safety and shipping departments. (Tr. 35; Ex. C-7).

On September 9, 1998, Dr. John Odell, Dykhoff's primary physician, executed another work limitations form. (Tr. 36; Ex. C-9). It is similar to the one executed by Dr. Lawrence in 1994 because it lists a major permanent limitation with respect to climbing stairs and ladders. A note at the bottom of the form states "no prolonged ascending or descending stairs."

As stated above, Mr. Dykhoff was out on disability during most of 1999 because of a non-work related back injury, but he returned to work in January 2000. (Tr. 38; Ex. C-10). Dr. Odell signed another work limitations form for Dykhoff on January 3, 2000, with the same work restrictions with respect to stair climbing and a note about his herniated disc. (Ex. C-11). Upon his return, Dykhoff worked as a forklift operator on the super bag crew in the boric acid sack room. (Tr. 39). Dykhoff complained about safety conditions including inadequate lighting in the sack room, sulfuric acid fumes, and inadequate ventilation. He also testified that he "turned in" some fork lift forks because they had been "ground off using a grinder." (Tr. 41). Jim Goodner, who was the safety representative at the sack room, told Dykhoff that Jim Lorentsen, the foreman, had been asking who had been making all the safety complaints.

In mid-February 2000, Dykhoff discussed his job assignment with Richard Gibson, who is the supervisor of both the boric acid and main sack rooms. Dykhoff did not like operating a fork lift on the super bag crew, as compared with the same job on the truck crew, because there was no opportunity for him to rest. (Tr. 44). Gibson asked if he would like to work in the main sack room to which Dykhoff responded "No."

Several days after this conversation and on the same day that he raised the sulfuric acid fumes issue, Lorentsen told Dykhoff that he was being transferred to the truck crew in the main

sack room. Dykhoff testified that Lorentsen told him that he was being transferred because he "complained to Gibson." (Tr. 45).

On his first day at work at the main sack room, Joe Kalina, Dykhoff's foreman, told him that Mr. Duke Vetor, a shipping supervisor, was concerned about his having to climb stairs. Dykhoff was told to eat lunch at the office in the truck dock rather than climbing up the stairs to the lunch room. He was also told that if he needed a foreman, he should call one rather than climb the stairs. Dykhoff asked if he could park his car next to the main sack room so that he would not have to walk the four tenths of mile from the employee parking lot. The plant manager told him that he could park near the sack room but his parking privilege was revoked by Darryl Caillier a few days latter. Caillier wrote Dykhoff a letter stating that his work limitations did not warrant granting him permission to park next to the main sack room. (Tr. 53). Caillier testified that he wrote that letter after the plant manager asked him to look into the matter. (Tr. 226). Caillier stated that he reviewed Dykhoff's medical file and could not find any restrictions that would prevent him from walking to the main sack room from the employee parking lot.

In late February 2000, Dykhoff complained about the conditions in front of the truck dock at the main sack room. He testified that the docks and ramps were in bad repair. (Tr. 49-50). He stated that the surface was badly cracked and was full of potholes. Because the fork lifts do not have any suspension, Dykhoff testified that his back was being subjected to constant jarring which caused him severe pain.[1] (Tr. 50). Dykhoff talked to Gibson about this issue and Gibson apparently told Dykhoff to go see his doctor. When Dykhoff replied that he would go on company time, they both went to see Mr. Caillier. The company wanted Dykhoff to fill out worker's compensation papers, but he refused. Dykhoff asked for union representation, which was provided, and Kevin Long, the head of the Human Resources Department, jointed the meeting. When Long asked Dykhoff if he was reporting an industrial accident, Dykhoff replied, 'No . . . [t]his is an injury that happened off the job, and it's being aggravated by the job." (Tr. 52). Long told Dykhoff to go back to work.

On March 1, 2000, Dr. Odell gave Dykhoff a note requesting that Dykhoff be granted permission to park his car near the main sack room. (Ex. C-12). The letter states:

> My patient, Mr. Louis Dykhoff, has severe osteoarthritis of lower extremities and back . . . . I am requesting he be allowed to park his automobile in close proximity to where he works. He has been parking 0.2 to 0.4 mile from job. This is not acceptable for his health problems.

Id. Dykhoff testified that he never received a response from the company and that he had to continue parking in the employee parking lot.

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[1] The references in the transcript to Mr. Caillier at page 49 line 20 and page 50 line 14 are incorrect and should be changed to Mr. Kalina.

In early March 2000, Dykhoff spoke to MSHA Inspector Harvey Brooks about the condition of the working surfaces at the truck dock. Dykhoff showed the inspector the cracks and potholes on the ramps, the slabs, and the docks at the main sack room. (Tr. 54-55, 315). About an hour later David Leach, a U.S. Borax supervisor, asked Dykhoff to show him the areas that he was concerned about. The company denied the union permission to take photographs of the area. (Tr. 282). A little later Leach told Dykhoff that he had generated a work order to have a coating applied to the area to smooth it out. Dykhoff testified that it was several weeks before the work was performed. A coating was applied to docks and ramps, but the slab at the loading docks was not repaired. (Tr. 57).

Dykhoff was off work for about 32 working days during June and July 2000. (Tr. 58-59). Dykhoff returned to work on July 17, 2000. He presented a note from Dr. Odell which stated: "May return to work July 17, 2000, see previous January work evaluation for restrictions." (Ex. C-14). Caillier called Dykhoff into his office to ask for a work limitations form and Dykhoff pointed to the reference in Odell's note to the January work limitations form. (Tr. 60). At about 3 p.m. that same day, Dykhoff was given a three-day disciplinary layoff by Mr. Gibson for excessive absenteeism. (Tr. 63, 227-28; Ex. C-15). Caillier recommended the disciplinary layoff because Dykhoff had an "absenteeism problem." (Tr. 229). The layoff was in accordance with the company's progressive discipline policy. Dykhoff had been disciplined in the past for excessive absenteeism. (Tr. 229-33; Exs. R-1, R-2). Most of his absences from work were related to his medical problems. (Tr. 263-64).

