APRIL 1998

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

APRIL 1998

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

Secretary of Labor, MSHA on behalf of Clay Baier v. Durango Gravel, Docket No. WEST 97-96-DM. (Judge Manning, March 10, 1998)

Cyprus Cumberland Resources Corporation v. Secretary of Labor, MSHA, Docket No. PENN 98-15-R. (Judge Feldman, March 19, 1998)

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

Secretary of Labor, MSHA v. Cyprus Emerald Resources Corporation, Docket No. PENN 94-50. (Joint Motion for Relief of May 3, 1994 decision issued by Judge Fauver)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 1, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEVA 93-146-A WEVA 93-81-R
CONSOLIDATION COAL COMPANY	:	

BEFORE: Marks, Riley, and Verheggen, Commissioners[1]

DECISION

BY THE COMMISSION:

This is a consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 801 et seq. (1994). The Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation against Consolidation Coal Company ("Consol") charging it with violating section 103(j) of the Mine Act, 30 U.S.C. § 813(j),[2] and proposed a penalty of $50,000. Administrative Law Judge

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[1] Chairman Jordan and Commissioner Beatty recused themselves in this matter and took no part in its consideration. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

[2] Section 103(j) provides:

> In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and

Gary Melick dismissed the citation. 18 FMSHRC 363 (March 1996) (ALJ). For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

On March 19, 1992, an explosion occurred at Consol's Blacksville No. 1 Mine in Monongalia County, West Virginia. 18 FMSHRC at 365; Tr. 156. Four miners, including Consol environmental engineer Ronald Baird, were killed in the explosion. 18 FMSHRC at 365; Gov't Ex. 1. On March 20, representatives of MSHA, led by chief investigator Jim Rutherford, arrived at the mine site to begin an investigation into the explosion. 18 FMSHRC at 368; Tr. 156, 157-58. Rutherford was a senior MSHA employee in charge of a ten-person investigating team and responsible for producing MSHA's accident report and determining whether violations were committed. Tr. 155-56. On March 20, Rutherford discussed with MSHA investigator Joseph Vallina the need to inventory vehicles on the surface and placed him in charge of that project. 18 FMSHRC at 368; Tr. 84-85, 198-99. Under Vallina's supervision, teams consisting of state and federal investigators and mine personnel were assigned the responsibility of inventorying vehicles. Tr. 87.

On the morning of March 21, Consol's vice-president for safety, Ronald Wooten, and company counsel, Walter Scheller, arrived at the mine to participate in the investigation. 18 FMSHRC at 365. Local mine officials notified Scheller that Baird's widow had requested that his personal effects be retrieved from his company vehicle. *Id.*; Tr. 225. At MSHA's request, Scheller was also trying to locate training records pertaining to subcontractors at the mine that were thought to be in Baird's vehicle. 18 FMSHRC at 365; Tr. 7-8, 226.

Scheller, accompanied by Wooten and John Morrison, safety supervisor at the mine, approached chief investigator Rutherford and requested permission to enter Baird's vehicle to look for his personal effects and the training records. 18 FMSHRC at 365, 366. Rutherford gave them permission to search the vehicle. *Id.* at 365-66. Also, in uncontested testimony, Wooten stated that at the time permission was granted, he told Rutherford, "[W]e would like to bring these materials back to this office . . . and put them on [the] desk for anyone, anyone involved in the investigation, to see." Tr. 264.

At around 10:00 a.m., Scheller and Morrison went to Baird's vehicle. *Id.* at 366. Because of the ongoing investigation into the mine explosion, there were many people in the area affiliated with either Consol, MSHA, the union, or the state mine authority. *Id.* Baird's vehicle,

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> he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

30 U.S.C. § 813(j).

which was parked near the mine entrance, had its windows blown out when the explosion occurred and was covered by a tarp. *Id.* Scheller and Morrison removed the tarp, and Scheller entered the vehicle. *Id.* Scheller found a metal clipboard with papers relating to a wrestling team that Baird had coached. *Id.* at 366-67. Morrison placed the clipboard along with other personal items, including a Bible and keys in a small cloth duffle bag that he had brought with him. Tr. 230. In the vehicle's middle console, Scheller located Baird's wallet along with a hand-held methane detector and charger. Tr. 230-31. Scheller removed the wallet from the console and handed it to Morrison who put it in the cloth bag. Tr. 231. He then told Morrison to remember where the methane detector had been found. 18 FMSHRC at 366-67; Tr. 11, 231.

Shortly thereafter, Vallina, who along with MSHA Inspector Teaster was standing about 25 feet away from Baird's vehicle and watching Scheller and Morrison, came up to them and asked them what they were doing. 18 FMSHRC at 366-67. Scheller responded that Rutherford had authorized them to look for Baird's personal effects and training records. *Id.* Scheller also told Vallina that he found a methane detector. *Id.* Vallina told Scheller to return the detector to where he had found it. *Id.* Scheller did so and then reattached the tarp over the vehicle. *Id.* at 366. Vallina did not search the cloth bag, nor did he ask what was in it. *Id.*; Tr. 138. Teaster accompanied Scheller and Morrison back to the mine office. 18 FMSHRC at 366. At the office, Rutherford confirmed that he had given Scheller permission to go into Baird's vehicle. *Id.* Scheller emptied the contents of the duffle bag on a table in the presence of Rutherford. *Id.* at 366-67. Scheller asked Rutherford whether there was a problem, and Rutherford answered, "No." *Id.* at 366.

On November 9, 1992, MSHA issued a citation against Consol,[3] which stated:

> The mine operator altered evidence which would assist in the accident investigation of the fatal methane explosion . . . . A Consol vehicle assigned to Rod Baird . . . was located in the blast area . . . and was damaged by the explosion. This vehicle contained items related to the work area that would assist the investigation. Specifically, a methane detector and a Consol . . . metal clipboard, which Baird reportedly used to attach routine work notes and records, were in the subject vehicle.
>
> On March 21, 1992, Consol employees Walter Scheller and John Morrison entered Baird's vehicle and took Baird's assigned methane detector and clipboard without permission along with a cloth bag of other items. Scheller and Morrison had obtained

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[3] MSHA issued several other citations and orders against Consol as a result of the investigation, including one that charged it with failing to conduct methane tests in a coal silo near the mine entrance. *Consolidation Coal Co.*, 18 FMSHRC 357 (March 1996) (ALJ). That citation was dismissed by the judge. *Id.* at 362.

> MSHA's permission to retrieve only training records and Baird's personal effects from the vehicle. Upon being observed and stopped by MSHA accident investigation team member Joseph Vallina, Scheller returned the methane detector to the vehicle. . . . .

Id. at 364; Gov't Ex. 1.

Consol contested the citation and the matter went to hearing. At the hearing, the Secretary's counsel clarified that the citation only charged a violation with regard to the methane detector but not as to the clipboard or cloth bag. 18 FMSHRC at 364. The judge initially held that, based on the language of the citation, it must be dismissed as a matter of law because it failed to charge a violation of section 103(j) of the Act. *Id.* In addition, the judge found that, even if the citation alleged a violation of section 103(j), the credible evidence established that Scheller had been given permission to search the Baird vehicle and remove specific articles and that he had been told that MSHA was through with the vehicle. *Id.* at 367. The judge credited Scheller's explanation that he intended to turn over the methane monitor to Rutherford as possible material evidence. *Id.* He concluded that the Secretary failed to carry her burden in proving that Consol failed to take appropriate measures to prevent the destruction of evidence. *Id.* at 365, 367-68.

II.

Disposition

The Secretary argues that the judge erred in determining that altering evidence by removing it from an accident scene was not a violation of section 103(j) of the Act. PDR at 1; S. Br. at 7-8. The Secretary also contends that substantial evidence does not support the judge's determination that, even if removal of evidence from an accident scene were a violation, the Secretary did not establish a violation of section 103(j). PDR at 2; S. Br. at 15. The Secretary asserts that, because the judge did not base credibility determinations on his observation of witnesses, those determinations are not entitled to deference. S. Br. at 15-16. Finally, the Secretary argues that the judge failed to reconcile inconsistencies in the testimony of witnesses whom he credited. *Id.* at 16-24.

Consol argues that the Secretary's interpretation of section 103(j) is not entitled to deference because its language is clear and does not include "alteration" of evidence that was the basis of the citation. Consol Br. at 2-9. Scheller's actions in removing the methane monitor to take it to MSHA officials, Consol argues, were designed to ensure that the evidence was not overlooked or destroyed. *Id.* at 11-15. With regard to the factual findings, Consol contends that substantial evidence supports the judge and that he correctly resolved conflicts among witness testimony based on proper considerations. *Id.* at 15-19.

Section 103(j) of the Act requires operators to "take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause [of an accident]." The purpose of the provision is to preserve evidence that could disclose the reason for a mine accident. S. Rep. No. 181, 95th Cong., 1st Sess. 29, *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1977).

Witnesses for both the Secretary and Consol similarly testified that Consol counsel Scheller asked MSHA's chief investigator Rutherford for permission to enter Baird's vehicle and retrieve his personal effects and training records. Tr. 8-9, 161, 186, 227, and 260-61. The judge credited Scheller's and Consol vice-president Wooten's testimony that Rutherford also stated that MSHA was through with the vehicle. 18 FMSHRC at 365. Once inside the vehicle, Scheller located the methane dectector, which he showed to inspector Vallina when he arrived. *Id.* at 366-67. The judge further credited Scheller's uncontroverted testimony that he intended to hand over the methane detector to Rutherford because it was material evidence. 18 FMSHRC at 367; Tr. 238.

A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (September 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (December 1981). The Commission has recognized that, because the judge has an opportunity to hear the testimony and view the witnesses, he is ordinarily in the best position to make a credibility determination. *In re: Contests of Respirable Dust Sample Alteration Citations,* 17 FMSHRC 1819, 1878 (November 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *appeal docketed sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, No. 95-1619 (D.C. Cir. Dec. 28, 1995). Nonetheless, the Commission will not affirm such determinations if there is no evidence or dubious evidence to support them. *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989) (citations omitted).

The Secretary contends that the Commission should not accord the judge's credibility resolutions the weight that such determinations are generally given because they were not based on witness demeanor and because the judge failed to consider other significant record testimony. S. Br. at 15-16. We disagree. Contrary to the Secretary's argument, there is nothing in the judge's decision to suggest that he did not consider his observation of witnesses in making his credibility determinations. *See* 18 FMSHRC at 365, 367 (general statements of credibility). We find the judge's reliance on witness demeanor in his credibility determinations is implicit. *Cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

Moreover, in this proceeding the judge supported his credibility determinations by drawing inferences from largely undisputed facts. Thus, in crediting Scheller's and Wooten's testimony, the judge noted that it was reasonable to infer that, if anyone was going to destroy evidence, it is not likely that he would do so in broad daylight under the eyes of federal investigators. 18 FMSHRC at 367. Nor is it likely that one who was interested in destroying evidence would wait

two days after the accident to search for evidence and seek the permission of the chief investigator to do so. *Id.* Rather, it would be more likely that such a person would seek out such evidence surreptitiously at night without permission during the early stages of an investigation. *Id.* Finally, as the judge noted, the presence of a methane detector in Baird's vehicle during the investigation of a methane explosion could be considered exculpatory; therefore, Consol officials would be motivated to preserve rather than destroy such evidence. *Id.* The inferences drawn by the judge based on record facts are reasonable, and the Secretary has offered no countervailing considerations that persuades us to overturn them.[4]

In crediting the testimony of Scheller and Wooten, the judge also weighed the contrary testimony of MSHA chief investigator Rutherford. The judge noted that Rutherford was "busy" and, therefore, his recollection of the conversation may not have been as clear as otherwise could be expected. *Id.* at 368. Thus, on the morning of March 21, Rutherford was engaged in trying to get a team of investigators underground for the first time since the mine explosion. Tr. 161-62. In addition, the judge found that notes that Rutherford wrote after incident, Resp. Ex. 4, were inconsistent with his trial testimony and omitted significant parts of his conversation with Scheller and Wooten that he later recalled. 18 FMSHRC at 368. The judge further noted that Rutherford was a senior skilled investigator who would not likely have given Consol officials permission to search Baird's vehicle unless he believed that its contents had been inventoried. *Id.* Lastly, the judge considered that Rutherford had instructed his investigators to inventory all vehicles in the blast area on the previous day, suggesting that he believed that the vehicle had been inventoried.[5]

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[4] The Commission has held that "the substantial evidence standard may be met by reasonable inferences drawn from indirect evidence." *Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1138 (May 1984). The "possibility of drawing either of two inconsistent inferences from the evidence [does] not prevent [the judge] from drawing one of them." *NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106 (1942). The Commission has emphasized that inferences drawn by the judge are "permissible provided they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent*, 6 FMSHRC at 1138 (citations omitted).

[5] Commissioners Riley and Verheggen note additionally as follows: We are perplexed by the Secretary's proposed penalty in this case, which our colleague properly characterized as "outlandish" at oral argument (Oral Arg. Tr. at 35). As to the gravity of the alleged violation, Secretary's counsel admitted that the methane monitor on which this case is based had absolutely no bearing on the accident investigation (*id.* at 32-36), which was completed when MSHA issued the citation some nine months after the accident investigation. Nor can we find in the circumstances of this case any indication that any of the Consol officials involved acted negligently; to the contrary, we agree with the judge's observation that they were attempting to "*preserve* evidence rather than destroy it." 18 FMSHRC at 365 (emphasis added). As to other penalty factors, we find nothing in the record that would justify a $50,000 penalty. We thus view with no small amount of skepticism the Secretary's arguments in this case. We believe that

Id. Contrary to the Secretary's argument, S. Br. at 18-19, the judge's analysis of Rutherford's testimony is logical and consistent with other record evidence and, therefore, we decline to disturb his credibility resolutions. *See also Ona*, 729 F.2d at 719 (reviewing court not bound by judge's credibility resolutions where inherently unreasonable or self-contradictory, or based on inadequate or no reason).

The Secretary finally argues that the judge failed to address inconsistencies in witness testimony with regard to Rutherford's granting permission to enter Baird's vehicle. S. Br. at 22-24. However, the differing versions of the conversation given by Scheller, Wooten, and Morrison do not provide a basis for overturning the judge. Unlike Scheller and Wooten, who testified that Rutherford said that MSHA was through with the vehicle (Tr. 227, 261), Morrison's testimony was silent on that point (Tr. 8-9). Given that there was only a direct conflict between the testimony of Rutherford, Scheller and Wooten, the judge reasonably limited his discussion to the inconsistencies in their testimony on this issue. The judge found it more significant that Morrison corroborated that Rutherford had given permission to enter and search the vehicle. 18 FMSHRC at 368. We agree.

When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (November 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (January 1997) (quoting *Universal Camera*, 340 U.S. at 488.

Based on the testimony credited by the judge, we conclude that substantial evidence supports the judge's determination that the actions of Consol officials did not contravene section 103(j). As the judge concluded, "the actions of Consol officials in removing the . . . methane detector from the Baird vehicle may reasonably be construed, under all the circumstances, to have been an effort to preserve evidence rather than destroy it." 18 FMSHRC at 365.

MSHA should not have sought to so severely penalize Consol for its own failure to properly secure and inventory the accident scene — after all, this case would not be before the Commission had MSHA's investigation proceeded as Rutherford apparently assumed it had.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision dismissing the citation against Consol.[6]

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[6] In light of our decision, we do not reach the Secretary's argument that section 103(j) of the Act proscribes alteration of evidence or its removal from an accident scene.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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April 9, 1998

KENNETH L. DRIESSEN	:	
	:	
v.	:	Docket No. WEST 96-291-DM
	:	
NEVADA GOLDFIELDS, INC.	:	

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

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge T. Todd Hodgdon determined that Nevada Goldfields did not violate section 105(c) of the Act, 30 U.S.C. § 815(c),[1] when it terminated employee Kenneth L. Driessen on February 7, 1996.

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[1] Section 105(c) of the Act provides, in pertinent part:

> (1) No person shall discharge or in any manner discriminate against or . . . otherwise interfere with the exercise of the statutory rights of any miner . . . in any coal or other mine subject to this Act because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.
>
> (2) 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

19 FMSHRC 157 (Jan. 1997) (ALJ). We granted the petition for discretionary review filed by Driessen challenging the judge's decision. For reasons that follow, we affirm the judge.

I.

Factual and Procedural Background

Nevada Goldfields, Inc. ("Nevada Goldfields") began mining operations at the Nixon Fork Mine, located in the central interior of Alaska near McGrath, in October, 1995. 19 FMSHRC at 158; Tr. 110. Access to the mine is limited; everything is transported in or out by airplane. 19 FMSHRC at 158; Tr. 129. The Nixon Fork Mine employs 50 miners and produces gold and some silver and copper. 19 FMSHRC at 158. The miners work 12-hour shifts, seven days a week. *Id.* The shifts begin at 7:00 a.m. and 7:00 p.m. *Id.* The miners work either two weeks on, one week off, or four weeks on, two weeks off. *Id.*

The ore comes out of the mine in rocks which are then conveyed through crushers, ball mills, and other processors until it is shipped out as bagged concentrate of dore ingots.[2] *Id.* The No. 1 ball mill at the mine processes the raw ore into copper/gold concentrate and operates continuously except during periods of maintenance. Tr. 118-19, 162. The ball mill is essential to processing ore at the mine. Tr. 167.

Prior to January 24, 1996, there were problems with the No. 1 ball mill and measures were taken to repair it. Tr. 47-48, 168. The mill sometimes overheated and slurry water leaked into the bearings, causing steam to be emitted. Tr. 48, 167. It was determined that the main problem was a seal leak, and grease fittings were installed as a stop-gap measure to reduce the operating temperature of the mill until the damaged discharge end bearing could be replaced. Tr. 47, 169-70, 173. The mill was shut down on the evening of January 24, and Kenneth Driessen, who was hired as a mechanic in October 1995, was asked to clean the mill, grease it, and put it

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> such violation occurs, file a complaint with the Secretary alleging such discrimination. . . .
>
> (3) . . . 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, charging discrimination or interference in violation of paragraph (1).

[2] "Dore" is defined as "gold and silver bullion . . . ." U.S. Dep't of Interior, *Dictionary of Mining, Mineral, and Related Terms* 164 (2d ed. 1997). "Ingot" is defined as "[a] mass of cast metal as it comes from a mold or crucible; specif[ically], a bar of gold or silver for assaying, coining, or export." *Id.* at 279.

back together. 19 FMSHRC at 160; Tr. 168. Driessen took apart the bearing and noticed that the grooves in the shaft of the mill were deep, indicating severe wear and damage caused by the leaking slurry water. Tr. 19, 168. Later that shift, Driessen informed mill superintendent Mike Rusesky that he believed that restarting the mill would be dangerous, and Rusesky decided not to restart the mill. 19 FMSHRC at 160; Tr. 19-20, 171. Both Driessen and Rusesky were later reproached for failing to speak with either maintenance supervisor Ted Botnan or mine manager Mel Swanson before deciding not to restart the mill, because this violated the procedures set forth in the communications section of the employee handbook. 19 FMSHRC at 160-61; Ex. H at 5.[3]

The faulty bearing in the ball mill was flown to San Diego for repairs. Tr. 172-73. Subsequently, it was fixed and returned to the mine early the following week. Tr. 173-74. From January 30 to February 6, a contract millwright supervised the installation of the bearing. Tr. 175. In a test on February 3, the mill did not exceed acceptable temperature levels when operated without grinding balls. Tr. 176-77. However, on February 6, the mill would not run when the steel grinding balls were put back into it. Tr. 20, 178.

At 7:00 p.m. on the evening of February 6 at the beginning of his shift, Driessen was asked to look at the ball mill to determine why it would not run normally, and he opined that the mill would not run because the rubber seal or flange on the feeder end of the mill, which was out of alignment, was binding. Tr. 179, 182-83. Management was aware that the flange was out of alignment, but this had never been a problem except to cause the flange to wear out more frequently. 19 FMSHRC at 164; Tr. 182. After allowing Driessen to attempt various repairs, Botnan and Swanson became convinced that the problem was electrical rather than mechanical.[4] 19 FMSHRC at 163. Driessen suggested cutting a flap on the flange but, after some argument, mine manager Swanson specifically ordered Driessen not to touch the flange, which mechanics on the prior shift had spent several hours fabricating and installing. *Id.* at 164; Tr. 147, 182-83. At approximately 11:00 p.m., Botnan and Swanson left. Tr. 147-48, 183-84.

The parties differ regarding which tasks Driessen was assigned to perform when Botnan and Swanson left. Driessen maintained that he was assigned to troubleshoot the mill on February 6-7 and was not given any other assignments. 19 FMSHRC at 161; Tr. 24, 68. Swanson and

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[3] The employee handbook provides in pertinent part: "If you have a problem or concern, you should discuss it with your supervisor first." Ex. H at 5. Mill superintendent Rusesky, the only person to whom Driessen reported his initial concerns about the ball mill, was not Driessen's supervisor. Tr. 116. Botnan acted as the mechanics' direct supervisor. Tr. 127, 130. According to company procedure, either Botnan or mine manager Swanson should have been consulted before the decision was made not to restart the ball mill. 19 FMSHRC at 161.

[4] Botnan and Swanson were correct in their assessment. 19 FMSHRC at 163 n.7. The electrical problem was repaired by an electrician the next day and the ball mill had operated without incident up through the date of the hearing. *Id.*

Botnan testified that, after Swanson had concluded that the problem with the mill was electrical, Driessen was given three specific tasks to be completed on his shift: reassemble and tighten the feed chute tube on the mill; reassemble the coupling on the mill's motor; and change a tire on the 966 loader.[5] 19 FMSHRC at 163-64; Tr. 130, 186.

At 7:00 a.m. the following morning at the end of Driessen's shift, Driessen spoke to Nevada Goldfields vice president Joe Kercher regarding the continuing problems with the ball mill, and gave Kercher a drawing of the mill he had drafted. 19 FMSHRC at 159, 164; Ex. 1. Botnan and Swanson arrived and discovered that the three assignments given to Driessen had not been completed; the flange on the mill had been cut; and Driessen had worked on drawings of the mill. 19 FMSHRC at 160, 164. The cut flange created a leak, destroying the work performed by the previous shift. *Id.* at 164; Tr. 185. After discussing the matter, Kercher, Botnan, and Swanson decided to fire Driessen for insubordination because he failed to complete the tasks assigned him and instead focused on other matters on which he had not been told to work. 19 FMSHRC at 164; Tr. 186. Botnan then informed Driessen that he was terminated. 19 FMSHRC at 164; Tr. 30-31, 187.

On March 4, 1996, Driessen filed a complaint with the Secretary of Labor's Mine Safety and Health Administration ("MSHA"), alleging that he had been discriminated against for engaging in protected activity. 19 FMSHRC at 157. Following an investigation, MSHA informed Driessen it had determined that no discrimination had occurred. Ex. C. Driessen filed a complaint with the Commission, and the matter proceeded to hearing before Judge Hodgdon.

The judge concluded that Nevada Goldfields did not violate section 105(c) by firing Driessen. 19 FMSHRC at 164. The judge found that Driessen engaged in protected activity prior to his termination. *Id.* at 160. On January 24, 1995, Driessen told mill superintendent Rusesky that it would be dangerous to restart the ball mill; and on February 7, 1996, Driessen expressed to company vice president Kercher his opinion about what repairs were still needed to be able to restart the mill. *Id.* at 159; Tr. 26-27. While the judge held that Driessen had made a protected safety complaint under section 105(c), he nevertheless concluded that Driessen was fired for insubordination. 19 FMSHRC at 164. Based on his determination that the company had the more credible version of the events prior to Driessen's discharge, the judge concluded that the termination was precipitated solely by Driessen's failure to comply with several direct orders and was in no part based on protected activity. *Id.*

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[5] On February 6-7, the 966 loader was the only piece of machinery that could unload freight from planes and plow snow off the landing field. Tr. 155-56.

II.

Disposition

Driessen, who was represented by counsel before the judge, filed a pro se petition for discretionary review, challenging the judge's conclusion that Nevada Goldfields did not violate section 105(c). Driessen argues that the judge erred in finding that Nevada Goldfields fired him for his allegedly insubordinate behavior alone. PDR at 1-3. Driessen maintains that, as a result of twice bringing to the company's attention what he considered to be dangerous situations, he was discriminatorily discharged. D. Br. at 1.[6] Finally, Driessen asserts that witnesses whom he subpoenaed for the hearing were unable to testify truthfully because they feared losing their jobs. PDR at 3.

Nevada Goldfields responds that the judge properly concluded that Driessen's termination did not violate section 105(c). Resp. Br. at 1, 5. The company asserts that the judge correctly found that company officials assigned Driessen three specific tasks which were to be performed on the February 6-7 night shift and that Driessen failed to complete any of these tasks. *Id.* at 2, 10. The company further argues that the judge's finding that it fired Driessen only for these insubordinate actions and that his safety complaints were in no part considered in the termination decision is supported by substantial evidence. *Id.* at 5. With regard to Driessen's assertions about witness credibility, Nevada Goldfields argues that the Commission should reject them as untrue and based on non-record evidence. *Id.* at 6-7.

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Act. A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 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, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend

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[6] Driessen also asserts that he was denied notice of the insubordination defense which was used against him at the hearing. *See* PDR at 2, 3. However, documents in the record undermine this claim. *See* Letter from Melvin R. Swanson with copy to Driessen, dated August 11, 1996, Ex. E (detailing the reasons for Driessen's discharge, including "his failure to perform assigned tasks, and to destroy [sic] a previous shift's construction effort"); Resp. Preliminary Statement at 2, dated November 8, 1996 (stating that Driessen was discharged for "blatant insubordination"). In short, Driessen was on notice of the insubordination defense well before the November 13, 1996 hearing date.

affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

As the judge found, Driessen engaged in acts protected by section 105(c), when he complained that starting the No. 1 ball mill would be dangerous,[7] and that he believed problems with the mill still existed. 19 FMSHRC at 159-60. Nevada Goldfields nowhere denies that these acts were related to safety. Therefore, as the judge concluded, Driessen engaged in protected activity before he was terminated, satisfying the first element of a *Pasula-Robinette* prima facie case. *Id.*; *see Robinette*, 3 FMSHRC at 817 (citing *Pasula*, 2 FMSHRC at 2799-800). Further, it is undisputed that Driessen was discharged on February 7, 1996. *See Robinette*, 3 FMSHRC at 817. Discharge is perhaps the clearest form of adverse action prohibited by the plain language of the Mine Act. *See* 30 U.S.C. § 815(c)(1); *Secretary of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984) (stating that discharge of a miner is "a self-evident form of adverse action").

The final inquiry to establish a prima facie case under *Pasula-Robinette* is whether the adverse action was motivated in any part by the protected activity. *Robinette*, 3 FMSHRC at 817 (citing *Pasula*, 2 FMSHRC at 2799-800). The complainant bears the burden of establishing that the adverse action complained of was motivated in any part by the protected activity. *See Secretary of Labor on behalf of Ribel v. Eastern Assoc. Coal Corp.*, 7 FMSHRC 2015, 2019 (Dec. 1985). Here, substantial evidence[8] supports the judge's conclusion that Nevada Goldfields' discharge of Driessen was in no part motivated by his protected activity.

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[7] Driessen was reproached for failing to inform his direct supervisors before advising Rusesky that restarting the mill might be dangerous. 19 FMSHRC at 160-61. Contrary to the dissent, slip op. at 14, Rusesky was verbally reprimanded as well for failing to inform his supervisors of his decision not to restart the mill. Tr. 114, 119-20. Following the shutdown of the mill on January 24, it was not run again — aside from a series of test-runs (Tr. 176-81) — until it was repaired during the following weeks. Tr. 117, 138.

[8] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). *See Secretary of Labor on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 14 FMSHRC 1549, 1555 (Sept. 1992). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

Based on credibility determinations and the lack of any corroborating testimony or evidence supporting Driessen's version of events, the judge concluded that Driessen did not carry his burden of proving that his safety complaints played any role in his discharge.[9] 19 FMSHRC at 160, 164. Mine manager Swanson testified that he, company vice president Kercher, and maintenance supervisor Botnan decided to fire Driessen for insubordination because Botnan "had given [Driessen] three specific instructions on what to do and he failed to do them, and he had done a project that . . . he was not instructed to do." Tr. 184-86; *see also* Tr. 130 (Botnan's testimony that Driessen failed to do the three tasks given him). The judge credited Swanson's and Botnan's testimony that the company fired Driessen solely for his failure to complete his assigned tasks.[10] 19 FMSHRC at 160. The judge did not find credible Driessen's testimony that he had been assigned to troubleshoot the mill. *Id.* at 161. The judge noted that Driessen's testimony "was so filled with inabilities to recall, irrelevancies, blanks, inconsistencies and lack of corroboration that it lacks credibility."[11] *Id.*; *see id.* at 161-63. Our review of the record

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[9] The dissent's use of circumstantial evidence to establish Nevada Goldfields' motive in terminating Driessen is misplaced. Slip op. 13-17. Here, the judge found that there was direct evidence of the reason for Driessen's termination. 19 FMSHRC at 160, 164. Therefore, use of circumstantial evidence to bypass the judge's fact findings on the pivotal issue of motivation is improper. *See Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSRHC 2508, 2510 (Nov. 1981), *rev'd on other grounds* 709 F.2d 86 (D.C. Cir. 1983).

[10] We also note that Driessen's termination was not inconsistent with the company's employee handbook. Ex. H at 5 (a Nevada Goldfields employee must be "willing to take directions"), 6 (insubordination and failure to perform a satisfactory quantity or quality of work are considered acts of misconduct); *see also Chacon*, 3 FMSHRC at 2513 (noting that complainant's discipline was consistent with company practice). While the handbook provides for a progressive discipline procedure, it also unambiguously states: "Any or all of the first three [disciplinary] steps may be omitted, depending on the seriousness of the violation." Ex. H at 6. Driessen's conduct on February 6-7 exhibited a clear disregard for the orders given by his supervisors. *See* 19 FMSHRC at 164 (discussing Driessen's failure to complete his assigned tasks). Furthermore, his failure to change the loader tire resulted in the delay of incoming cargo from the aircraft which arrived at the isolated mine on February 7. *See* Tr. 186; *see also* Tr. 129, 156 (discussing loader's importance to mine's operation).

[11] Driessen argues that the judge's conclusion that he cut the ball mill seal or flange is not supported by substantial evidence. *See* PDR at 2. However, the judge did not specifically find that Driessen cut the seal, and he based his dismissal of the complaint on Driessen's failure to complete the three tasks given him. *See* 19 FMSHRC at 164. The judge relied, however, on Driessen's equivocal testimony regarding the cut flange (Tr. 60-67) to evidence his overall lack of candor. 19 FMSHRC at 162-63.

indicates no basis for overturning the judge's credibility resolutions in finding that Driessen was terminated solely for insubordination.[12]

Nor are we persuaded by Driessen's asserted reasons for failing to complete his assigned tasks. Driessen's claim that his failure to complete his assigned tasks was due, in part, to another mechanic requesting assistance with a water problem has no credible support in the record. PDR at 2-3. As the judge found, Driessen's testimony was "rambling" and "contradictory" and not supported by any corroborating evidence. 19 FMSHRC at 164. *Compare, e.g.*, Tr. 26, 32 *with* 60. His claim that he made some progress on his assignments on February 6-7 (Tr. 71) is controverted by other testimony. Tr. 154, 156 (Botnan's testimony that the ball mill assignments would take less than two hours to complete and that the tools and lug nuts near the 966 loader had not been moved during Driessen's shift). Also, no evidence was presented that anyone other than Driessen was instructed to reassemble the feed chute tube on the ball mill, reassemble the coupling on the mill, or change the loader tire on February 6-7,[13] all of which went unfinished that night. *See* Tr. 130, 147, 182. The judge found that Driessen's testimony regarding these tasks was unconvincing. 19 FMSHRC at 164. In sum, substantial evidence supports the judge's finding that Driessen was not discharged in violation of section 105(c).[14]

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[12] The Commission does not lightly overturn an administrative law judge's credibility determinations, which are entitled to great weight. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995); *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Generally, the Commission will uphold a judge's credibility determination unless compelling evidence supporting reversal is offered. *See, e.g.*, *S&H Mining, Inc.*, 15 FMSHRC 956, 960 (June 1993) (upholding judge's credibility determination because no compelling evidence supporting reversal was offered); *Bjes v. Consolidation Coal Co.*, 6 FMSHRC 1411, 1418 (June 1984) (refusing to take the "exceptional step" of overturning judge's findings based on credibility resolutions); *see also Metric Constructors, Inc.*, 6 FMSHRC 226, 232 (Feb. 1984), *aff'd* 766 F.2d 469 (11th Cir. 1985) (stating that when the judge's finding rests upon a credibility determination, the Commission will not substitute its judgment for that of the judge absent clear indication of error).