At about 9 a.m. on July 17, the day he returned to work, Dykhoff was looking at the bulletin board in the main sack room when Mr. Leach came down the stairs from the foreman's office and struck the back of his hard hat. According to Dykhoff, Leach stood there glaring at him. (Tr. 61). Leach then walked into the clerk's office next to the bulletin board. Dykhoff believes that Leach's actions demonstrate hostility towards his safety activities. He reported this incident to union Vice President Robert Jungers and to Mr. Caillier. He asked the union to "lodge a formal complaint" with the plant manager. Dykhoff also reported it to the Kern County Sheriff's Department. Leach testified that he merely tapped the back of Dykhoff's hard hat to say hello. (Tr. 143). Leach testified that after Dykhoff turned around, they smiled at each other.

In October 2000, Dykhoff was approached by Leach who told him that he had to wear a U.S. Borax issued hard hat. Dykhoff was wearing an Oakland Raiders hard hat. Dykhoff testified that the hard hat was an "ANSI, NIOSH approved hard hat." (Tr. 65). Leach told him that, because it was not issued by the U.S. Borax warehouse, he could not wear it. Dykhoff testified that he was going to get his U.S. Borax issued hard hat from his vehicle during a break, but before he could do so, Leach again questioned him about the Raiders hard hat. Leach told Dykhoff it was a safety violation for him to continue wearing the Raiders hat and had him wait until someone from the warehouse brought him a new one. Leach told Keith Baird, a union official, that all employees must wear U.S. Borax issued hard hats. (Tr. 118). Mr. Baird also testified that Leach told him that Dykhoff is an "itch" that he has to "scratch." (Tr. 119-20). Leach does not recall making this remark to Baird. (Tr. 146) Leach testified that U.S. Borax

requires the use of company issued hard hats by all employees. (Tr. 144). He stated that the company has this policy to ensure that all hard hats meet MSHA requirements and to control the stickers and decals that employees put on their hard hats.

On December 6, 2000, Dykhoff talked to MSHA Inspector Mike Burgess about the cracks and potholes in the slab in front of the main sack room dock. (Tr. 68). He told the inspector that the slab aggravates his back and that other employees had complained to him about the cracks and potholes. Inspector Burgess took photographs of the area. Dykhoff also showed the inspector pre-shift inspection cards completed by employees that noted the poor condition of the slab. Inspector Burgess told Dykhoff the next day that the condition of the slab did not violate MSHA's safety standards but that the company had agreed to fix the problem.[2] (Tr. 73).

On December 8, 2000, Dykhoff took time off work to attend a parent-teacher conference for his son. When he told his supervisor, who was Tony Artiago at that time, he was informed that he would have to bring in written proof that he attended the conference. Dykhoff testified that he had not been required to provide such proof when Kalina was his supervisor. Dykhoff told Artiago that the proof requirement was discrimination and harassment. (Tr. 70). Dykhoff supplied a note from the guidance counselor at the school, who told him that he had never been asked for a note before. (Tr. 71; Ex. C-17). Dykhoff testified that Artiago asked for the note at the request of the Human Resources Department.

Leach testified that, as far as he knew, no employee had ever specifically sought permission to take leave to attend a parent-teacher conference. When Artiago told him about Dykhoff's request, he called Caillier to find out what to do. (Tr. 145, 171). Caillier told him that U.S. Borax did provide for such leave but that verification was required. Leach told Artiago to give Dykhoff time off but that Dykhoff must provide proof that he attended the conference. (Tr. 146). Caillier testified that when he was asked about whether an employee could take time off to attend a parent-teacher conference, he looked at the corporate policy book. (Tr. 235). Caillier discovered that an employee is entitled to up to 40 hours of unpaid leave per year to attend school activities. (Tr. 235-37, 265-66; Ex. R-4). He testified that he read the written policy quickly and thought that written documentation was required, but the policy actually states that the company may request documentation from the school as proof of participation in the activity. (Tr. 307; Ex. R-4). An employee may also ask for regular paid leave for such activities if he has such leave available.

On December 12, 2000, Dykhoff was transferred from the truck crew at the main sack room to the "10-Mol packing line" at the main sack room. (Tr. 74). Apparently he was transferred at the direction of Mr. Leach. Dykhoff testified that the packing line job was "a lot more physically demanding" because there is no opportunity to sit down and rest. (Tr. 74-75).

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[2] Dykhoff met with Inspector Burgess a number of times later in December to discuss safety issues including the concrete slab at the loading dock for the main sack room and his job transfers within the main sack room.

He worked on this packing line for one day and was then transferred to the super bag crew at the main sack room. At the time of this second transfer, the packing line had broken down. Dykhoff testified that he saw Leach and Artiago looking at him. Dykhoff testified that Artiago told him that Leach told him to transfer Dykhoff. In order to make this transfer, an employee from the super bag crew was transferred to the packing line. (Tr. 76, 314-15). Dykhoff considers working with the super bag crew to be an even more demanding job because of the speed at which he had to work. The job requirements were the same as when he had worked on the super bag crew at the boric acid sack room. (Tr. 78).

Leach testified that Dykhoff was transferred to the 10-Mol crew because the condition of the slab was aggravating Dykhoff's back. Leach stated that he talked the matter over with Frank Murphy and MSHA Inspector Burgess. Murphy also discussed the matter with Caillier. (Tr. 284; Ex. C-30). Murphy recommended that Dykhoff be relocated until such time as the necessary repairs to the slab could be completed. (Tr. 147, 176). The slab was aggravating Dykhoff's back problem but he would not be required to drive the forklift over the slab as a packing line employee. The floor was smooth inside the main sack room where the 10-Mol employees work. Leach also testified that the 10-Mol packing line frequently breaks down and that the pace of the 10-Mol line was not particularly fast. (Tr. 151-52). According to Leach, Dykhoff would have plenty of time to rest when working on the 10-Mol line. (Tr. 152-155). Leach testified that he was aware of Dykhoff's complaint to MSHA of March 8, 2000, but he did not realize that Dykhoff's complaint also applied to the condition of the slab, in addition to the ramps and docks. (Tr. 167-68).

Leach testified that Dykhoff was transferred from the 10-Mol line to the super bag station after Mr. Artiago relayed concerns that Dykhoff expressed about some of his duties on the 10-Mol line. (Tr. 156). Apparently, Dykhoff complained to Artiago that he was required to use his arms to lift loads that exceeded his work limitations. Leach said that Dykhoff was transferred to the super bag line because he would not be required to get off the forklift to lift material on that crew and he would not need to drive the forklift over the cracked slab. (Tr. 157). Leach did not confer with Dykhoff before transferring him to these new positions. (Tr. 174).

Although the slab was patched about a week after Dykhoff raised the issue with Inspector Burgess, Dykhoff remained on the super bag crew. (Tr. 86). When Dykhoff asked to be reassigned to the truck crew, he was advised by Lorentsen, who was the foreman that day, that Leach was of the opinion that the surface of the slab was not smooth enough for Dykhoff to be driving on. Leach testified that the repairs to the slab did not eliminate the uneven seams in the concrete. (Tr. 192). He felt that even with the repairs, the company would be "subjecting Louis to unnecessary trauma to his back by asking him to drive on that slab." *Id.*

The weekly safety meetings for the employees in the main sack room were held in the lunch room. Because the lunch room was up two flights of stairs, as described above, Dykhoff was given his safety instructions in the truck dock office or in the clerk's office by a foreman.

The clerks also received safety training in the clerk's office.[3] (Tr. 113-14). Dykhoff could get to these offices without having to climb stairs. He testified that he never ate lunch in the lunch room. In the past, Dykhoff climbed the stairs to the foreman's office only occasionally. He climbed these stairs more frequently after he became a day-shift union steward on November 29, 2000. (Tr. 80, 102, 157, 307; Ex. C-16). On December 13, 2000, Artiago told Dykhoff that he would have to climb the stairs to the lunch room to attend the safety meeting that day. Dykhoff told Artiago that he had restrictions. Dykhoff testified that Artiago replied that Leach told him that if Dykhoff can climb stairs to the foreman's office he can climb stairs to attend safety meetings. (Tr. 83, 120-21). Leach stated that he told Artiago to instruct Dykhoff that he would be required to attend the safety meetings. (Tr. 177). He did not deny telling Artiago that if Dykhoff can climb stairs to see the foreman, he can climb stairs for the safety meetings. (Tr. 190). Leach testified that he made this decision after observing Dykhoff climbing the stairs to the foreman's office on a regular basis over the previous month. (Tr. 180-81). Prior to that time, Leach stated that Dykhoff had not climbed the stairs. *Id.* Dykhoff attended the December 13 safety meeting in the lunch room and, after the meeting, told Artiago that he would not climb the stairs to the foreman's office any more because he did not want to climb the stairs to the safety meetings. Dykhoff testified that Artiago indicated that he would no longer be required to climb the stairs to the safety meetings.

Another safety meeting was held on December 20, 2000. Dykhoff did not attend the meeting in the lunch room. After the meeting, Leach asked him why he did not attend the safety meeting. Dykhoff explained that he thought that he had settled the issued with Artiago. He further explained that, under his work restrictions, he can only climb stairs four times a day or as he can tolerate. (Tr. 88). When Leach questioned the terms of his work restriction, Dykhoff asked for union representation. After Chief Steward Trini Esquival arrived, Leach explained that Dykhoff refused to climb stairs and that there is no restriction in his file that allows Dykhoff to refuse to climb stairs. (Tr. 90, 123-25). Leach told Dykhoff to go home, bring back a doctor's certification, and report to the Human Resources Department.[4] *Id.*

Leach testified that Mr. Dykhoff had demonstrated on many occasions that he was "fully capable of climbing stairs." (Tr. 157). He stated that it "poses an additional and unnecessary burden" on supervisors to "single him out and give him a safety talk on a one-on-one basis." (Tr. 157, 210). Leach believes that Dykhoff's separate safety talk was not very effective because he could not participate in the general discussion of safety issues. Leach also does not believe that his work restrictions prevented him from climbing the stairs to attend safety meetings. (Tr. 159).

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[3] Charlene Umsted, a clerk in the main sack room shipping department, testified that she regularly received safety training in the clerk's office. (Tr. 213-14). She was never told that she had to go to the lunch room to receive safety training.

[4] Leach stated that they could not go to the Human Resources Department to see what work restrictions were in Dykhoff's file because the offices were not open that day. (Tr. 159-60).

Leach testified that Dykhoff told him that he was too tired to climb the stairs and that he could not tolerate climbing. (Tr. 191).

On or about December 21, Dykhoff brought a doctor's note to the Human Resources Department. (Tr. 91). The note, signed by Dr. Odell, states as follows:

> Because of inherited developmental bone disease, especially in the lower extremities, I am requesting for Mr. Louis Dykhoff that he be allowed to minimize the following, and only to his tolerance: (1) climbing ladder; (2) climbing stairs.

(Ex. C-18). Dykhoff presented this note along with Dr. Lawrence's letter of February 16, 1995, at a meeting held in Caillier's office. Caillier questioned these restrictions and said that they were different than what was on file. He told Dykhoff to go home and to stay home until he could climb the stairs. (Tr. 93). Leach told Dykhoff that he could not pick which activities that he would climb the stairs for. (Tr. 200; Ex. C-25).

Leach testified that in September 2000, after he became the general supervisor, he reviewed Dykhoff's work restrictions. After reviewing these restrictions, he formed the belief that Dykhoff could be required to climb stairs about four times per shift. (Tr. 183). He had previously signed a "Return to Work Clearance" on July 2, 1998, that set forth Dykhoff's work restrictions. (Ex. C-24). This form states that Dykhoff had a major limitation with respect to ascending and descending stairs, but it did not include a numerical limitation. *Id.*

Leach testified that he interpreted the Dykhoff's limitation to be that he could be required to climb stairs so long as it was not prolonged. (Tr. 195, 198; Ex. C-25). He based this conclusion on his personal observation of Dykhoff's work habits and what he believed to be his work restrictions. (Tr. 199). Leach believed that Dykhoff was capable of climbing the stairs to attend the safety meetings. (Tr. 209). He also discussed the matter with Caillier, who did not disagree with his approach. (Tr. 204-05, 207). Leach stated that he told Dykhoff to get clarification from his doctor because Leach understood that he could be required to use the stairs up to four times a day while Dykhoff was telling him that his restriction allowed him to refuse to climb the stairs. (Tr. 202). Leach testified that, as a supervisor, he could not "base [his] workday on what an employee can and cannot tolerate at that particular moment." *Id.* Leach stated that if Dykhoff cannot climb stairs, "then he needs to bring . . . documentation, a doctor's statement that he can't do the work." *Id.*