[13] Driessen acknowledged that working on the loader tire was on his work list (Tr. 32) and that changing the tire was a "priority." Tr. 71.

[14] Our dissenting colleagues correctly state that Botnan testified that "at least some attempt to try to [perform assignments] is good enough for me." Slip op. at 17 (alteration added) (quoting Tr. 151). They fail to acknowledge, however, that Botnan further stated that *Driessen made "no attempt to try"* completing any of his assigned tasks. Tr. 151 (emphasis added). Given that there were no plans to run the ball mill until further tests were run, the mill posed no danger to Driessen or other workers that would have justified Driessen's disregarding his work assignments in order to compose his two page sketch and notes.

Driessen urges one final ground for reversing the judge — an allegation of witness bias. PDR at 3. In support of that ground, Driessen references a letter that he wrote to the judge after the hearing[15] and an affidavit attached to his petition for review. *Id.* Both documents allege essentially that, after the hearing, mill superintendent Rusesky told Driessen that Driessen was fired for saying that the ball mill was dangerous but that Rusesky could not so testify because he was afraid of losing his job. *See* Driessen Aff. dated Jan. 9, 1997; Letter from Driessen to Judge Hodgdon of Dec. 17, 1996. Neither document is properly part of the record and thus neither can be considered by the Commission on review. 30 U.S.C. § 823(d)(2)(C).[16] Such evidence should be considered by the judge in the first instance (*see Union Oil Co. of Cal.*, 11 FMSHRC 289, 301 (Mar. 1989)), and Driessen has not established "good cause" for failing to explore the issue of witness bias at the hearing where he was represented by counsel. 30 U.S.C. § 823(d)(2)(A)(iii). Indeed, Driessen asserts in his petition that he knew *before* the hearing that neither Rusesky, nor

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The dissent evaluates Driessen's termination as one involving disparate treatment. Slip op. at 12. However, it is incumbent on the complainant to introduce evidence showing that another employee guilty of the same or more serious offense escaped the disciplinary fate suffered by the complainant. *See Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 16 (Jan. 1984); *Chacon*, 3 FMSHRC at 2512. Here, Driessen introduced no evidence of disparate treatment, despite the dissent's attempts to glean such evidence from the record. Finally, in addressing Nevada Goldfields' grounds for terminating Driessen as an affirmative defense, our dissenting colleagues invade the fact-finding province of the judge, slip op. at 16-17, and make credibility determinations, slip op. at 18, exceeding the Commission's role under the Mine Act. *See* 30 U.S.C. § 823 (d)(2)(C).

[15] The judge declined to consider the December 17 letter which Driessen faxed to his office over a month after the hearing because the record was closed and the parties had elected not to file briefs. 19 FMSHRC at 158 n.3. The judge did not abuse his discretion in refusing to consider the letter. *See Kerr-McGee Coal Corp.*, 15 FMSHRC 352, 357 (Mar. 1993). In his PDR, Driessen indicated that he had attached a copy of the letter to his petition; however none was attached. The letter submitted to the judge was retained in the record.

[16] 30 U.S.C. § 823(d)(2)(C) states in pertinent part:

> For the purpose of review by the Commission . . . the record shall include: (i) all matters constituting the record upon which the decision of the administrative law judge was based; (ii) the rulings upon proposed findings and conclusions; (iii) the decision of the administrative law judge; (iv) the petition or petitions for discretionary review, responses thereto, and the Commission's order for review; and (v) briefs filed on review. No other material shall be considered by the Commission upon review.

a second subpoenaed witness, Dan Steely, could testify truthfully because of fear of losing their jobs.[17] PDR at 3.

Even if the Commission were to treat Driessen's petition and supporting documents as a motion to reopen the proceedings before the judge under Rule 60(b)(2) of the Federal Rules of Civil Procedure,[18] he fails to meet the criteria of the rule. Given Driessen's statement that he was aware prior to the hearing of the issue of the credibility of Rusesky and Steely, whom he subpoenaed and who were still employed by Nevada Goldfields, he fails to show that the evidence upon which he now relies was newly discovered and could not have been discovered by due diligence. *See Bruno v. Cyprus Plateau Mining Corp.*, 11 FMSHRC 150, 153 (Feb. 1989). Thus, it is not apparent why Driessen could not have pursued the issue of witness bias in discovery and used it at trial. Further evincing a lack of diligence, Driessen waited over a month after Rusesky's purported statement to bring it to the attention of the judge. In these circumstances, we deny consideration of Driessen's post-hearing evidence.

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[17] It is, of course, a violation to discriminate against any miner who has testified in a Mine Act proceeding. 30 U.S.C. § 815(c)(1). However, the Commission cannot infer bias on every occasion a testifying witness is still employed by an operator which is a respondent in a Mine Act proceeding.

[18] Rule 60(b) states, in pertinent part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)."

III.

Conclusion

For the foregoing reasons, we affirm the judge's dismissal of Driessen's section 105(c) complaint.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioners Marks and Beatty, dissenting:

We respectfully dissent from our colleagues' decision to affirm the judge's dismissal of the complaint filed by miner Kenneth Driessen based upon the judge's determination that the discharge of Driessen by Nevada Goldfields, Inc. ("Nevada Goldfields") was *in no part* motivated by Driessen's conduct in raising safety complaints relating to the No. 1 ball mill at Nevada Goldfield's Nixon Fork Mine. *See* slip op. at 6. We believe that the judge erred in failing to consider record evidence that, in our view, was clearly sufficient to establish a prima facie case that Driessen was discharged at least in part because of his protected conduct. Moreover, we believe that the record compels a conclusion that Driessen was discharged by Nevada Goldfields because of his protected activity, because Nevada Goldfields failed to either rebut the prima facie case or establish as an affirmative defense that it was also motivated by Driessen's unprotected activity and would have discharged him for the unprotected activity alone. Accordingly, we would reverse the judge's order dismissing Driessen's complaint, and conclude that Driessen was discharged for his protected conduct in violation of section 105(c) of the Mine Act.[19]

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 the individual engaged in protected activity and that the adverse action complained of was motivated *in any part* by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 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, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Applying these principles, our colleagues in the majority conclude that substantial evidence supports the judge's conclusion that "Nevada Goldfields' discharge of Driessen was *in no part* motivated by his protected activity." Slip. op. at 6 (emphasis added). We cannot concur in this assessment. In our view, the judge misapplied the *Pasula-Robinette* test by failing to initially consider whether a prima facie case was established that Driessen's discharge was motivated *in any part* by the protected activity that he undisputably engaged in. Instead of first analyzing this issue independently, as *Pasula-Robinette* requires, the judge jumped ahead to the

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[19] Section 105(c)(1) prohibits an operator from discharging or discriminating against a miner because he "has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . ." 30 U.S.C. § 815(c).

second step of the analysis, and determined that he believed Nevada Goldfield's explanation that Driessen was discharged solely on the basis of his failure to perform three work assignments on the evening of February 6-7, 1996. 19 FMSHRC 157, 160, 164 (Jan. 1997) (ALJ). As a result of his improper combination of the first and second steps of the *Pasula-Robinette* test, the judge failed to consider compelling record evidence indicating that the discharge of Driessen was motivated *at least in part* by his protected conduct. We believe that the Commission majority commits the same error as the judge by ignoring this strong evidence that the discharge of Driessen was unlawfully motivated *at least in part*, and focusing instead on Nevada Goldfield's rebuttal explanation, based upon Driessen's alleged insubordination, in upholding the judge's conclusion that Driessen failed to make out a prima facie case under *Pasula-Robinette*. *See* slip op. at 6-8.

In our view, the majority also fails to consider Commission precedent which provides us with an analytical framework for determining whether a prima facie case of unlawful motivation has been established in cases involving alleged discriminatory conduct under section 105(c) of the Act. In a prior ruling, the Commission recognized the problems associated with establishing a motivational nexus between the complainant's protected activity and adverse action taken by the operator. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect. . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'" *Id.* at 2510 (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 (8th Cir. 1965)). In *Chacon*, the Commission held that discriminatory intent can be established by circumstantial evidence of: (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. *Id.* A review of the record evidence in this case shows support for each of the elements set forth in *Chacon*.

With respect to the first factor, the record indicates that on January 25, 1996, Driessen initially raised concerns about the condition of the ball mill. 19 FMSHRC at 160. Additionally, on the morning of his discharge, February 7, 1996, Driessen presented Nevada Goldfields management with a report outlining his continuing concerns about the safety of the ball mill. *Id.* at 159. Two safety complaints communicated directly to management within a two week period is more than sufficient to establish the operator's knowledge of the employee's protected activity.

The record also indicates that Nevada Goldfields had previously demonstrated hostility to the protected conduct of Driessen in raising concerns about the safety of operating the ball mill. On the morning of January 25, after Driessen had initially raised concerns the night before about the condition of the ball mill, and the danger of restarting it, he was reproached by maintenance supervisor Botnan and mine manager Swanson. *Id.* at 160. The record shows that Driessen was rebuked for failing to follow procedures set forth in Nevada Goldfields' employee handbook by reporting the problem to mill superintendent Mike Rusesky rather than Botnan, his immediate

supervisor. *Id.* at 160-61.[20] Botnan criticized Driessen for making "million dollar decisions," such as shutting down the ball mill, without going through "the standard procedures" by informing Botnan or Swanson. Tr. 140. The record indicates, however, that it was mill superintendent Rusesky, not Driessen, who made the decision in the early morning hours of January 25 not to restart the ball mill, without consulting Botnan or Swanson, who were both asleep at the time.[21] 19 FMSHRC at 160. Therefore, if anyone was to blame for deciding not to restart the ball mill without consulting with other management officials, it was Rusesky, and not Driessen. There is no evidence, however, indicating that Rusesky was disciplined for failing to follow company policies.[22] This hostility demonstrated by Nevada Goldfields officials to Driessen for raising a safety concern about the possible danger of restarting the ball mill, even though it was Rusesky who ultimately made the decision not to restart the mill, strongly suggests that the operator harbored a strong animus in connection with Driessen's protected conduct in initially questioning the safety of operating the ball mill. This hostility was further reflected in Botnan's remark to Driessen, at the time of his February 7 discharge, that, "I've had enough of your disasters." Tr. 104.

Apart from the aforementioned, it is evidence supporting the third factor of the *Chacon* analysis that, standing alone, warrants a remand of this case. The record establishes that Driessen was discharged on the morning of February 7, 1996, *moments* after he presented Nevada Goldfields' vice-president Joe Kercher with a report he had prepared that reflected his *continuing* concerns about the safety of the mill. Tr. 27. Kercher immediately consulted with maintenance supervisor Ted Botnan and mine manager Mel Swanson, who made a collective decision to fire Driessen. 19 FMSHRC at 164. The stated reason for the discharge was Driessen's insubordination in failing to perform three tasks assigned to him the night before and working on

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[20] The employee handbook provides, in pertinent part: "If you have a problem or concern, you should discuss it with your supervisor first." Ex. H at 5. Maintenance supervisor Botnan was the direct supervisor of the mechanics, including Driessen. Tr. 127, 130. Botnan testified that, according to company procedure, either he or mine manager Swanson should have been consulted before the decision was made not to restart the ball mill. 19 FMSHRC at 161; Tr. 140, 152. The record also indicates, however, that when Driessen initially notified Rusesky of his safety concerns relating to the ball mill, in the early morning hours of January 25, Botnan and Swanson were both in the mining camp asleep. Tr. 112-14, 119, 171.

[21] Rusesky testified that it was 3:30 a.m. on the morning of January 25 when he was notified of the problem with the ball mill, and that he decided to wait until 6:30 a.m., when Swanson, his boss, would be on the scene to make any further decision about restarting the mill. Tr. 114.

[22] Although Rusesky agreed that Mine Manager Swanson "got mad" at Rusesky for not informing Swanson immediately about the shut down of the ball mill on the night of January 24-25 (Tr. 114, 119-20), contrary to the majority's assertion (slip. op. at 6 n.7), there is no evidence that Rusesky received a verbal reprimand or any other formal discipline as a result.

another matter on which he had not been told to work.[23] Botnan then told Driessen: "Pack your stuff. You're out of here." Tr. 104-05. Driessen was not afforded an opportunity to discuss his safety concerns, nor was he considered by the Nevada Goldfields officials to be a candidate for any progressive discipline mandated by the same employee handbook that he allegedly violated a week earlier.

In determining whether the timing between the reporting of safety concerns and a discharge implies a discriminatory intent, we again find guidance in *Chacon*. In that case, the Commission held that complaints ranging from four days to one and one-half months before the discharge were sufficiently coincidental in time to indicate an illegal motive. 3 FMSHRC at 2511. In *Donovan on behalf of Anderson v. Stafford Constr. Co.*, 732 F.2d 954 (D.C. Cir. 1984), the D.C. Circuit Court of Appeals, noting that two weeks had elapsed between the alleged protected activity and the miner's dismissal, held that "[t]he fact that the Company's adverse action against [the miner] so closely followed the protected activity is itself evidence of an illicit motive." *Id.* at 960; *see also Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530-31 (Apr. 1991), and cases cited. A discharge which occurs *moments* after reporting a safety complaint would certainly fall into the time frames established in *Chacon*.

The final inquiry in evaluating the possibility of discriminatory intent in the context of a section 105(c) case is disparate treatment of the complainant. Disparate treatment of Driessen is evident in this case because, as noted, his discharge was also inconsistent with the progressive disciplinary policy provided for in the employee handbook distributed by Nevada Goldfields, which provides:

> **DISCIPLINARY ACTIONS**
>
> Disciplinary actions are obviously a last resort that we hope to avoid through sound work habits, a good working knowledge of rules, regulations and good communications at all levels. *Every reasonable effort will be made to use progressive discipline in dealing with violations*, administered as fairly as possible. Steps of progressive discipline at [Nevada Goldfields] include:
>
> (a) verbal warning or correction
>
> (b) written reprimand with a copy placed in the offender's personnel file

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[23] The latter matter involved the flange on the ball mill, which Driessen had been specifically instructed by mine manager Swanson not to cut. 19 FMSHRC at 164. As our colleagues acknowledge, however, the judge did not find that Driessen disobeyed these instructions and cut the flange on the night of February 6-7. Slip op. at 7 n.9.

(c) written reprimand and suspension with pay; and

(d) dismissal.

Ex. H at 6 (emphasis added).

In this case, there is no evidence that Driessen had ever previously received any form of discipline (verbal warning, written reprimand, or suspension) during his period of employment with Nevada Goldfields. This is particularly noteworthy in view of testimony from Botnan that several incidents occurred involving Driessen, prior to the incidents which lead to his discharge, where he had refused to work on jobs as requested. Tr. 130-34. In those instances, there was no evidence that Driessen received any type of discipline from Nevada Goldfields. This selective application of discipline for alleged insubordinate conduct is indicative of discriminatory intent. Moreover, until the time that he first reported safety concerns about the ball mill in January 1996, Driessen was regarded by Nevada Goldfields management as a capable and valued employee.[24] This sudden and marked change in the attitude of management regarding Driessen's capabilities as an employee, and the operator's failure to adhere to its own progressive disciplinary policy in discharging him, provide additional evidence that Driessen was discharged in retaliation for his protected conduct.[25]

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[24] Personnel records for Driessen indicate that on December 8, 1995, less than two months after he began working for Nevada Goldfields, Driessen received a $1.00 an hour pay raise, from $16.00 to $17.00 an hour. Ex. 2 at 11. Mine manager Swanson testified that a portion of this pay raise (50 cents per hour) was intended to correct an administrative error in the hourly wage originally paid to Driessen, but that the remainder was a merit raise tied to the fact that Driessen made the second rotation, which Swanson described as "an accomplishment." Tr. 166. The comment section on the form, which was signed by both Botnan and Swanson, states: "Do not want him to leave — excellent all around mech[anic.]" Ex. 2 at 11. Dan Steely, a float operator for Nevada Goldfields, testified that Driessen "did a good job for us." Tr. 122. Indeed, even Nevada Goldfield's counsel conceded at the hearing that Driessen was "a competent mechanic. . . . And in a place like Nixon Fork Mine or any remote location in Alaska, you don't expect perfection." Tr. 204.