Caillier testified that at the meeting on December 21 in his office, Dykhoff brought a document from Dr. Odell that said that he should be required to climb stairs only "as tolerated". (Tr. 237;
Ex. C-18). Caillier testified that Dykhoff told him that his restriction was that he could only be required to climb stairs when he could tolerate it. (Tr. 244, 287-88). Caillier told Dykhoff that the company "couldn't accommodate those restrictions." *Id.* And 299). Caillier believed that

under his work restrictions Dykhoff could "minimize his climbing" but he could not refuse to climb stairs so long as prolonged climbing of stairs was not required. (Tr. 245, 289; Ex. C-20). Caillier believes that this "as tolerated" restriction is a new work restriction that differs from the ones previously placed in his medical file. (Tr. 238-39, 267). The "as tolerated" restriction "allowed him to climb at his tolerance, period." (Tr. 239). The previous restrictions stated that there should be no "prolonged ascending or descending stairs." *Id.* Caillier testified that Dr. Lawrence's restrictions stated that Dykhoff "could climb approximately four times a shift, but if he could tolerate more, he could climb more than four." *Id.* [5] Thus, Caillier interpreted Dykhoff's "no prolonged ascending or descending stairs" restriction to mean that "he could do it but he couldn't do it a lot." (Tr. 281-82).

Caillier also stated that Dykhoff was aware of the company's interpretation of his work restriction prior to December 2000, but Dykhoff denies it. (Tr. 295, 315). Dykhoff testified that U. S. Borax understood from the time he was transferred to the main sack room that "I was only to climb stairs as much as I could tolerate." (Tr. 316). It appears that this was the only occasion that Dykhoff refused to climb stairs. (Tr. 297). Caillier testified that he told Dykhoff that the company could not accommodate what it considered to be this new work restriction and that he should not return to work until he could do a minimum amount of stair climbing. Caillier stated that he reached this conclusion after he discussed the matter with Leach. (Tr. 270-71).

Caillier also testified that the shipping operator's job description includes a requirement to climb stairs on a frequent basis and that this requirement was a critical part of the job. (Tr. 246-47; Ex. R-7). Another critical requirement is the ability to get on and off equipment on a frequent basis. *Id.* Caillier further testified that the job description presented by Dykhoff in this proceeding was out-of-date in December 2000. (Tr. 248; Ex. C-8). That job description lists climbing stairs as important but not critical. (Tr. 258; Ex. C-8). Caillier stated that the job description set forth in Exhibit R-7 was put into place in December 1999. (Tr. 248-49, 258). Mr Baird testified that he was unaware of this change in the job description. (Tr. 312). Caillier believes that Dykhoff was always required to climb stairs, but that the company tried to limit the amount of stair climbing he had to do. (Tr. 275-76). Caillier also testified that he observed Dykhoff ascend and descend the stairs to the foreman's office several times during a single shift earlier in December 2000. (Tr. 307).

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[5] Caillier recalls that Mr. Ing received oral clarification from Dr. Lawrence that the "no prolonged ascending or descending stairs" meant that he should be able to climb stairs at least four times in a shift. (Tr. 239-40). Dykhoff testified that Dr. Lawrence told him that " you might be able to [climb stairs] four times a day, but only if you can tolerate it" (Tr. 319).

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Mr. Dykhoff

Mr. Dykhoff argues that climbing stairs to the lunch room to attend weekly safety meetings in not an essential function of his job. He maintains that U.S. Borax did not present any factual or legal justification for ending his longstanding exemption from climbing the stairs to the lunch room for these meetings. The stair-climbing restrictions placed on Dykhoff have remained unchanged since Dykhoff returned to work in 1994 and U.S. Borax had no basis to start disregarding these restrictions in December 2000. There was simply no business justification for U.S. Borax to discontinue accommodating Dykhoff's stair climbing restriction.

U.S. Borax's refusal to continue accommodating Dykhoff's limitations was motivated by its hostility towards his MSHA complaints. U.S. Borax was displeased by the complaints that Dykhoff made about his work area in the main sack room in February 2000. The company refused to permit him to take photographs of the broken concrete. The company did not make any repairs for three months and failed to repair the slab in front of the truck dock. Shortly after Dykhoff lodged these complaints, Caillier revoked the consent that had been previously granted that allowed Dykhoff to park close to the main sack room. In July 2000, when Dykhoff returned after a month long absence, Leach "thumped" Dykhoff's hard hat and glared at him. On that same day, Dykhoff was disciplined for excessive absenteeism, even though his absence was the for *bona fide* medical reasons. Leach also prohibited Dykhoff form wearing a non-company issued hard hat because Dykhoff was an "itch" that he had to "scratch."

The character of U.S. Borax's reactions to Dykhoff's safety complaints demonstrates animus. Although the company's witnesses testified that they welcomed safety complaints, they were hostile to Dykhoff's complaints. For example, the company refused to allow the union to take photographs of the slab. The company can offer no explanation why Dykhoff's safety activities were reported to Caillier, the head of the Human Resources Department. Dykhoff was transferred to the 10-Mol line as punishment for complaining about the condition of the slab.

The timing of U.S. Borax's actions with respect to Dykhoff demonstrates animus. Immediately after Dykhoff reported the slab condition to the MSHA inspector, the company started harassing Dykhoff by, for example, requiring him to bring a note from his son's school to justify his absence for a parent-teacher conference. More importantly, even though Dykhoff had been exempted from climbing stairs upon returning to work in January 2000, it became "urgently important" for the company to deprive Dykhoff of this accommodation in December 2000 after he brought his complaint to MSHA. The company could offer no explanation for this sudden change in policy.

The explanations offered by U.S. Borax for requiring Dykhoff to attend the weekly safety meetings in the lunch room were pretext to hide its unlawful conduct. The company knew of Dykhoff's work restrictions yet acted as if these restrictions were a new unreasonable demand

being made by Dykhoff. The "as tolerated" language had existed in Dykhoff's work restrictions since 1994. The transparent invalidity of the company's pretextual reasons for sending Dykhoff home on December 21, 2000, demonstrated by its witnesses' lack of candor, is strong evidence of its retaliatory motivation.

B. U.S. Borax

Mr. Dykhoff did not establish a *prima facie* case of discrimination. Dykhoff produced no direct evidence that the actions taken by the company with respect to his employment were based on his complaints about safety. Dykhoff's complaint of discrimination is based only on his groundless speculation that U.S. Borax unlawfully discriminated against him. The testimony of Leach and Caillier make clear that Dykhoff's job transfers, instruction to attend safety meetings, and removal from work had nothing to do with any of his safety complaints. Many of the events that Dykhoff uses as proof of discriminatory motive are minor, discrete, and remote in time from any protected activity. Most of the events that Dykhoff contends were discriminatory took place months before his complaint of discrimination was filed and are time-barred under section 105(c)(2) of the Mine Act. There has been no showing of a connection between his safety activities and the company's decision (1) to discipline him for excessive absenteeism; (2) to require him to wear a company hard hat; and (3) to require him to submit proof that he attended a parent-teacher conference. Dykhoff's case also ignores the fact that his transfers within the main sack room were made to protect him from conditions that may have aggravated his medical problems.

Even if a *prima facie* case were established, the adverse actions complained of were not motivated in any part by his protected activities. Caillier and Leach testified credibly that the personnel actions that Dykhoff objects to were made for legitimate, nondiscriminatory reasons. U.S. Borax transferred Dykhoff to different work areas to help minimize aggravating his preexisting medical conditions. Leach required Dykhoff to attend the mandatory weekly safety meetings because Dykhoff demonstrated that he was capable of climbing stairs and the requirement was within his work restrictions. Caillier sent Dykhoff home because he did not believe that his work restriction allowed him to refuse to climb stairs in the manner that he did on December 21 and, to the extent his restriction would allow such a refusal, the company could not accommodate it. U.S. Borax also argues that it was motivated by Dykhoff's unprotected activities and would have taken the adverse actions based on these unprotected activities alone.

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No.

181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.*; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

I find that Mr. Dykhoff engaged in protected activity when he complained about fumes in the boric acid sack room and the condition of the ramps, docks, and slab at the main sack room. He had also raised many other safety issues over the course of his employment at Boron Operations and U.S. Borax was well aware of these safety activities.

In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

There can be no dispute that U.S. Borax was aware of Dykhoff's safety complaints. The company knew that he had lodged a number of safety complaints both to management and to MSHA in 2000. The primary complaints concerned the condition of the loading docks, ramps, and slab outside the main sack room. Some, but not all, of the adverse actions that Dykhoff complains of occurred shortly after he engaged in protected activities. Because of Dykhoff's rather unique medical condition and his resulting work restrictions, it is difficult to assess whether there was disparate treatment. But the company did not treat Dykhoff differently with respect to some of the alleged adverse actions, such as requiring him to wear a U.S. Borax hard

hat. Dykhoff contends that the company demonstrated hostility and animus towards his protected activity, while the company denies that it was hostile towards his safety activities. These issues are discussed in more detail below.

It should be noted that Dykhoff has been an active participant in safety issues at Boron Operations for many years.[6] Thus, the safety concerns raised in this case are not isolated events. He has also been active in union affairs including the union's safety advocacy. It should also be noted that Dykhoff filed a number of complaints following the company's decision to send him home on December 21, 2000, including a complaint under the Americans with Disabilities Act of 1990 ("ADA"). Much of the evidence and many of the arguments in this case concern whether the accommodations made by U.S. Borax in response to Dykhoff's medical condition were reasonable. I do not have jurisdiction to consider whether the company violated the ADA when it took the actions described above that Dykhoff believes were adverse to his interests. My findings and conclusions in this decision should not be construed as entering any findings with regard to ADA issues.

The Commission has cautioned its administrative law judges that the "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) (citations omitted). Consequently, I cannot enter a decision in favor of a complainant in a section 105(c) case simply because I believe that he was treated in an unfair or unduly harsh manner by his employer.

The alleged adverse actions in this case are varied. I find that Dykhoff failed to establish that the following actions taken by the company are in any way related to his safety activities: (1) Dykhoff's transfer from super bag crew in the boric acid sack room to the truck crew in the main sack room in mid-February 2000; (2) the company's denial of Dykhoff's request to park near the main sack room rather than in the employee parking lot; (3) the company's denial of the union's request to take photographs of the cracks and potholes in the area outside the main sack room; (4) the company's decision to discipline Dykhoff on July 17, 2000, for excessive absenteeism; (5) the company's decision not to discipline Leach for thumping the back of Dykhoff's hard hat on July 17, 2000; and (6) Leach's order that Dykhoff wear a company issued hard hat. I reach this conclusion for a number of reasons, as discussed below.

First, I note that these alleged adverse actions may be time-barred because they occurred more than 60 days prior to the date he filed his complaint of discrimination. Section 105(c)(2) of the Mine Act provides the any miner "who believes that he has been . . . discriminated against by

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[6] Another complaint of discrimination brought by Dykhoff at the Boron Operations was litigated before this Commission, *Dykhoff v. U.S. Borax Corp.*, 21 FMSHRC 791 (July 1999); *aff'd* 22 FMSHRC 1194 (Oct. 2000). The discrimination complaint alleged that the company disciplined him for excessive absenteeism at least in part because he had engaged in protected activity.

any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint of discrimination with the Secretary alleging such discrimination." If Dykhoff believed that these actions were adverse and discriminatory, he was obligated to file complaints with MSHA within 60 days. No explanation was given for his failure to do so. Nevertheless, because there was no showing that U.S. Borax was prejudiced by the delay, I do not base my holding with respect to these claims on Dykhoff's failure to file a timely complaint of discrimination. The delay did not prevent U. S Borax from defending against these claims.

Dykhoff did not establish that his transfer from the boric acid sack room to the main sack room was related to his complaints about fumes or the condition of the fork lift trucks. Dykhoff told Gibson that he did not want to work as a fork lift operator on the super bag crew because there was no opportunity for him to rest. Instead, Dykhoff wanted to operate a fork lift on the truck crew. As a consequence he was transferred to the truck crew at the main sack room. There is no evidence that working on the truck crew in the main sack room was any more arduous that working on the truck crew in the boric acid room. The only difference was the fact that the main sack room had more stairs and it was a little farther from the parking lot. The mere fact that foreman Lorentsen had been asking who was making safety complaints does not indicate that his transfer was in retaliation for these complaints. I find that preponderance of the evidence shows that Dykhoff was transferred because he told Gibson, who supervised both sack rooms, that he wanted to work on the truck crew. Thus, Dykhoff continued to work under Gibson at the same rate of pay after this transfer. There is insufficient evidence for me to draw an inference that his protected activities played any part in this transfer.