[25] While the majority claims that "Driessen introduced no evidence of disparate treatment" (slip op. at 8 n.14), Nevada Goldfields' failure to adhere to its established disciplinary policy in discharging Driessen is apparent from even a cursory examination of the above-quoted section of the employee handbook introduced into evidence by the operator. Although Driessen was represented by counsel at the hearing in this case, his counsel inexplicably failed to argue or even note that Nevada Goldfields failed to adhere to the progressive disciplinary system provided for in the employee handbook in discharging Driessen. As noted above, however, this employee handbook is included in the record in this case and Nevada Goldfields has relied upon other provisions of that handbook to support its claim that Driessen failed to follow company policy in raising his initial concerns about the safety of the ball mill.

Despite this demonstrated failure to adhere to the progressive disciplinary system set forth in Nevada Goldfields' employee handbook, our colleagues in the majority inexplicably conclude that "Driessen's termination was not inconsistent with the company's employee handbook," relying on provisions dealing with the willingness of employees to take directions and listed examples of employee misconduct, and finding that the handbook explicitly gives the company discretion to dismiss an employee for serious violations without first instituting progressive disciplinary measures. Slip op. at 7 n.10. This latter reference is presumably to language in the "Disciplinary Actions" section that provides: "Any or all of the first three [progressive disciplinary] steps may be omitted, depending upon the *seriousness* of the violation." Ex. H at 6 (emphasis added). The mere existence of this provision, however, begs the question of whether Driessen's purported failure to complete the three tasks assigned to him on the night of February 6-7 was a *serious* enough infraction to warrant immediate discharge, in contravention of the progressive disciplinary system that Nevada Goldfields has committed to make "[e]very reasonable effort" to follow.[26] *Id.* The available evidence strongly suggests that this was not the case. For instance, referring to the three tasks purportedly assigned to Driessen on the night shift of February 6-7, maintenance supervisor Botnan testified that he "never minded if a guy didn't do any of [the assigned tasks,] but at least some attempt to try to do them is good enough for me." Tr. 151. This testimony hardly suggests an attitude on the part of Nevada Goldfields management that the failure to perform assigned work tasks was considered a *serious* form of employee misconduct that warranted immediate discharge. This is particularly true given Botnan's earlier testimony that Driessen had failed to perform work on other occasions, none of which he was disciplined for according to the record.

In our view, the coincidence in timing between Driessen's protected activities and his subsequent discharge, which was not addressed by the judge, is alone sufficient to establish a prima facie case that his discharge was motivated at least in part by his protected conduct. It is also evident from the record, however, that this case supplies evidence sufficient to meet all elements of the *Chacon* test for determining discriminatory animus in section 105(c) cases. We therefore conclude that the judge erred in failing to consider the foregoing evidence and in concluding that Driessen failed to establish a prima facie case that his discharge was motivated at least in part by his protected conduct.

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[26] The majority concludes that Driessen's conduct on the night of February 6-7 "exhibited a clear disregard for the orders given by his supervisors," and thus amounted to a transgression of sufficient seriousness to warrant an exception to Nevada Goldfields' progressive disciplinary policy. Slip op. at 7 n.10. This determination, however, violates the majority's own admonition against "invad[ing] the fact-finding province of the judge" (slip op. at 9 n.14), since the judge never analyzed the question of Nevada Goldfields' failure to adhere to its progressive disciplinary policy in discharging Driessen, or whether it was warranted in doing so.

Since, in our view, there was ample evidence to establish a prima facie case that the discharge of Driessen was motivated at least in part by his protected conduct, [27] the burden shifted to Nevada Goldfields to either rebut this prima facie case by showing that the discharge was in no part motivated by his protected activity, or to establish as an affirmative defense that it was motivated by unprotected activity on the part of Driessen and would have discharged him for that unprotected activity alone. *Robinette*, 3 FMSHRC at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d at 642. In order to prevail on an affirmative defense based upon the purported insubordination of Driessen in failing to perform the three tasks that it claims were assigned to him on the night shift of February 6-7, Nevada Goldfields was required to demonstrate that it would have discharged Driessen for this conduct alone, irrespective of his protected conduct. To meet this burden, Nevada Goldfields was required to show that it considered an employee's failure to perform assigned tasks to be a particularly *serious* form of insubordination that warranted immediate discharge. We believe that the self-serving testimony of maintenance supervisor Botnan (Tr. 130) and mine manager Swanson (Tr. 186) that Driessen was discharged solely because of his failure to perform the three tasks allegedly assigned to him, and that Driessen's safety complaints did not influence that decision, was hardly sufficient in itself to overcome the persuasive amount of evidence in this case supporting a prima facie case of discriminatory intent on the part of Nevada Goldfields, or support its position that Driessen would have been discharged solely for his unprotected conduct. Moreover, this testimony is directly inconsistent with other testimony of Botnan indicating that Nevada Goldfields did not have a steadfast policy of requiring that all tasks assigned during a particular

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[27] Although we believe that the existing record compels a conclusion that Driessen was discharged because of his protected conduct, we also believe that the majority erred in not reopening the record to consider the letter submitted by Driessen to the judge following the hearing, and the affidavit attached to his petition for discretionary review, in which he alleges that, following the hearing, mill superintendent Rusesky told Driessen that Driessen was fired for raising safety complaints concerning the ball mill and that Rusesky had been threatened by mine manager Swanson with discharge if he brought this up at the hearing. Driessen Aff. dated Jan. 29, 1997. We believe that this evidence is entitled to consideration under Rule 60(b)(2) of the Federal Rules of Civil Procedure, which allows the consideration of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2). Contrary to the Commission majority (slip op. at 9), we find that the statements attributed to Rusesky, which were not even allegedly made to Driessen until after the hearing, clearly qualify as newly discovered evidence that could not with due diligence have been discovered previously within the meaning of Rule 60(b)(2). We believe that the statements attributed to Rusesky in the Driessen affidavit involve serious allegations of witness bias, and if true would provide additional evidence that the discharge of Driessen was unlawfully motivated. We also note that in a rebuttal affidavit attached to Nevada Goldfields' response brief, Rusesky did not directly deny having made the statements attributed to him by Driessen, but only stated that he could not "recall verbatim what was said" at a meeting with Driessen and Dan Steely, another Nevada Goldfields' employee, following the hearing. Rusesky Aff. dated April 30, 1997, at 2.

shift were entirely completed, and thus did not regard the failure to complete work assignments as a particularly egregious form of misconduct warranting immediate discharge.[28]

For the foregoing reasons, we would reverse the judge's order dismissing Driessen's complaint, conclude that Driessen has established a prima facie case that his discharge was motivated at least in part by his protected conduct, and further conclude that the record compels a conclusion that Driessen was discharged for his protected conduct in violation of section 105(c) of the Mine Act in light of the failure of Nevada Goldfields to either rebut the prima facie case or establish as an affirmative defense that it was also motivated by Driessen's unprotected activity and would have discharged him for the unprotected activity alone.

Marc Lincoln Marks, Commissioner

Robert H. Beatty, Jr., Commissioner

[28] As noted above, maintenance supervisor Botnan testified that he "never minded if a guy didn't do any of [the assigned tasks,] but at least some attempt to try to do them is good enough for me." Tr. 151.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 30, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. KENT 94-944-R KENT 94-1052
TOPPER COAL COMPANY, INC.	:	

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

DECISION

BY THE COMMISSION:

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves an alleged significant and substantial ("S&S") violation by Topper Coal Company, Inc. ("Topper"), of section 103(a) of the Mine Act, 30 U.S.C. § 813(a),[1] for impeding a spot

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[1] Section 103(a) provides, in part:

> Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this [title] or other requirements of this [Act]. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person . . . . In carrying out the requirements of clause[] . . . (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year . . . . The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this [Act], and his experience under this [Act] and other health and safety laws. For the purpose of making any inspection or investigation under this [Act], the

inspection for smoking materials.[2] Administrative Law Judge T. Todd Hodgdon concluded that Topper violated section 103(a) and that the violation was S&S, and assessed a $5,000 civil penalty. 17 FMSHRC 945 (June 1995) (ALJ). The Commission granted Topper's petition for discretionary review ("PDR") challenging the judge's conclusions. For the following reasons, we affirm, in result, the judge's decision.

I.

Factual and Procedural Background

Topper operates the No. 9 underground coal mine in Knott County, Kentucky. Pet. for Assessment of Civil Penalty at 1. On May 19, 1994, Howard Williams, Elmer Hall, Jr., and Ronald Honeycutt, inspectors with the Department of Labor's Mine Safety and Health Administration ("MSHA"), arrived at the mine to conduct a spot saturation inspection for smoking materials. 17 FMSHRC at 946. The inspection was part of MSHA's smoking prevention initiative, which was instituted in response to recent underground mine explosions caused by smoking. Tr. 116. Under the initiative, MSHA inspected 175 mines in Kentucky, Tennessee, Virginia, and West Virginia. Tr. 117.

The inspectors arrived during mid-shift so they would not be observed by the miners. Tr. 118. Upon entering the mine office, Inspector Hall told Gary Fields, the president of Topper, that they were there to conduct an inspection and instructed him not to telephone underground to alert the miners that they were coming. 17 FMSHRC at 946; Tr. 14-15, 68. Then Inspectors Hall and Honeycutt crawled into the mine to conduct the inspection[3] while Inspector Williams remained in the mine office to monitor the telephone. 17 FMSHRC at 946; Tr. 18-19, 68.

> Secretary, . . . or any authorized representative of the Secretary . . . , shall have a right of entry to, upon, or through any coal or other mine.

[2] Smoking materials are prohibited by section 317(c) of the Mine Act, 30 U.S.C. § 877(c), which states:

> No person shall smoke, carry smoking materials, matches, or lighters underground, or smoke in or around oil houses, explosives magazines, or other surface areas where such practice may cause a fire or explosion. The operator shall institute a program, approved by the Secretary, to insure that any person entering the underground area of the mine does not carry smoking materials, matches, or lighters.

[3] The coal seam ranged from 36 to 42 inches high. Tr. 69. The inspectors crawled approximately 2,500 feet over 30 to 40 minutes to reach the working section. Tr. 70.

About 15 to 20 minutes after Inspectors Hall and Honeycutt went underground, Fields telephoned the working section and told a miner that "two federal inspectors" were in the mine and that he wanted the miners to "watch out and be careful." 17 FMSHRC at 946; Tr. 177. After hanging up, Fields explained to Inspector Williams that he was concerned that, absent the warning, the miners might not see the inspectors and might run over them with a shuttle car. 17 FMSHRC at 946; Tr. 19, 177-78.

Inspectors Hall and Honeycutt, about 20 to 25 minutes after going underground, intercepted two miners cleaning up accumulations around a belt. Tr. 85. They took the two miners to the working section and, with the assistance of the section foreman, gathered the remaining seven miners. Tr. 70, 71. The miners were then searched, but no smoking materials were found. 17 FMSHRC at 947; Tr. 71-72.

As a result of Fields' telephone call alerting the miners underground that the inspectors were coming, Inspector Williams issued Topper Citation No. 4243301, pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), alleging a violation of section 103(a) for impeding the inspection. 17 FMSHRC at 946; Jt. Ex. 1, at 1.[4] The citation was later modified to increase the gravity of the violation to S&S, reflecting that it was "reasonably likely" to cause injury or illness that could be "fatal," and to increase the level of negligence to "reckless disregard." Jt. Ex. 1, at 2. Topper contested the issuance of the citation. The Secretary subsequently proposed a civil penalty assessment of $8,500 for the alleged violation and Topper challenged the proposed assessment. 17 FMSHRC at 945.

Following an evidentiary hearing, the judge concluded that Topper violated section 103(a). *Id.* at 947-51. He based his determination on the "right of entry" provision in section 103(a), which he concluded prohibits impeding or interfering with an inspection. *Id.* at 947-50. The judge found that, by alerting the miners that the inspectors were coming, Fields obstructed the inspection. *Id.* at 950. He found that Fields had understood the inspectors' instructions not to call underground and he discredited Fields' testimony that he had called for safety reasons. *Id.* at 950-51. The judge reasoned that Fields had not expressed concern before calling, he did not need to identify the people entering the mine as "federal inspectors," and his belief that the inspectors were already at the working section was inconsistent with his belief that there would be a safety purpose in alerting the miners to their arrival. *Id.*

In addition, the judge concluded that the violation was S&S. *Id.* at 951-53. He recognized that "[t]he problem with trying to assess this violation under the traditional criteria is that there is no way of knowing what the inspectors would have found if the miners had not been alerted to their presence." *Id.* at 952. He accepted the Secretary's argument that "[t]he

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[4] In addition, two citations were issued for alleged violations of 30 C.F.R. § 75.360 for failure to record a preshift examination and 30 C.F.R. § 75.400 for failure to clean up coal and coal dust accumulations around a shuttle car. 17 FMSHRC at 947; Tr. 73-74; S. Br. at 4, 26. These charges are not part of this proceeding.

Secretary's right of entry is the mechanism by which the entire Act is enforced" and the denial of entry, directly or indirectly, is presumptively S&S because the inspector would be "unable to determine the number and the type of violative conditions which pose serious hazards to miners working underground and to ensure that these hazards are eliminated." *Id.* (quoting S. Post-Hearing Br. at 10). The judge reasoned that "the logical consequence of warning underground miners that inspectors are on their way underground would be for the miners to attempt to cover-up, dispose of, or even correct any violations of which they are aware." *Id.* at 953. He concluded that, when an inspection is impeded, "it is reasonably likely that an S&S violation would have been discovered," and, thus, "there is a presumption that the violation [of section 103(a)] is S&S." *Id.* He also found that Topper did not present any evidence to rebut the presumption. *Id.*

Finally, after considering the criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), the judge assessed a $5,000 civil penalty against Topper. 17 FMSHRC at 955. He found that Topper was a small operator and that the violation was the result of high negligence, concluding that Fields' conduct was intentional and that there were no mitigating circumstances. *Id.* at 953-55.

II.

Disposition

A. Violation

Topper argues that it did not deny the inspectors the right to enter the mine or impede the inspection. PDR at 2; T. Br. at 4-5. It contends that 2 of the 10 miners, i.e., the miners working at the belt, were not aware that MSHA inspectors were coming underground, so they did not have the opportunity to dispose of any smoking materials. PDR at 2. Moreover, it asserts that, even if Fields had not alerted the miners to the inspectors' presence, some of them might have seen the inspectors gathering the other miners and would have had the opportunity to dispose of any smoking materials. T. Br. at 5. Topper argues that MSHA had no reason to suspect that its miners were smoking underground or that its smoking material search plan was inadequate. *Id.* at 6. It asserts that Fields was concerned about the safety of the miners and the inspectors. *Id.*

The Secretary responds that substantial evidence supports the judge's finding that Fields' warning to the miners that inspectors were coming, contrary to the inspectors' instructions, impeded the inspection in violation of section 103(a). S. Br. at 8-20. She asserts that, in so doing, Fields eliminated the element of surprise, which the unannounced inspection was designed to ensure. *Id.* at 13. The Secretary states that, because smoking materials can be easily concealed, advance notice of an inspection can frustrate enforcement efforts. *Id.* at 9-11. In addition, she argues that miners have a strong incentive to conceal smoking materials because

they can be held personally liable under section 110(g) of the Mine Act, 30 U.S.C. § 820(g).[5] *Id.* at 12. Regarding the two miners working at the belt and the miners at the working section who might have seen the inspectors gathering miners, the Secretary argues that section 103(a) is violated whether an inspection is completely prevented or merely hindered. *Id.* at 14-15. In addition, she asserts that the judge properly discredited Fields' testimony that, in telephoning underground, he was motivated by safety concerns. *Id.* at 16-17.

Although the focus of the judge's decision and the parties' arguments is whether Topper violated the "right of entry" provision in section 103(a), we conclude that the "no advance notice" provision of section 103(a) is applicable to this case. Section 103(a) explicitly provides that "no advance notice of an inspection shall be provided to any person." Here, the record indicates that the inspectors specifically instructed Fields not to notify the miners of their arrival. Tr. 15, 31-32, 67-68, 82-83, 105-06, 112, 173, 196-97. It is undisputed that Fields intentionally disregarded these instructions by calling underground to warn the miners that "federal inspectors" were coming. Tr. 173, 176-77, 196-97. Fields' warning of the inspection clearly is sufficient to establish a violation of the "no advance notice" language.

We do not accept Topper's defense that the warning was provided solely due to Fields' concern that the unannounced inspection might cause injury to the miners or the inspectors. T. Br. at 6. The judge specifically discredited Fields' testimony that he had called for safety reasons. 17 FMSHRC at 950-51. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge has an opportunity to hear the testimony and view the witnesses, he is ordinarily in the best position to make a credibility determination. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1815, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)). The judge soundly rejected Fields' excuse, and we find no basis to overturn his ruling on that issue.

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[5] Section 110(g) provides:

> Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission, which penalty shall not be more than $250 for each occurrence of such violation.

Based on the foregoing, we conclude that substantial evidence[6] supports the judge's determination that Topper violated section 103(a). Accordingly, we affirm, in result, the judge's holding.

B. Penalty

Topper argues that, under MSHA's penalty assessment regulations set forth in 30 C.F.R. Part 100, the violation was the result of only moderate negligence. PDR at 3; T. Br. at 8-9. It asserts that mitigating factors are that Fields was unaware of the reason for the inspection or the requirements of section 103(a), and that he was concerned about the safety of the miners and the inspectors. PDR at 3; T. Br. at 9. Moreover, noting that in *Cougar Coal Co.*, 17 FMSHRC 628 (Apr. 1995) (ALJ), a penalty amount of $1,000 was assessed under identical circumstances, Topper asserts that it is a smaller operator than Cougar and should be assessed a smaller penalty of $250. PDR at 4; T. Br. at 9-10.

The Secretary responds that substantial evidence supports the judge's finding that the violation resulted from high negligence. S. Br. at 30. She asserts that Fields knew of the violation because he understood the inspectors' instructions not to call underground and recognized their desire to ensure the element of surprise in the inspection, but nevertheless deliberately disregarded those instructions. *Id.* In addition, the Secretary argues that there were no mitigating circumstances. *Id.* at 31.

The Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) of the Mine Act.[7] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar.

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

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

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

1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). With regard to the criterion of negligence, the Commission has recognized that a finding of high negligence "suggests an aggravated lack of care that is more than ordinary negligence." *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991). In particular, the Commission has held that an operator's intentional violation constitutes high negligence for penalty purposes. *Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992) ("*Consol Penalty Case*"). Here, we conclude that substantial evidence supports the judge's penalty determination.

We find unavailing Topper's argument that, under MSHA's penalty assessment regulations set forth in 30 C.F.R. Part 100, the violation was the result of only moderate negligence. PDR at 3; T. Br. at 8-9.[8] We are unpersuaded by Topper's argument that Fields' negligence was mitigated by the fact that he was unaware of the reason for the inspection or the requirements of section 103(a), and that he was concerned about the safety of the miners and the inspectors. PDR at 3; T. Br. at 9. Fields intentionally disregarded the inspectors' instructions not to call underground to alert the miners. 17 FMSHRC at 950. As the judge recognized, Fields' purported ignorance of the inspection's purpose does not reduce the level of negligence because he knew that the inspectors did not want him to alert the miners. *Id.* at 954. Moreover, as we have explained, the judge explicitly rejected Fields' testimony that he had called for safety reasons.[9]

Based on the foregoing, we conclude that substantial evidence supports the judge's determination that the violation resulted from high negligence. Accordingly, we affirm the judge's holding and penalty assessment.

C. Significant and Substantial

Topper argues the judge erred in concluding that "when an inspection is impeded there is a presumption that the violation is S&S." PDR at 2-3 (quoting 17 FMSHRC at 953). Citing *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), Topper contends that, in this case, there is no evidence that the alleged violation would have contributed to the hazard of explosion, which

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notification of the violation.

30 U.S.C. § 820(i).

[8] It is well settled that the Commission is not bound by the penalty assessment regulations adopted by the Secretary. Rather, the Commission determines *de novo* the amount of the penalty based on the criteria of section 110(i). *Sellersburg*, 5 FMSHRC at 291, *aff'd*, 736 F.2d at 1152.

[9] With regard to Topper's reference to the *Cougar* case, we note that Commission Procedural Rule 72, 29 C.F.R. § 2700.72, provides that unreviewed administrative law judge decisions are not precedent binding upon the Commission.

would be reasonably likely to result in injury. *Id.* at 2; T. Br. at 7-8. It points out that the mine has no history of methane liberation and, with respect to the two miners with whom there was no interference in the inspection, no smoking materials were found. PDR at 3; T. Br. at 7-8.

The Secretary responds that the judge properly determined that section 103(a) violations are presumptively S&S. S. Br. at 21-25. The Secretary contends that the violation is very serious because MSHA's authority to inspect is essential to the enforcement scheme of the Mine Act. *Id.* at 21. She asserts that, under *Mathies*, a section 103(a) violation contributes to a measure of danger to the safety of miners because it impedes an inspection, thus increasing the likelihood that violations will go undetected and placing miners at greater risk of working in unsafe conditions, which in the course of continued mining operations would be reasonably likely to result in serious injury. *Id.* at 21-22. She contends that, because it is impossible "in the vast majority of cases" for MSHA to establish that it would have detected S&S violations if the inspection had not been impeded, it is "only fair" to presume that the section 103(a) violation is S&S. *Id.* at 23-24. In addition, the Secretary argues that substantial evidence supports the judge's finding that Topper failed to rebut the presumption that the violation was S&S. *Id.* at 25-29.

Three Commissioners agree that the violation is S&S. Chairman Jordan and Commissioner Marks vote to adopt the presumption that violations of the advance notice prohibition of section 103(a) are S&S. Commissioner Beatty votes to reject the presumption and concludes that the violation is S&S based on substantial evidence under the *Mathies* test. Commissioners Riley and Verheggen vote to reverse the judge's S&S determination. The effect of this vote is that the judge's S&S determination is affirmed in result. The separate opinions of the Commissioners on the S&S issue follow.

III.

Separate Opinions of the Commissioners

Chairman Jordan and Commissioner Marks, in favor of affirming the judge's S&S determination:

Unannounced mine inspections are a fundamental component of the Mine Act's statutory scheme. In discussing the importance of unannounced inspections under section 103(a), the Senate Report accompanying the passage of the Mine Act states:

> [I]t is important that . . . *no advance notice* of an inspection be given to any person. . . .
>
> . . . .
>
> . . . The Committee intends to grant a broad right-of-entry to the Secretaries or their authorized representatives to make inspections and investigations of all mines under this Act without first obtaining a warrant. . . . The Committee notes that despite the progress made in improving the working conditions of the nation's miners under present regulatory authority, mining continues to be one of the nation's most hazardous occupations. Indeed, *in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained,* a warrant requirement would seriously undercut this Act's objectives.[1]

S. Rep. No. 181, 95th Cong., 1st Sess. 26-27 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources ("Senate Committee" or "Committee"), 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 614-15 (1978) ("*Legis. Hist.*") (emphasis added). The Committee expressly rejected the provision of the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. § 721 et seq. (1976), which permitted such advance notice. *Legis. Hist.* at 615.

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[1] In *Donovan v. Dewey*, 452 U.S. 594 (1981), the Supreme Court upheld a Fourth Amendment challenge to the warrantless inspection requirement of section 103(a), finding that "Congress could properly conclude: '[I]f inspection is to be effective and serve as a credible deterrent, unannounced . . . inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection.'" *Id.* at 603 (quoting *United States v. Biswell*, 406 U.S. 311, 316 (1972)).

The critical importance Congress attached to this prohibition is underscored by section 110(e) of the Mine Act, which provides that "any *person* who gives advance notice of any inspection to be conducted under this [Act] shall, upon conviction, be punished by a fine of not more than $1,000 or by *imprisonment* for not more than six months, or both." 30 U.S.C. § 820(e) (emphasis added). In contrast, violations of a mandatory health or safety standard must either be "willfully" committed by an operator or "knowingly authorized, ordered, or carried out" by a corporate "director, officer or agent" to warrant criminal sanctions. *See* 30 U.S.C. § 820(c), (d).

It is against this background that we turn to the question of whether the violation of section 103(a), based on the advance notice of the inspection, was appropriately designated S&S.

A. Employing a Presumption to Find Violations of Section 103(a) S&S

The S&S terminology is taken from sections 104(d)(1) and (e) of the Mine Act, 30 U.S.C. § 814(d)(1), (e), which provide special consequences for violations that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard . . . ." The Commission has held that a violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995) (approving *Mathies* criteria); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (same). The Commission also has held that an evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

In this case, the judge acknowledged that the *Mathies* criteria did not provide an appropriate analytical framework for determining the seriousness of this violation. *See* 17

FMSHRC at 952. He concluded that it was appropriate to apply a presumption of S&S to violations of that part of section 103(a) prohibiting advance warning of inspections.[2] *Id.* at 953.

We agree that the *Mathies* criteria fail to provide a framework for determining the seriousness of such violations.[3] In this instance, it is impossible to determine the particular hazard "contributed to by the violation." Due to the advance notice provided by the operator, MSHA was unable to determine the number and type of violative conditions to which the miners may have been exposed. MSHA's inability to detect the violations prevents that agency from ensuring that the hazards associated with such violations are eliminated. The judge determined that it was appropriate to presume that, when an operator interferes with an inspection by providing advance warning, it is reasonably likely that an S&S violation would have been discovered. 17 FMSHRC at 953.

The judge's approach is consistent with *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987) ("*Consol Dust Case*"), in which a unanimous Commission adopted a presumption that all violations of the respirable dust standard, 30 C.F.R. § 70.100(a), are S&S. *See also Twentymile Coal Co.*, 15 FMSHRC 941, 946 (June 1993) (reaffirming *Consol Dust Case* holding that any concentration of respirable dust over 2.0 mg/m^3 is presumptively S&S). In the *Consol Dust Case*, the Commission largely based the adoption of the presumption on the difficulty of proving the third element of *Mathies.* 8 FMSHRC at 898-99. We reasoned that it was impossible to prove that one incident of overexposure of respirable dust was reasonably likely to result in a respiratory illness, but in light of the "unambiguous legislative declaration in favor of preventing any disability from pneumoconiosis" and the serious nature of the health hazard involved, we determined that a violation of the respirable dust standard should be considered presumptively S&S. *Id.* at 897-99.

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[2] A presumption is "a rule of law, statutory or judicial, by which [the] finding of a basic fact gives rise to [the] existence of [a] presumed fact . . . ." *Black's Law Dictionary* 1185 (6th ed. 1990). A rebuttable presumption is one "that can be overturned upon the showing of sufficient proof." *Id.* at 1186. Presumptions are created for reasons of fairness, public policy, procedural convenience, probability, or a combination of these reasons. *See* 2 *McCormick on Evidence* § 343, at 454-55 (John W. Strong ed., 4th ed. 1992). They may be defeated by attacking the existence of the basic fact, introducing evidence contrary to the presumed fact (i.e., rebuttal), or both. *See generally id.* § 344, at 460-76.

[3] Commissioner Marks agrees that an S&S presumption should be applied to this violation. In addition, for the reasons set forth in his concurring opinions in *U.S. Steel Mining Co.*, 18 FMSHRC 862, 868-75 (June 1996), and *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 240 (Feb. 1997), he continues to urge that the ambiguous language of the Commission's *Mathies* test, 6 FMSHRC at 3-4, be replaced with a clear test that is consistent with Congressional intent.

In *Manalapan Mining Co.*, 18 FMSHRC 1375, 1395-94 (Aug. 1996) (opinion of Chairman Jordan and Commissioner Marks), we recognized a presumption that violations of the preshift standard (30 C.F.R. § 75.360(a)) are S&S. *Id.* at 1388-98 & n.10. The presumption was based on the premise that the preshift examination requirement is of "fundamental importance in assuring a safe working environment underground." *Id.* at 1393 (quoting *Buck Creek Coal Co.*, 17 FMSHRC 8, 15 (Jan. 1995)). We applied a presumption because of the difficulty of analyzing the violation under *Mathies*, as the failure to conduct a preshift examination deprived the inspector of any way to establish that specific hazards existed at the time the preshift examination should have taken place. *Id.* at 1393-94.

Considerations similar to those expressed in the *Consol Dust Case* and in our *Manalapan* opinion compel our conclusion that a presumption of S&S is warranted when an operator provides advance notice of an inspection. First, there is a difficulty of proof; it is impossible to determine what injuries were reasonably likely to occur because the operator informed the miners underground that inspectors were on the way. Second, the prohibition against advance notice involves a matter of deep-seated Congressional concern; Congress plainly intended that Mine Act inspections be unannounced because, like the respirable dust standard in the *Consol Dust Case*, Congress directly inserted the prohibition against advance notice into the Mine Act itself. *See* 8 FMSHRC at 896-97 (respirable dust standard was taken directly from section 202 of the Mine Act, 30 U.S.C. § 842). Taking into account strong Congressional direction regarding respirable dust standards in affirming the Commission's *Consol Dust Case* decision, the D.C. Circuit cited with approval the Commission's reasoning that "Congress clearly intended the full use of the panoply of the Act's enforcement mechanisms to effectuate [this Congressional goal], including the designation of a violation as a significant and substantial violation." 824 F.2d at 1086 (citing 8 FMSHRC at 897). The same holds true for violations of the advance notice provision. We conclude that, based on unambiguous Congressional intent, an advance notice violation also is presumptively S&S.[4]

We are reluctant to apply the *Mathies* test in the usual manner in cases involving advance notice of inspections because it allows operators to derive a legal advantage from the very lack of evidence concerning conditions in the mine that their own violation of the law created. When a party violates a statutory obligation, and the legal ramifications of the violation cannot be determined with certainty because of lack of evidence, it is only fair to resolve the uncertainty against the party committing the violation. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983) ("The employer is a wrongdoer; he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk [of liability] because he

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[4] In dissent, Commissioners Riley and Verheggen state that a presumption is appropriate only "under extraordinary circumstances." Slip op. at 35. Even under this test, we believe that when an operator provides advance notice that an MSHA inspection is imminent, the difficulty of proof of concealed health hazards and the clear Congressional intent forbidding such advance notice warrant the presumption of S&S.

knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing.").

To ensure due process when a presumption is applied, it is "essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976) (quoting *Mobile, J. & K. C. R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910)) (upholding presumptions of disability due to pneumoconiosis under Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act")). In addition, an administrative agency's presumption must be consistent with the relevant statute. *Consol Dust Case*, 824 F.2d at 1084-86 (upholding Commission's S&S presumption for violation of respirable dust standard as rational and consistent with Mine Act).