There has also been no showing that the company's refusal to allow Dykhoff to park at the main sack room was a result of his safety activities. When he was given permission to park at the sack room by the plant manager, Mr. Caillier was on vacation. When Caillier returned, the plant manager asked him about the parking situation. Caillier determined that Dykhoff's work restrictions did not prevent him from parking in the employee parking lot. There is no evidence that Caillier took Dykhoff's safety activities into consideration when he made this determination and I cannot draw an inference to the contrary.

Dykhoff contends that the company denied the union's request to take photographs of the cracks and potholes in the area outside the main sack room in March 2000 in retaliation for his safety activities. He argues that this refusal shows that the company was hostile to his safety concerns. This refusal is not an adverse action because it did not affect Dykhoff's employment status. The company is not denying that the conditions complained of did not exist. Photographs of the cracks in the slab that were taken by Mr. Murphy in December 2000 were introduced into the record. (Exs. R-33 & R-34).

Dykhoff contends that the company's decision to discipline him at the end of his shift on July 17, 2000, for excessive absenteeism is related to his safety complaints. I fail to see the connection. The discipline was issued the day he returned from a lengthy absence. He has a record of being off work for considerable lengths of time because of his medical conditions. He

has been disciplined in the past for excessive absenteeism. Even if the company was motivated in some small part to discipline him on July 17 because of his safety activities, I find that they would have issued the same discipline even if he had not raised safety issues.

The incident where Leach thumped the back of Dykhoff's hard hat is very minor. Leach maintains that he did not mean anything by it, but Dykhoff believes that it demonstrated management's continuing hostility towards his safety activities. This incident did not result in any adverse action being taken against Dykhoff, but it may indicate a hostile attitude towards Dykhoff's safety complaints, as discussed in more detail below.

Similarly, Leach's order to Dykhoff that he remove his Oakland Raiders hard hat and wear a company issued hard hat is not particularly significant. Except for contractor employees, everyone working at Boron Operations was required to wear U.S. Borax hard hats. Leach wanted Dykhoff to change hard hats more quickly than Dykhoff thought was necessary. This fact does not indicate animus towards his safety complaints. Moreover, this incident did not result in any adverse action against Dykhoff.

The events of December 2000 have more significance. Dykhoff again raised the issue about the condition of the slab with an MSHA inspector. This was the second time that he had raised this issue. The slab had not been repaired with the ramps and docks earlier in the year. Dykhoff believed that this was a deliberate action on the part of the company and that Leach lied about it at the hearing. I find no evidence to support this claim. At most the company was negligent for not taking the matter more seriously or listening more carefully to Dykhoff's legitimate complaints. The company did not deliberately fail to repair the slab as retaliation for Dykhoff's complaints.

Dykhoff discussed the slab with the inspector on December 6 and took time off to attend a parent-teacher conference on December 8. Dykhoff did not ask for vacation leave, but asked for leave to attend a school function.[7] The request went up the chain of command until an inquiry was directed to Caillier. I credit the statements of company witnesses that they had never encountered a specific request like this one. I also credit Caillier's statement that when he looked at the corporate policy he thought that Dykhoff was required to supply a note from the school. In reality, the company could ask for such a note but it was not mandatory. This event occurred very soon after Dykhoff spoke to Inspector Burgess about the slab. By itself it did not demonstrate hostility to his safety complaints. Requiring Dykhoff to bring a note could be regarded as demeaning, but only slightly so. The company's policy provided for such notes and this was the first time that anyone had requested such unpaid leave. Consequently, I find that the company's demand for a note from Dykhoff was not motivated by his safety complaints.

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[7] Although there is no evidence on this issue, Dykhoff may not have had any paid vacation leave available at that time, given the fact that he had to take off a significant amount of time because of his medical problems.

On December 12, Leach transferred Dykhoff to the 10-Mol line as a direct result of Dykhoff's complaint about the condition of slab outside the main sack room. On the truck crew, Dykhoff had to drive his forklift over the cracks and potholes as he loaded material. On the 10-Mol line he operated the forklift exclusively on the concrete inside the plant. I credit Leach's testimony that he made this decision after he discussed the issue with Murphy, the company's safety director, and Inspector Burgess. Murphy recommended the transfer. Leach believed that this transfer would help Dykhoff with his back pain and that the workload in his new position was no more arduous than on his previous crew. I find that the company did not have an ulterior motive behind this transfer. I cannot draw an inference that Dykhoff was transferred in retaliation for his safety complaint, rather he was transferred to remove him from the hazardous area, at least until the area could be patched. I credit the testimony of Leach that the company did not perceive that Dykhoff's new position would be more difficult for him. I note that it may have been advantageous for all concerned if the company had discussed the proposed transfer with Dykhoff in advance, but the wisdom of an operator's employment policies are not before me except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act. I find that this transfer did not conflict with section 105(c).

A day or so later, Dykhoff was transferred again, this time to the super bag station. On the 10-Mol line he was required to get off the fork lift from time-to-time to lift material. This lifting violated his work restrictions. Consequently, he was transferred to a crew where such lifting would not be required. Again, Dykhoff was not consulted. Dykhoff believes that Leach stared at him while he was resting as a result of breakdown in the 10-Mol line broke down and subsequently transferred him to deny him the ability to rest. He contends that Leach took this action as a consequence of his safety complaints. I do not credit Dykhoff's testimony in this regard. There is nothing in the record to support his premise. He relies, in large measure, on the various indications of animus towards him that have been discussed above. I conclude that he was transferred solely because Dykhoff's work limitations and that this transfer did not violate section 105(c) of the Mine Act because it was not motivated by his safety complaints.

The crucial events in this case relate to the company's requirement that Dykhoff begin taking his safety training in the lunch room in the main sack room. On December 13, he complied with the request, but on December 20 he refused because he thought that an agreement has been made that he could continue receiving his training on the ground level. The parties presented evidence about the terms of Dykhoff's work restrictions with respect to climbing stairs. I find that much of what they presented is not relevant to the issues in this case. The basic standard set by both Drs. Lawrence and Odell was that Dykhoff was restricted from "prolonged ascending or descending stairs." When the company asked for clarification, Dr. Lawrence responded with a letter that was quite ambiguous. As set forth above, it stated that no prolonged ascending or descending meant that during an eight-hour shift Dykhoff "may ascend or descend flights of stairs approximately four times, or as tolerated." Apparently Dykhoff interpreted this ambiguous language to mean that he could be required to climb stairs only when he could tolerate it. The company believed that he could be required to climb stairs about four times a day and perhaps more if he could tolerate it.