The presumption that a violation of the advance notice provision of section 103(a) is S&S satisfies these criteria. It is rational to assume that if an operator provides advance notice of an inspection (the proven fact), there is a reasonable likelihood that one of the many potential hazards commonly existing in mines will go undetected, and consequently unabated, and, in the course of continued mining operations, will be reasonably likely to result in serious injury (the presumed fact).[5]

Further, the presumption is rational because the very act of providing advance notice of an inspection makes it more likely that the operator has something to hide in the first place. In reviewing an analogous situation in *Smith v. District of Columbia*, 436 A.2d 53 (D.C. 1981), a challenge to the constitutionality of the District of Columbia's ban on radar detectors, the D.C. Court of Appeals upheld the law and explained why radar detectors (similar to advance notice of inspections) may be presumed to be used to hide dangerous violations:

> The prohibition is intended to promote the public safety by aiding in the enforcement of highway speed limits through preventing drivers from anticipating the presence of police radar. The [Commissioners] must have assumed that drivers who use or

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[5] In this case, for example, the record shows that smoking materials, in particular, are easy to conceal because cigarettes, lighters, and matches are small items that can be buried under ribs, loose coal, or rock dust, or sent down a conveyor belt in a matter of seconds. Tr. 72-73, 122. Further, the record reflects that smoking plans are generally ineffective at keeping miners from carrying smoking materials underground because there are numerous ways to carry smoking materials without the operator's knowledge. Tr. 49-50, 55, 98. Even Fields acknowledged that there is "no way to stop" miners from carrying smoking materials underground. Tr. 189. Fields himself admitted that if he was working underground and he had smoking materials and knew the inspectors were coming, he "would probably hide it or get rid of it one way or the other." Tr. 190.

> possess radar detection devices will be more likely to violate the traffic laws . . . [and] to use them . . . in order to avoid speed limits and enforcement efforts.

Id. at 58-59 (alteration in original).

There is no credible reason why an operator would provide notice of an inspection, except to try to hide a violation. As the *Smith* court remarked in the parallel context of the challenge to the radar detector prohibition:

> Radar detectors have no utility other than aiding an illicit effort to drive in an irresponsible manner, evading society's punishment for such conduct. . . . [T]he nexus between the prohibition of radar detectors and highway safety is obvious and evidences the rationality of the Commissioner's [sic] enactment of the regulation.

Id. at 59 (footnote omitted).

In addition, the adoption of the S&S presumption with regard to violations of section 103(a) is consistent with the Mine Act. As we have already discussed, Congress recognized the critical role of unannounced inspections in combating safety and health hazards. *Legis. Hist.* at 614-15. The presumption is also clearly consistent with the criminal penalty provision of section 110(e).

For the foregoing reasons, rather than requiring the Secretary to prove all four elements of the *Mathies* test in cases involving violations of section 103(a), we adopt a presumption that all violations of the advance notice provision of section 103(a) are S&S. The presumption applies to all cases where advance notice is given in violation of section 103(a). Under the presumption, once the Secretary establishes a section 103(a) violation, the burden of producing evidence shifts to the operator. It then has an opportunity to rebut the presumption by adducing evidence that the violation is not S&S. *See, e.g., Consol Dust Case*, 8 FMSHRC at 899.

B. Application of the Presumption to Topper

After finding that the operator violated section 103(a) by giving advance notice of an inspection, the judge properly employed a presumption that the violation was S&S. 17 FMSHRC at 951-53. The judge then concluded that the operator failed to present sufficient evidence to rebut that presumption. *Id.* at 953. We agree. On appeal, Topper asserts only that providing advance notice of the MSHA inspection was not S&S because an explosion was not reasonably likely to occur, as the mine does not have a history of methane liberation and the two miners who were examined by MSHA inspectors were not in possession of smoking materials. T. Br. at 7-8. Topper failed to rebut the testimony of an MSHA witness that the mine could nonetheless produce methane. Tr. at 126. It points to no additional evidence to demonstrate that

the advance notice did not create the potential for danger. Accordingly, we conclude that substantial evidence supports the judge's determination that Topper failed to rebut the presumption and, consequently, we find the violation S&S.[6] Based on the foregoing, we would affirm the judge's holding.[7]

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[6] Although Commissioner Beatty declines to apply a presumption, his S&S analysis is, in many ways, similar to ours. Almost every one of his reasons supporting an S&S determination in this case would be equally applicable to any violation alleging advance notice of an inspection in any mine. He notes that the safety hazard at issue here is "the increased *likelihood* of smoking materials underground." Slip op. at 24 (emphasis added). He acknowledges that the hazard is created by "an increased *potential* for unchecked smoking materials underground, thereby creating a reasonable likelihood of injury," *id.* at 27 (emphasis added), and recognizes that the hazard here is "the *threat* of miners carrying and using smoking materials." *Id.* at 28 (emphasis added). Much of the record evidence to which he points in support of his holding is generalized and would apply universally. For instance, evidence showing that smoking materials are easy to conceal and that smoking control plans are often ineffective, *id.* at 24, would probably apply to all mines. Thus, we believe the differences between his analysis and ours are largely only semantic.

[7] Relying only on cases regarding the retroactive application of federal or state legislation or federal regulations, our dissenting colleagues, Commissioners Riley and Verheggen, assert that this case must be remanded if a presumption is applied. Slip op. at 35-36. We believe a remand is not necessary. Topper has had ample opportunity to rebut the Secretary's presumption before both the judge and the Commission, and has chosen not to do so. For example, MSHA's Mine Safety and Health Specialist Cheryl McGill testified at the hearing why the Secretary considered this violation to be S&S. Tr. 128, 156-58, 165. She testified that the operator's advance notice made it reasonably likely that a fatality would occur because "we no longer had the element of surprise" and were unable "to effectively determine whether or not smoking materials had been carried into that mine" and, therefore, the agency was going to "assum[e]" that the miners had smoking materials that they had discarded at the time of the inspection. Tr. 156-57. In addition, the Secretary's post-hearing brief, filed May 15, 1995, argued that the advance notice violation "should be *presumed* to be significant and substantial." S. Post-Hearing Br. at 10 (emphasis added). In its post-hearing brief, filed more than 10 days later on May 26, 1995, Topper never sought to rebut this presumption argument, nor did it even mention the presumption issue. *See* T. Post-Hearing Br. at 10-11. Topper also failed to move to reopen the record for the purpose of adducing evidence rebutting the presumption. Also, at the hearing, Topper had requested and was granted the right to file a reply brief (Tr. II 12-13), but by letter dated June 2, 1995, Topper expressly informed the judge that it was not going to file a reply brief and that the "case should be decided based upon the evidence introduced at trial and the original post-hearing briefs." Similarly, before the Commission, Topper did not attempt to rebut the presumption, even though it was fully aware that the judge had applied the presumption in finding S&S (17 FMSHRC at 951-53) and the Secretary was urging the Commission to adopt the presumption (S. Br. at 21-25). Nor does Topper ask the Commission for a remand to put on

C. The Legal Basis for Citing Mine Act Violations as S&S

Although the issue was neither raised nor briefed by the parties, our dissenting colleagues question the Secretary's ability to cite Mine Act violations as S&S and are troubled by the "Secretary's insistence on citing violations of provisions other than mandatory safety and health standards as S&S under section 104(a)." Slip op. at 33. It is undisputed that the sections of the Act that refer to a violation as S&S also refer to "a violation of any mandatory health or safety standard."[8] A literal reading of such statutory language could lead, as our dissenting colleagues suggest, to the conclusion that Congress intended to preclude the Secretary from designating a violation as S&S, unless the standard that was violated fell within the statutory definition of a "mandatory health or safety standard."

The Mine Act defines a mandatory health or safety standard as "the interim mandatory health or safety standards established by [titles] II and III of this [Act], and the standards promulgated pursuant to [title] I of this [Act]." 30 U.S.C. § 802(*l*).[9] The Mine Act thus contains explicit safety standards and also empowers the Secretary, through rulemaking, to promulgate improved safety standards as experience and technology develop. *See Southern Ohio Coal Co.*, 14 FMSHRC 1, 9 (Jan. 1992) ("*SOCCO*"). The prohibition against advance warnings is contained in section 103(a) of title I. It is plainly illogical for a standard promulgated pursuant to title I of the Mine Act to be subject to more stringent enforcement than a prohibition inserted into that title by the drafters themselves. Congress deemed the advance warning prohibition so important that it expressly included it in the Act and made violators subject to potential criminal sanctions. If the Secretary can apply the full panoply of the Mine Act's enforcement scheme to any regulation she promulgates pursuant to title I of the Act, surely she should be able to do the same regarding behavior that the lawmakers themselves took the trouble to prohibit. As the First Circuit has stated, "[i]t is . . . an established canon of statutory construction that a legislature's words should never be given a meaning that produces a stunningly counterintuitive result — at least if those words, read without undue straining, will bear another, less jarring meaning." *United States v. O'Neil*, 11 F.3d 292, 297 (1st Cir. 1993).

Our decision to accord this statutory prohibition in title I the same enforcement significance as a rule issued thereunder is consistent with prior court and Commission cases,

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additional evidence rebutting the presumption. Therefore, we conclude that Topper was on notice that the Secretary was seeking a presumption that the advance notice violation was S&S, had an opportunity to rebut that presumption, and failed to do so.

[8] The S&S references are found in sections 104(d)(1) and (e), 30 U.S.C. § 814(d)(1), (e). These provisions allow the issuance of withdrawal orders when certain events have occurred involving repeated violations. An S&S designation is a necessary, but not the sole prerequisite for issuing a withdrawal order under either of these sections.

[9] This definition remained unchanged from the Coal Act. *See* 30 U.S.C. § 802(*l*) (1976).

which have explicitly declined to adopt a narrow construction of the statutory definition of "mandatory health or safety standard." In *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 401, 405 (D.C. Cir.), *cert. denied*, 429 U.S. 858 (1976), the court rejected a literal reading of the Coal Act that would have permitted citations to be issued only for violations of "mandatory health and safety standards." In that case, the operator argued that, because a ventilation plan provision did not meet the statutory definition of a mandatory health or safety standard, the provision was unenforceable. 536 F.2d at 402. The court acknowledged that, under the plain meaning of the Coal Act, the operator was correct, but rejected such a "deceptively simple resolution of the problem." *Id.* at 405. The court foresaw that "a strict literal reading of the statute's definition provision" would render unenforceable many other protective provisions of the Coal Act that did not conform to the definition of a mandatory health or safety standard. *Id.* This was a "result" that "Congress could have hardly intended" since it "would greatly impair the statute's effectiveness as a tool for bringing about improvements in mine health and safety conditions." *Id.* Congress expressly approved the reasoning in *Ziegler* when it enacted the Mine Act. *Legis. Hist.* at 613.

In the *Consol Penalty Case*, 14 FMSHRC at 963-65, the Commission rejected an argument by the operator that the Secretary was without authority to propose civil penalties under section 110(a) of the Mine Act, 30 U.S.C. § 820(a), for violations of Part 50 regulations because they were not "mandatory health or safety standards."[10] Section 110(a) requires the Secretary to assess a civil penalty against "[t]he operator of a . . . mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this [Act] . . . ." 30 U.S.C. § 820(a). The Commission stated that section 110(a), "if read in isolation, appears to authorize civil penalties only for violations of the Act and of mandatory safety and health standards." *Consol Penalty Case*, 14 FMSHRC at 964. Rejecting this narrow view, the Commission adopted an approach that harmonizes sections 104(a), 105(a),[11] and 110(a), and concluded that civil penalties could be assessed for violations of any regulation promulgated under the Act, not just those meeting the definition of a mandatory health or safety standard. *Id.* at 964-65. The Commission held that each part of a statute should be construed in connection with other parts "so as to produce a harmonious whole." *Id.* at 965 (citing 2A *Sutherland Statutory Construction* § 46.05 (Singer 5th ed. 1992)). The Commission concluded that the Secretary's interpretation, allowing civil penalties for violations of Part 50 regulations, "advance[d] the goals of the Act and maintain[ed] the importance of civil penalties as a deterrence." *Id.*[12]

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[10] Regulations contained in Part 50 of 30 C.F.R. pertain to "Notification, Investigation, Reports and Records of Accidents, Injuries, Illnesses, Employment and Coal Production in Mines" and were promulgated under title V of the Act.

[11] 30 U.S.C. § 815(a).

[12] Other cases have refused to accept restrictive interpretations of Mine Act provisions. For instance, in *Emerald Mines Co. v. FMSHRC*, 863 F.2d 51 (D.C. Cir. 1988), the operator

In these cases, the D.C. Circuit and the Commission refused to restrict the Secretary's enforcement power to conform to a literal reading of the statute. The Commission reasoned that Congress would not put enforcement mechanisms in place only to then prevent the Secretary from using them against certain classes of violations. We determined that Congress did not intend to designate only mandatory safety and health standards as subject to citations and penalties, because such a restriction would dilute the effectiveness of the Mine Act. These considerations also apply to the enforcement of section 103(a). Barring the use of certain statutory enforcement mechanisms for violations of this provision is inconsistent with other sections of the Act demonstrating the high priority Congress placed on the enforcement of the advance notice prohibition. *See* slip op. at 10.

Allowing the Secretary to designate these violations S&S is consistent with the legislative history of the Mine Act. The Senate Committee disapproved the "unnecessarily and improperly strict view" of S&S taken by the Commission's predecessor, the Interior Board of Mine Operations Appeals, under the Coal Act in *Eastern Associated Coal Corp.*, 3 IBMA 331 (1974). *Legis. Hist.* at 619. In *Eastern Associated*, the Board based its narrow reading of S&S, in part, on the "explicit restriction to infractions of the mandatory standard." 3 IBMA at 349. In effect, our colleagues seek to return us to the age of weak and watered-down safety enforcement described by the Senate Committee. *See Legis. Hist.* at 592 ("Numerous disasters in both coal and non-coal segments of the industry underscore those areas of inadequacy of our current law and the fact that the enforcement and administration of our current mine health and safety programs has failed to produce the level of protection for our nation's miners which should be within the capacity of our current mine safety laws.")

In fact, the terms "violations of the law" and "mandatory health and safety standards" are used interchangeably throughout the legislative history of the Mine Act. For example, when discussing the newly enacted training requirements contained in title I, 30 U.S.C. § 825, the Senate Committee continually referred to this provision of the Act as a "mandatory safety and health training standard." *Legis. Hist.* at 637. The Senate Report also describes statutory language requiring the Secretary to issue citations for violations of the Act, or any standard, rule, order, or regulation, and immediately afterwards, in explaining the provision calling for the abatement of such violations, employs only the term "standard." *Id.* at 618. Indeed, the legislative history indicates that unwarrantable failure designations apply to violations of the Act. The Senate Committee responsible for drafting the bill that became the Mine Act, in discussing unwarrantable failure closure orders, explained: "[t]he unwarrantable failure order recognizes

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asked the court to vacate section 104(d)(1) withdrawal orders and citations, which were based upon an "investigation," because that section only authorized citations for unwarrantable failure found "upon any inspection." *Id.* at 54 (emphasis removed). The D.C. Circuit held, however, that "[t]he statute . . . resists such tidy construction," and ruled that the operator could be cited when an inspector investigates a site after the violation has occurred. *Id.* at 55; *see also Nacco Mining Co.*, 9 FMSHRC 1541, 1546 (Sept. 1987) (Commission has "resisted previous invitations to give the Mine Act a technical interpretation at odds with its obvious purpose").

that the law should not tolerate miners continuing to work in the face of hazards resulting from conditions *violative of the Act*." *Id.* at 619 (emphasis added). Of course, a withdrawal order under section 104(d)(1), 30 U.S.C. § 814(d)(1), is triggered by a violation that is both S&S and unwarrantable. Therefore, if a violation of the Act can trigger a withdrawal order under this section, MSHA must have the authority to cite it as S&S as well as unwarrantable.

The dissent reasons that, since the S&S terminology appears only in sections 104(d)(1) and (e), and those provisions refer to mandatory health or safety standards, the Secretary is precluded from attaching the S&S designation to a violation unless it involves a "mandatory health or safety standard." Slip op. at 31. However, our colleagues overlook the fact that section 104(a) is the source of the Secretary's power to issue citations for alleged violations of the Act. Section 104(d) is not a separate basis for the issuance of citations independent from section 104(a). *Utah Power & Light Co.*, 11 FMSHRC 953, 956 (June 1989). As the Commission has held, "the statutory language makes clear that 'significant and substantial' and 'unwarrantable failure' determinations by MSHA inspectors constitute special findings that are 'includ[ed]' in any citation" issued under the authority of section 104(a). *Id.* Thus, section 104(d) cannot and should not be read in isolation from section 104(a), which is exactly where our colleagues have gone astray.