The stair climbing issue did not come to a head until December. Up until that time, the company did not require him to climb stairs and Dykhoff did not voluntarily climb stairs except on an occasional basis. Starting in late November, however, Dykhoff began voluntarily climbing the stairs to the foreman's office. Company management believed that Dykhoff climbed the stairs to the foreman's office fairly regularly in the weeks prior to December 13. On at least one shift, he ascended and descended the stairs more than once. I find that U.S. Borax decided to require Dykhoff to attend the weekly safety meetings in the lunch room because its managers observed him voluntarily climbing the stairs to the foreman's office. Leach and Caillier took the position that Dykhoff should not be permitted to pick and choose when and for what activities he would climb the stairs.

At the meeting on December 21, Dykhoff stated that he could be required to climb stairs only if he could tolerate it. The company believed that this was a "new" interpretation of his work restriction. Much of the dispute at the hearing about whether the language in the work restrictions changed over time or how often Dykhoff can be required to climb stairs is irrelevant to the issues in this case. I credit the testimony of Caillier and Leach that they did not previously understand that Dykhoff's work restriction permitted him to refuse to climb stairs in situations where there was no prolonged ascending and descending stairs.

It must be understood that prior to December 13, U.S. Borax did not require Dykhoff to climb stairs at all. Starting on December 13, the company required Dykhoff to climb the stairs to the lunch room only once a week, to attend the weekly safety meetings. He was not required to climb stairs at any other time during his work week. I find that the company's decision to start requiring Dykhoff to attend safety meetings in the lunch room was not motivated in any part by his protected activities.

In a section 105(c) discrimination case, a judge may conclude that the justification offered by the employer for taking an adverse action "is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive." *Chacon*, at 3 FMSHRC 2516. In *Chacon*, the Commission explained the proper criteria for analyzing an operator's business justification for an adverse action:

> The Commission and its judges have neither the statutory charter not the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgement our views on "good" business practice or on whether a particular adverse action was "just or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities. If a proffered

> justification survives pretext analysis . . . , then a limited examination of its substantiality becomes appropriate. The question, however, is not whether such a justification comports with a judge's or our sense of fairness or enlightened business practice. Rather the narrow statutory question is whether the reason was enough to have legitimately moved that operator to have disciplined the miner.

Chacon, at 3 FMSHRC 2516-17 (citations omitted). The Commission further explained its analysis as follows:

> [T]he reference in *Chacon* to a "limited" and "restrained" examination of an operator's business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgement or a sense of "industrial justice" for that of the operator. As we recently explained, "Our function is not to pass the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed."

Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (Nov. 1982) (citations omitted).

I find that the U.S. Borax's alleged business justification for the challenged adverse action is entirely plausible and credible. Dykhoff had been exempted from climbing the stairs because of his work restriction. When company supervisors observed Dykhoff climb the stairs to the foreman's office in December 2000, they believed that he demonstrated a capacity to climb stairs. More importantly, when Dykhoff asserted at the December 21 meeting that he has the right to refuse to climb stairs any time that he cannot tolerate it, the company believed that this assertion was both new and incorrect under his existing work limitations on file with the company. U.S. Borax managers understood that he was merely restricted from "prolonged ascending and descending stairs." I do not have the jurisdiction to resolve this dispute, but I find that the company's position on this issue was genuine. The company did not use this issue as "pretext . . . to cloak the discriminatory motive." *Chacon*, at 3 FMSHRC 2516.

In addition, even if the some or all of the company's actions were motivated in part by Dykhoff's protected activities, I find that it would have sent Dykhoff home on December 21 for his unprotected activities alone. Dykhoff presented evidence that the events of 2000, described above, demonstrated the company's animus towards his protected safety activities. I find that the company would have taken the same position at the December 21 meeting even if Dykhoff had not made any safety complaints. The company believed that requiring Dykhoff to climb the

stairs to the lunch room once a week to attend safety meetings was consistent with his work limitations. It believed that Dykhoff's refusal to climb the stairs violated the terms of his work restrictions. Dykhoff was sent home on December 21 as a direct result of this dispute over the terms of his work restrictions and U.S. Borax would have sent him home for this reason alone.

IV. ORDER

For the reasons set forth above, the complaint filed by Louis Dykhoff, Jr., against U.S. Borax Incorporated under section 105(c) of the Mine Act is **DISMISSED**

Richard W. Manning
Administrative Law Judge

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RWM

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 8, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-200
Petitioner	:	A. C. No. 15-14492-03843
v.	:	
	:	
	:	
LODESTAR ENERGY INCORPORATED,	:	
Respondent	:	Baker Mine

ORDER DENYING MOTIONS FOR SUMMARY DECISION / NOTICE OF RESCHEDULED HEARING

Before: Judge Melick

On February 5, 2002, Respondent, Lodestar Energy Inc., (Lodestar) filed a motion for summary decision in the captioned proceeding as to Citation Nos. 7646256, 7646257 and 7646265, seeking vacation of the citations and the related civil penalties. Each of the citations at issue charges violations of the standard at 30 C.F.R. § 75.321(a)(1). That standard provides, as relevant hereto, that "the air in areas where persons work and travel . . . shall contain at least 19.5% oxygen. . . ." On February 20, 2002, the Secretary filed an opposition to that motion and filed her own motion for summary decision seeking to affirm those citations and the proposed civil penalties.

Lodestar argues that it is entitled to summary decision because the areas cited were areas where "persons" did not work or travel. In support of this position Lodestar cites the affidavit of Kevin Vaughn, compliance coordinator for Lodestar's Baker Mine, that "the only individuals who would be in the general areas where the citations were written would be the examiner employed by Lodestar, who would examine the area once each week; and an MSHA inspector; and, perhaps, a miner's representative accompanying the MSHA inspector." Lodestar cites no legal authority nor other rationale to support its contention that mine examiners, MSHA inspectors and miner's representatives are not "persons" within the meaning of the cited standard. No definition of "persons" has been proferred, moreover, that would exclude mine examiners, MSHA inspectors and miner's representatives from the scope of the term "persons."

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

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

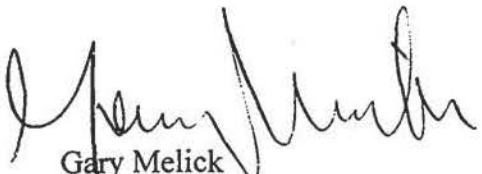
Since it is undisputed that at least mine examiners, MSHA inspectors and miner's representatives were working and/or traveling in the cited areas and since there is no legal reason to exclude those individuals from the definition of "persons" within the meaning of the cited standard, Lodestar's Motion for Summary Decision in this regard must be denied as a matter of law.

Lodestar also argues in the alternative, "that some of the testing methods used by the inspector are unclear at best, and it is impossible to tell from the available information whether they properly depict the oxygen content in the areas where people actually [*sic*] or travel within the mine." This argument on its face however acknowledges that there is a genuine issue as to material facts. Accordingly this alternative argument likewise cannot support a summary decision.

The Secretary, in essence, argues in her motion for summary decision that the material facts set forth in the citations and affidavit of Inspector DeLeon are undisputed and entitles her to summary decision establishing the cited violations and a civil penalty of "at least $55" for each violation. Lodestar in its motion, made an anticipatory challenge to the credibility of the inspector's affidavit "given the lack of contemporaneous documentation and the amount of time between the dates the citations were written and now." Since the credibility of witnesses needed to establish essential facts is in dispute, those essential facts are likewise in dispute. Accordingly the Secretary's motion for summary decision must also be denied.

ORDER

The motions for summary decision are denied. This case (as to Citation Nos. 7646256, 7646257 and 7646265) is accordingly rescheduled for hearings on the merits on April 30, 2002 at 9:00 a.m. in Evansville, Indiana. The assigned courtroom will be designated at a later date.



Gary Melick
Administrative Law Judge
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March 11, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-298
Petitioner	:	A. C. No. 15-02085-03741
	:	
v.	:	
	:	
PERRY COUNTY COAL CORP.,	:	
Respondent	:	Mine: EAS No. 1

ORDER DENYING MOTION TO REOPEN
ORDER TO PAY

Before: Judge Barbour

This case is before me pursuant to an order of the Commission dated October 31, 2001, remanding this matter for further consideration and determination as to whether the operator, Perry County Coal Corp. ("Perry"), is entitled to relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure.[1] Rule 60(b)(1) provides relief from a final judgment in cases where there has been a "mistake, inadvertence, surprise, or excusable neglect." In the order, the Commission denies relief with respect to Citation Nos. 7467118, 7467119, and 7512809 but remands with respect to Citation No. 7497581. Subsequent to this October remand order, Perry filed a Motion to Reconsider. The Commission denied the motion in a February 19, 2002 order.

This matter arose because the operator failed to notify the Secretary that it wished to contest the proposed penalty within 30 days of receipt of the proposed penalty assessment. In its request to reopen, Perry, through counsel, asserts that it filed a notice of contest to all the citations listed above, but, through mistake or inadvertence, failed to return the "green card" to contest the civil penalties. Letter dated May 26, 2001. In its Motion to Reconsider the Commission's October 31 order, Perry contends it filed a notice of contest for Citation No. 7497581 in Docket No. KENT 2000-222-R, believing that contesting the single citation would be

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

adequate to contest all four citations in addition to any subsequent proposed penalties for the citations. Mot. at 1-2.

The Commission has stated that default is a harsh remedy, and if the defaulting party makes a showing of adequate or good cause for failing to timely respond, the case may be reopened. *Coal Prep. Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). Defaulted cases have been reopened where a party appearing *pro se* has misunderstood Commission procedure. (*See Sproule Const. Co.*, FMSHRC 691, 692 (June 1999), reopened where the operator, appearing *pro se*, was not familiar with Commission procedures and failed to appreciate the significance of a Show Cause Order).

However, the present case is distinguishable from *Sproule* in that Perry has been represented by counsel at least since the filing of the notice of contest for Citation No. 7497581. Mot. Requesting Hearing, KENT 2000-222-R. Counsel could have been made aware of the need to file a notice of contest to the proposed penalty assessment through basic research or inquiry into Commission procedures. Accordingly, I find that Perry has failed to meet the criteria of Rule 60(b)(1).

Therefore, Perry's request to reopen is **DENIED**.

Perry is **ORDERED** to pay the proposed penalty assessment of $14,055.00 for all four citations.

David F. Barbour
Chief Administrative Law Judge

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March 13, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 2002-39 A. C. No. 29-00845-03610
v.	:	
PITTSBURG & MIDWAY COAL MNG CO YORK CANYON CMPLX, Respondent.	:	Mine: York Canyon Surface Mine

ORDER DENYING MOTION TO RECONSIDER

On February 7, 2002, I issued an order accepting the Petitioner's late filed Petition for Assessment of Penalty. I ruled that the Secretary had shown adequate cause for the 11 day delay in filing the petition, and that the delay was not prejudicial to the Respondent. Subsequently, I assigned the case to Commission Administrative Law Judge Gary Melick. Three days after assignment, the Respondent moved for reconsideration of the Order Accepting Late Filing. Judge Melick has returned the case to me so that I may rule on the motion.

As I stated in the order accepting the petition, the Commission has made clear that the Secretary may be given permission to late file if there is adequate case for the delay and if there is no prejudice to the operator. (*Salt Lake County Road Dept.*, 3 FMSHRC 1714, 1715 (July 1981)). The Respondent argues that the Secretary's assertion of "inadvertent error" as cause for the delay is not adequate. I disagree.

The Secretary's counsels handle a large volume of cases requiring penalty petitions and almost all such cases are timely filed. Late filed petitions are very rare. There is no hint the Secretary is habitually slothful when it comes to filings. None the less, human nature being what it is, inadvertent mistakes inevitably will be made and late filings will occur. When, as here, the delay is short, when the delay does not prejudice the opposing party, and when a singular "inadvertent error" causes delay, a more complete explanation for the delay occurred is not, in my judgement, necessary and the late filed petition may be accepted. The result --acceptance of the petition-- is consistent with the Commission's historic reluctance to debar parties on purely procedural grounds.

ACCORDINGLY, the Motion to Reconsider is **DENIED** and the case is returned to Judge Melick for further proceedings.

David F. Barbour
Chief Administration Law Judge

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