Section 104(a) provides that a citation may be issued for violations of "this [Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this [Act]" and requires that it "describe with particularity the *nature* of the violation." 30 U.S.C. § 814(a) (emphasis added). Section 104(d) requires an inspector to determine, among other things, whether the violation "is of such *nature* as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (emphasis added). The Commission has concluded that, construing sections (a) and (d) together, the required description of the nature of the violation cited under section 104(a) may include a finding by the inspector that the violation is S&S. *Consolidation Coal Co.*, 6 FMSHRC 189, 192 (Feb. 1984) ("*Consol*"). This holding was not expressly limited, as our colleagues incorrectly assert (slip op. at 33), to mandatory health or safety standards. Rather, the case simply never presented the question of whether violations of the Mine Act cited under 104(a) could be S&S.

The Commission has not restricted S&S findings to violations of mandatory health or safety standards in the past. *See SOCCO*, 14 FMSHRC at 15 (remanding for determination of whether violation of safeguard was S&S); *LJ's Coal Corp.*, 14 FMSHRC 1224 (Aug. 1992) (remanding Part 50 violation for S&S analysis).[13] Our dissenting colleagues have provided us no

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[13] The dissent is mistaken when it questions our reliance on *SOCCO* for the proposition that the Commission has found violations to be S&S, even when the underlying requirement did not constitute a mandatory health or safety standard. *See* slip op. at 33. *SOCCO* involved a safeguard that, because it was issued by the inspector without notice and comment rulemaking, did not fall under the statutory definition of a mandatory health or safety standard. Because of this distinction, mandatory standards are construed broadly in a way that effectuates their

basis for deviating from our precedent now. They suggest that it would have been more appropriate for the Secretary to have responded to the violative conduct by proposing an individual penalty against Fields under section 110(c) or resorting to criminal sanctions under section 110(e). Slip op. at 34. Unlike our colleagues, we see no need to second guess the Secretary's choice of prosecutorial tools, and are troubled by their attempt to usurp the Secretary's enforcement prerogative. The Mine Act bestowed upon the Secretary the authority to choose among the enforcement provisions of that statute. 30 U.S.C. §§ 813, 814; *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

Our colleagues' complaint merely serves to underscore the incongruity of their position. Why would Congress allow an operator to go to prison for a violation that the Secretary was precluded from designating S&S? By what logic would Congress not permit MSHA to utilize the withdrawal orders available in sections 104(d) and (e) to deter conduct that could subject the transgressor to the even more severe sanctions available to the Secretary under sections 110(c) and (e)? *See Chemical Mfrs. Ass'n v. EPA*, 919 F.2d 158, 165 (D.C. Cir. 1990) (rejecting as "anomalous at best" interpretation that would have treated less stringently hazardous waste facilities that, by terms of statute, were meant to be treated more stringently).

In declaring the S&S designation in this case to have no legal impact, our dissenting colleagues ignore the historical role that an S&S designation has played, as a practical matter, in Mine Act enforcement. The designation of S&S has served as the agency's dividing line, separating the violations to be treated in a perfunctory fashion from those to be subjected to more individualized scrutiny. The D.C. Circuit recognized this fact of life in the *Consol Dust Case*, 824 F.2d 1071. In discussing the significance to be attached to a section 104(a) violation that was designated S&S, the court found that MSHA routinely applied a flat $20 penalty to non-S&S violations and excluded them from the operator's history of violations.[14] The court noted that the "[d]esignation of [section 104(a)] violations as significant and substantial . . . is necessary if the more severe sanctions available under [section] 104(e) are ever to be applied." *Id.* at 1078. This differential treatment for 104(a) violations designated S&S led the court to conclude that the

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purposes whereas safeguards are construed more narrowly. 14 FMSHRC at 8. Thus, when the Commission has determined that a safeguard violation was S&S, the Commission has indeed extended the S&S designation to a requirement not falling within the definition of a mandatory safety or health standard. We note that our dissenting colleagues acknowledge that "the Commission has traditionally viewed [a safeguard] as a mandatory safety standard" (slip op. at 33), finding this less than literal reading acceptable. Yet they refuse to consider a statutory requirement analogous to a mandatory safety standard for the purpose of designating violations S&S.

[14] The Secretary's current practice is to apply a flat penalty of $50 to non-S&S violations, 30 C.F.R. § 100.4, but the violations are now included in an operator's history as a result of the ruling in *Coal Employment Project v. Dole*, 889 F.2d 1127, 1138 (D.C. Cir. 1989), that the policy of excluding such violations from an operator's history itself violates section 110(i).

operator had suffered "a cognizable injury under the Act" and that the case was, therefore, ripe for review. *Id.* at 1079.

Our dissenting colleagues also fail to recognize that, if the Secretary availed herself of section 110(c) or criminal sanctions instead of utilizing an S&S designation, her evidentiary burden would be significantly greater. For example, if she attempted to prove a violation of section 110(c), as our colleagues suggest (slip op. at 34), she would need to produce evidence of a "knowing" violation. Furthermore, our colleagues' insistence that the Secretary could initiate criminal proceedings against an operator who provides advance notice ignores the fact that the ultimate decision to prosecute such a case lies with the U.S. Attorney, not the Secretary. It also ignores the significant differences between the burden of proof in an S&S proceeding and the more stringent standard in a criminal case.

We must constantly keep in mind the fundamental purpose of the Mine Act — to improve the health and safety of our nation's miners. The dissent's interpretation of section 104 runs counter to, and effectively acts to defeat, this objective. As the Supreme Court has noted:

> [I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose and object to accomplish . . . . Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees . . . seems inconsistent with Congress' intention . . . .

Public Citizen v. Department of Justice, 491 U.S. 440, 454-55 (1989).

As the Seventh Circuit has observed, "[s]ince the Act in question is a remedial and safety statute, with its primary concern being the preservation of human life, it is the type of enactment as to which a narrow or limited construction is to be eschewed." *Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974) (quoting *St. Marys Sewer Pipe Co. v. Director of United States Bureau of Mines*, 262 F.2d 378, 381 (3d Cir. 1959) (discussing Coal Act). The dissent's literal approach disregards this very basic tenet of statutory construction.

Based on the foregoing, we adopt the presumption that violations of section 103(a) are S&S and vote to affirm the judge's holding.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Commissioner Beatty, in favor of affirming the judge's S&S determination on substantial evidence grounds:

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995) (approving *Mathies* criteria); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (same). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

While I share the concerns of Chairman Jordan and Commissioner Marks about the serious repercussions for enforcement of the Mine Act that could result if operators believe that they are free to impede an MSHA inspection without the risk of an S&S designation, and agree with the result they reach in upholding the judge's determination that Topper's section 103(a) violation was S&S, I reach this conclusion by applying the *Mathies* criteria to the evidence adduced in this case, rather than by applying a presumption. To this end, I share the views of Commissioners Riley and Verheggen that the application of an S&S presumption involving this type of violation is not necessary or warranted. In my view, there is substantial evidence to support a determination that Topper's section 103(a) violation met all four elements of the *Mathies* test, and therefore was S&S.

Under the first criterion of *Mathies*, the violation at issue is the conduct of Topper President Fields in impeding the MSHA investigation by alerting the miners underground that two MSHA inspectors were on their way. Fields' actions were directly contrary to the specific instructions of the MSHA inspectors and in direct violation of the express language of section

103(a) of the Mine Act prohibiting advance notice of inspections.[1] *See* slip op. at 5.

The second element of *Mathies* requires finding a discrete safety hazard — that is, a measure of danger to safety contributed to by the violation. The safety hazard resulting from this violation is the increased likelihood of smoking materials underground because of MSHA's inability to conduct an effective inspection for smoking materials. This is particularly important in the instant case because of the propensity of miners at Topper's No. 9 mine to carry smoking materials underground, and their ability to conceal such materials. This conduct is well established by the record. First, the record indicates that smoking materials, in particular, are easy to conceal underground because cigarettes, lighters, and matches are small items that can be buried under ribs, loose coal, or rock dust, or sent down a conveyor belt in a matter of seconds. Tr. 72-73, 122. Further, the record reflects that smoking control plans enforced by operators are generally ineffective at keeping miners from carrying smoking materials underground because there are numerous ways miners can carry smoking materials without the operator's knowledge. Tr. 49-50, 55, 98. Indeed, there is record evidence that miners at Topper's No. 9 mine were discharged after they were found to have carried smoking materials underground. Tr. 180. This is a strong indication that Topper's smoking control plan was not totally successful at eradicating the presence of smoking materials underground. Even Topper President Fields conceded that there was "no way to stop" miners from carrying smoking materials underground. Tr. 189. Moreover, Fields admitted that if he was working underground and had smoking materials and knew the inspectors were coming, he "would probably hide it or get rid of it one way or the other." Tr. 190.

I also find that the above-described safety hazard, the unchecked presence of smoking materials underground, is reasonably likely to cause an injury-producing event, i.e., fire or explosion, satisfying the third element of the *Mathies* test. Where an operator impedes the inspection process of MSHA by providing advance notice to miners of an ensuing inspection, it is more likely than not that smoking materials will not be detected on the miners. Under these conditions, miners will develop a sense of security in carrying and utilizing smoking materials underground. In my view, this scenario, combined with the presence of combustible materials like coal, coal dust, and methane, creates a reasonable likelihood of an injury resulting from a fire or explosion.

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[1] I expressly decline to address the argument advanced by Commissioners Riley and Verheggen that only violations of mandatory health and safety standards may be found to be S&S under section 104(d) of the Mine Act. *See* slip op. at 31-34. In my view, this issue is not properly before the Commission, since it was concededly not raised by Topper in its petition for discretionary review. Under the Mine Act and the Commission's procedural rules, review is limited to the questions raised in the petition. 30 U.S.C. § 823(d)(2)(A)(iii); 29 C.F.R. § 2700.70(f). *See Wyoming Fuel Co.*, 16 FMSHRC 1618, 1623 (Aug. 1994), *aff'd mem.*, 81 F.3d 173 (10th Cir. 1996); *Donovan on behalf of Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 91 & n.6 (D.C. Cir. 1983).

Finally, I conclude that the fourth criterion of *Mathies* is established. Injuries resulting from a fire or explosion in an underground coal mine would be reasonably likely to be of a reasonably serious nature. Based on the foregoing, I conclude that the record in the instant case provides substantial evidence to support a determination that this violation was S&S.

In my view, an evidentiary-based determination that Topper's violation of section 103(a) is S&S under the *Mathies* criteria is consistent with, and strongly supported by, prior S&S findings of the Commission in cases involving violations of prophylactic safety standards. In these cases, the Commission made S&S findings without the use of a presumption. For instance, in *Buck Creek Coal Co.*, the Commission applied the *Mathies* test to an operator's failure to conduct a preshift examination in violation of 30 C.F.R. § 75.360(a), and concluded that the violation was S&S. 17 FMSHRC 8, 13-14 (Jan. 1995). In *Buck Creek*, the Commission reversed the judge's determination that the third element of *Mathies* had not been established, despite the absence of specific hazards disclosed upon examination of the area of the mine where miners had entered. *Id.* The Commission expressly declined to adopt the S&S presumption advocated by the Secretary. *Id.* at 14 n.9. *See also Kellys Creek Resources, Inc.*, 19 FMSHRC 457, 461 (Mar. 1997) (violation of 30 C.F.R. § 75.388 for failure to drill boreholes); *Manalapan*, 18 FMSHRC at 1381-83 (Commissioners Holen and Riley, concurring) (failure to conduct preshift examination); *but see Manalapan*, 18 FMSHRC at 1388-89 (Chairman Jordan and Commissioner Marks, concurring) (recognizing S&S presumption where preshift standard violated).[2]

Like the preshift examination and borehole drilling requirements involved in those cases, section 103(a)'s inspection requirement and prohibition on advance notice are designed to ensure the timely detection of safety hazards and prevent the exposure of miners to those hazards. As Chairman Jordan and Commissioner Marks point out in their separate opinion (slip op. at 9),

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[2] Although it has no binding precedential effect on the Commission (*see* 29 C.F.R. § 2700.72), I am also persuaded by the reasoning employed by Commission Administrative Law Judge James Broderick in concluding that the failure to conduct a preshift examination was S&S in *Emerald Mines Corp.*, 7 FMSHRC 437 (Mar. 1985) (ALJ). Despite the obvious inability to determine the precise type of hazards that the preshift inspection might have disclosed, if conducted, Judge Broderick explained that:

> [t]he whole rationale for requiring preshift examinations is the fact that underground coal mines are places of unexpected, unanticipated hazards: roof hazards, rib hazards, ventilation and methane hazards. I conclude that failure to make the required preshift examination of active workings in an underground coal mine contributes to "*a measure of danger to safety*" which is reasonably likely to result in a reasonably serious injury.

Id. at 444 (emphasis added).

section 103(a)'s requirement for unannounced inspections is a prophylactic safety measure whose importance was explicitly recognized by Congress in its adoption of the Mine Act. In addition, Congress expressed particular concern about the hazards of smoking in underground mines by enacting section 317(c) to prevent smoking-related ignitions and explosions. *See* 30 U.S.C. § 877(c). Section 317(c) of the Mine Act was based on an identical provision in the predecessor statute, the Coal Act. The section-by-section analysis of the Senate Report that accompanied the passage of the Coal Act notes:

> From 1952 through 1968, the Bureau of Mines records indicate that 28 actual and nine possible local gas ignitions or explosions were caused by workmen using smoking materials, matches, or lighters underground. In many cases, matches were used, in accordance with the practice at the mine, to light fuses. In others, matches were used to light cigarettes. As a result of the 37 occurrences, 38 men were injured, and 13 were killed.

S. Rep. No. 411, 91st Cong., 1st Sess. 51 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 177 (1975). Further, Congress reinforced the prohibition against smoking by enacting section 110(g) of the Mine Act,[3] under which a civil penalty can be assessed directly against a miner for smoking or carrying smoking materials underground.

Based on my conclusion that an S&S finding can be upheld on substantial evidence grounds, I see no need to employ a presumption to achieve that result. In my view, the use of a broad-based presumption to determine whether Topper's section 103(a) violation is S&S unduly complicates the analysis, and is contrary to the *Mathies* requirement that the S&S determination be based on "the particular facts surrounding th[e] violation." *Mathies*, 6 FMSHRC at 3 (citing *National Gypsum*, 3 FMSHRC at 825); *see also Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992) (application of presumption is contrary to *Mathies* analysis based on careful examination of evidence surrounding violation).

I also believe that the Secretary has failed to develop a record in this case that establishes a need for such a change in the law. In fact, there is no Commission precedent supporting the use of a presumption to establish S&S other than one case involving the respirable dust standards. In the *Consol Dust Case*, the Commission held that when the Secretary proves a violation of the respirable dust standard (30 C.F.R. § 70.100(a)), "a presumption arises that the third element of the significant and substantial test — a reasonable likelihood that the health hazard contributed to will result in an illness — has been established." 8 FMSHRC at 899. The Commission adopted

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[3] Section 110(g) provides: "Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Commission. . . ." 30 U.S.C. § 820(g).

the presumption because of the virtual impossibility of determining the contribution of a single incident of overexposure to respirable dust as it relates to development of respiratory diseases, including pneumoconiosis. "[I]t is not possible to assess the precise contribution that a particular overexposure will make to the development of respiratory disease." *Id.* at 898. In my view, the Secretary has not shown, in this case, a similar need for the use of a presumption in analyzing violations involving advance notice of an MSHA inspection, in particular the type of inspection involved in this case.[4] Thus, I decline to decide on the present record that, in determining whether an operator's impedance of an MSHA inspection is properly designated as S&S, we should apply a presumption that shifts the burden of proof to the operator.

In my view, the position that the *Mathies* analysis is inadequate, or impossible to apply, when determining the S&S nature of this type of violation is based on overly restrictive interpretation of certain criteria — i.e., the concern that it is not possible to ascertain the specific hazards an inspector would have found if miners had not been alerted to the inspection. I believe that the act of impeding an MSHA inspection results in a hazard by creating an increased potential for unchecked smoking materials underground, thereby creating a reasonable likelihood of injury sufficient to satisfy the third element of the *Mathies* test, despite the inability to determine precisely the specific hazards the inspectors might have found if no advance warning was given. This analysis is consistent with the approach followed by the Commission in prior decisions. *See, e.g., Buck Creek*, 17 FMSHRC at 13-14; *Manalapan*, 18 FMSHRC at 1381-83 (Commissioners Holen and Riley, concurring); *see also Kellys Creek*, 19 FMSHRC at 461 (failure to drill boreholes). [5]

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[4] It is also significant that the presumption adopted in the *Consol Dust Case* covers only the third *Mathies* element, with other elements established through violation of the dust standard. In this case, however, the presumption advocated by the Secretary would be used to establish all four elements of the *Mathies* test.

[5] Chairman Jordan and Commissioner Marks assert that the difference between their analysis and mine is "largely only semantic." Slip op. at 15 n.6. I respectfully disagree with my colleagues on this point, since I believe that the two lines of analysis differ significantly on two important points. First, the second element of *Mathies* requires that we find a discrete safety hazard — that is, a measure of danger to safety contributed to by the violation. My colleagues argue that *Mathies* does not provide the proper framework because "it is impossible to determine the *particular hazard* 'contributed to by the violation.'" *Id.* at 11 (emphasis added). As I have explained, however, I do not believe it is necessary that we find a *particular hazard* upon which to predicate the *Mathies* analysis. Instead, in my view, it is sufficient that a "measure of danger to safety" is created when MSHA inspections are thwarted by an operator's advance notice. Support for this approach can be found in prior Commission cases. *See Manalapan*, 18 FMSHRC at 1396 (Chairman Jordan and Commissioner Marks, concurring) (S&S determination should be based on "the serious potential for harm that can confront miners" as result of violation); *Emerald Mines*, 7 FMSHRC at 444 (failure to make required preshift examination in underground coal mine found to be S&S because it "contributes to '*a measure of danger to*

As stated earlier, I am persuaded by the reasoning employed by Judge Broderick in *Emerald Mines*, where he held that the determination of the risk posed by this type of violation should not turn on the fortuitous circumstances that the unexamined area did not contain the hazardous conditions the exam was designed to detect:

> How does one evaluate the *hazard* to which the violation contributes? By what is disclosed on an examination of the area after the examination? Emerald contends that this is the test. But the hazard and the violation here involve, not the condition of the area as such, but rather the assigning of miners to work in an uninspected area. . . . *Can it seriously be argued that failure to perform one of these examinations is not significant and substantial if a post-violation examination does not show hazardous conditions*?

7 FMSHRC at 444 (emphasis added). Applying Judge Broderick's reasoning, the hazard in this case is not so much the actual discovery of smoking materials on a miners' person as the threat of miners carrying and using smoking materials without the fear of an unannounced smoking inspection by MSHA. Under this line of analysis, it follows that, contrary to the concern expressed by Chairman Jordan and Commissioner Marks (slip op. at 12), a presumption is not necessary to prevent an operator from deriving legal advantage from the lack of evidence concerning the hazards an inspector *might* have found if the investigation had not been impeded by advance notice. As Judge Broderick articulates, it is the failure to make the required examination, or in this case an inspection without advance notice, which contributes to "a measure of danger to safety" that is reasonably likely to result in a reasonably serious injury. *Id.*

Also, I find the application of an S&S presumption particularly troubling in this case because it appears that Topper never had an opportunity to adduce evidence at the hearing to attempt to rebut the presumption. As Commissioners Riley and Verheggen point out (slip op. at 35), the Secretary first argued for a presumption in her post-hearing brief, submitted after the close of the hearing. Therefore, at the time of the hearing, Topper had no notice that the Secretary would argue for application of an S&S presumption, and therefore no apparent reason to argue against application of the presumption or to introduce evidence that it could rely upon to rebut such a presumption. In these circumstances, I believe that it would be unfair to retroactively apply an S&S presumption and conclude that Topper failed to rebut the presumption. If such a presumption were to be applied in this case, I agree with Commissioners

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safety' which is reasonably likely to result in reasonably serious injury") (emphasis added). Second, the presumption applied by my colleagues shifts the burden of proof to the operator to show that the violation was *not* S&S. In my view, this is a significant departure from the general rule that the burden of proving a violation, as well as its nature and characteristics, rests entirely with the Secretary.

Riley and Verheggen that it would be fair and equitable to remand the case to afford Topper a meaningful opportunity to rebut the presumption. *See* slip op. at 36.

On this point, I am also concerned about the circumstances under which this type of presumption may be rebutted and whether, as a practical matter, an operator will ever have a meaningful opportunity to rebut the presumption. If an operator is not afforded an opportunity to rebut the presumption, then the presumption is in effect an irrebuttable presumption, raising additional concerns about the fairness and propriety of its application in this and future cases. "'[P]ermanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments'" because the Due Process Clause requires "a more individualized determination." *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 644-45 (1974) (quoting *Vlandis v. Kline*, 412 U.S. 441, 447 (1973)).

In my opinion, if no smoking materials are found after advance warning of an inspection, as occurred in this case, the question becomes: how can the operator successfully rebut the presumption? Is it sufficient to elicit testimony from the MSHA inspector that he searched the miners in the area and found no smoking materials? If so, then the operator will likely be able to successfully rebut the presumption in virtually every case. To this end, the adoption of the Secretary's proposed presumption may achieve a result contrary to that intended, thereby precluding a finding that an operator's interference with an MSHA investigation is S&S.

Conversely, the operator may be required to elicit testimony from all miners present in the area inspected designed to show that they did not possess smoking materials at the time of the inspection in spite of the advance notice provided by the operator. This gives rise to another potential problem — the possibility that miners, after receiving the advance warning, may have concealed smoking materials and are thereafter reluctant to admit this fact because of their exposure to discharge under the operator's smoking control plan and the threat of penalties under section 110(g). While we certainly cannot anticipate that miners or other witnesses will not testify truthfully at a hearing involving this type of violation, this type of situation could provide a strong inducement for miners to conceal the truth in order to protect their jobs and livelihood and avoid the imposition of penalties. Under this analysis, the Secretary may find herself in a posture where the operator is able to successfully rebut the presumption and no S&S determination is made.

Finally, I believe that the reliance of Commissioners Riley and Verheggen on the "impressive array of prosecutorial resources at [the Secretary's] disposal" to combat this type of "extremely serious" violation (slip op. at 36) is misplaced, at least for purposes of this case. In this case, the Secretary relied *only* upon the S&S designation, and the consequences that flow from it, as a prosecutorial tool for penalizing this violation.[6] As indicated above, I share the

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[6] Commissioners Riley and Verheggen contend that no consequences flow from the S&S designation in this case based on their view that the S&S designation is only applicable to, and only carries enforcement consequences in connection with, violations of mandatory health and

concerns of Chairman Jordan and Commissioner Marks about the serious repercussions for enforcement of the Mine Act that could result if operators believe that they are free to impede an MSHA inspection without the risk of an S&S designation. In my view, these concerns are best rectified in this case by finding this violation to be S&S on substantial evidence grounds through application of the *Mathies* test.

Based on the foregoing, I vote to affirm the judge's S&S holding on substantial evidence grounds.

Robert H. Beatty, Jr., Commissioner

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safety standards. Slip op. at 33-34, 36. Having declined to consider this issue on the ground that it is not properly before the Commission (*id.* at 24 n.1), I do not necessarily agree with the view of my colleagues that the S&S designation at issue in this case has no enforcement consequences or legal effect.

Commissioners Riley and Verheggen, in favor of reversing the judge's S&S determination:

For the reasons set forth below, we find that, as a matter of law, the judge's S&S finding in this case is in error. We therefore dissent from our colleagues' decisions affirming in result the judge's S&S finding.

A. Whether the Judge Properly Found that the Violation Was S&S

Our colleagues have set forth two rationales for affirming the judge's S&S determination in this case. The Chairman and Commissioner Marks would sidestep the Commission's *Mathies* test and create a new presumption that violations of section 103(a) of the Mine Act are S&S. Slip op. at 12 (hereinafter, we refer to the opinion of the Chairman and Commissioner Marks as the "presumption opinion"). They feel that "the *Mathies* criteria fail to provide a framework for determining the seriousness of the violation[]," and that "it is impossible to determine the particular hazard 'contributed to by the violation.'" *Id.* at 11. Commissioner Beatty finds no such impediments to applying *Mathies*. He carefully weighs the evidence and finds that the record supports the judge's conclusion that the violation was S&S. *Id.* at 23-26.[1]

All our colleagues, however, have glossed over a fundamental problem with the Secretary's S&S allegation in this case. The first element of the *Mathies* test requires the Secretary to prove an "underlying violation of a *mandatory safety standard*." 6 FMSHRC at 3-4 (emphasis added). But here, the Secretary has proven a violation of a provision of the Mine Act that is not a mandatory safety standard. Her allegation of S&S thus fails to meet the first element of the *Mathies* test, and on this ground, the judge legally erred at the very threshold of his decision.

The S&S terminology appears only in sections 104(d)(1) and (e) of the Mine Act, both of which are limited in scope to violations of "mandatory health and safety standards." 30 U.S.C. § 814(d)(1), (e). Section 104(a) of the Act, on the other hand, grants the Secretary the authority to cite violations of the "[Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to [the Act]." 30 U.S.C. § 814(a). The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question in issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder*

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[1] In its brief, Topper appears to have assumed that the discrete safety hazard at issue is miners carrying smoking materials underground, which, in turn, would pose the hazard of a fire or explosion in the mine if such smoking materials were used underground. T. Br. at 7-8. Commissioner Beatty treats this as the hazard at issue, then analyzes whether the third and fourth *Mathies* elements have been met. Slip op. at 24-25. Were we to overlook the problems posed by the first *Mathies* criterion, we would join Commissioner Beatty's opinion. In fact, we find that his analysis of the third element, especially, is eloquent proof of the continuing vitality of the *Mathies* test.

Basin Coal Co., 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Here, by their plain terms, sections 104(d)(1) and (e) are limited in application to violations of mandatory health and safety standards. The Act thus limits the Secretary to citing violations as S&S only when such violations are of mandatory health and safety standards.

We do not, as argued in the presumption opinion, "overlook the fact that section 104(a) is the source of the Secretary's power to issue citations" by reading section 104(d) "in isolation from section 104(a)." Slip op. at 19. Instead, we begin with the axiomatic proposition that the Secretary's power to cite mine operators for violations of the Act originates in section 104(a), which broadly covers violations of the "[Act], or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to [the Act]." 30 U.S.C. § 814(a). In various sections of the Act, Congress then set forth additional prosecutorial tools for the Secretary to use in connection with specific actors and offenses, such as sections 110(c) and (d) addressing individual civil and criminal liability, section 110(e) addressing advance notice of inspections, section 110(f)[2] addressing false statements made to the Secretary, and section 110(g) addressing smoking in mines. In section 104(d), Congress provided the Secretary with the power to make special findings in connection with one broad category of offenses, violations of mandatory health and safety standards, when such violations are "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" or "caused by an unwarrantable failure of [an] operator to comply with such mandatory health or safety standards." Section 104(d) thus addresses only one category of violations enumerated in section 104(a): violations of mandatory health or safety standards.

Read *together*, sections 104(a) and (d) thus create a hierarchy of enforcement under which the Secretary can bring additional enforcement sanctions to bear on operators who violate mandatory health and safety standards. *See Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) ("The Mine Act's use of different terms within the same statute demonstrates that Congress intended the different terms to censure different types of operator conduct within a graduated enforcement scheme."). It is not irrational to infer that Congress created these additional separate enforcement sanctions beyond section 104(a) because it considered violations of mandatory health and safety standards as graver than, say, Part 50 reporting requirements, for which no such additional sanctions were created in section 104, any of the subsections of section 110, or any other provision of the Act. Similarly, Congress considered advance notice of inspections so critical a violation that it created a separate provision of the Act providing for severe criminal sanctions. *See* 30 U.S.C. § 820(e).

Although it is argued in the presumption opinion that it is illogical for section 103(a), the Act's prohibition against interfering with inspections, to receive less enforcement significance than "standards" (slip op. at 16), Congress placed many "standards" in titles II and III of the Act,

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[2] 30 U.S.C. § 820(f).

clearly designating them as *mandatory* health or safety standards. Congress then singled out such "mandatory health or safety standards" in sections 104(d) and (e) as meriting different, more severe sanctions when an operator has violated them repeatedly. Similarly, Congress focused on advance notice violations as meriting different and very severe sanctions: criminal liability. 30 U.S.C. § 820(e). The Act speaks for itself, and has its own internal logic. A bald assertion of illogicality, divorced from the specific context of the Act, means very little, and is in fact at odds with the plain meaning and logical structure of the Act.

In passing on a question similar to the one we raise here, the Commission has concluded that "the required description of the nature of the violation of a mandatory safety or health standard cited under section 104(a) may include a finding . . . that the violation is significant and substantial." *Consol*, 6 FMSHRC at 192. The holding of this *Consol* case, however, is limited to violations of mandatory health and safety standards cited as S&S under section 104(a) — whereas here, a violation of the Act has been cited as S&S under section 104(a). A *SOCCO* case is cited in the presumption opinion for the proposition that the "Commission has not restricted S&S findings to violations of mandatory health and safety standards in the past." Slip op. at 19 (citing *SOCCO*, 14 FMSHRC at 15). This citation is just plain wrong. *SOCCO* involved a violation of a safeguard, which the Commission has traditionally viewed as a mandatory safety standard. 14 FMSHRC at 8; *see also Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985). We believe that the other case cited, remanding a Part 50 violation for an S&S analysis (slip op. at 19 (citing *LJ's Coal Corp.*, 14 FMSHRC 1224)), was wrongly decided. We would acknowledge the implied point here, that the Secretary's practice of citing as S&S violations of provisions other than mandatory safety and health standards appears to have stood the test of time. Only until now, however, in our opinion, because this practice is at odds with the Act. As the Supreme Court has held, the age of an agency interpretation of its enabling statute "is no antidote to clear inconsistency with [the] statute." *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (striking down Department of Veterans Affairs regulation that had been on books for 60 years). As the Court noted, if an agency interpretation "flies against the plain language of the statutory text, [this] exempts courts from any obligation to defer to it." *Id.*

We are also troubled by the policy implications of the Secretary's insistence on citing violations of provisions other than mandatory safety and health standards as S&S under section 104(a). An S&S allegation in a section 104(a) citation does not trigger the sanctions of section 104(d). Nor can such an allegation be used to establish a pattern of violations of anything other than mandatory safety and health standards under section 104(e), which by its plain terms is limited to violations of mandatory health and safety standards. *See* 30 U.S.C. § 814(e). A section 104(a) S&S designation is merely an allegation that a particular violation is serious. We thus believe that no legal consequences flow from such a designation that the Secretary could not more efficiently accomplish under her Part 100 civil penalty regulations,[3] including her broad

[3] Even under the Secretary's single penalty assessment regulation, 30 C.F.R. § 100.4, she has broad discretion to assess a penalty based upon the unique circumstances of each case, notwithstanding whether a citation has been designated S&S.

discretion to impose special assessments (*see* 30 C.F.R. § 100.5), or under the various provisions of section 110 of the Act aimed at specific violations. We believe that the Secretary has wasted her resources and those of the Commission by resorting to a term of art under sections 104(d) and (e) to measure the gravity of a section 104(a) violation.

A hue and cry is raised in the presumption opinion that we "seek [a] return . . . to the age of weak and watered-down safety enforcement." Slip op. at 18. We believe, however, that it is the *Secretary* who has engaged in "weak and watered-down safety enforcement" by making an allegation of seriousness against Topper that has had absolutely no legal effect other than to prolong this litigation. The Secretary's S&S allegation is nothing more than a shorthand description of the seriousness or gravity of the offense — it accomplishes *nothing else* and has no legal effect beyond its descriptive function.[4] Instead of making an empty gesture, the Secretary ought to have brought to bear sanctions based on clear statutory provisions, such as sections 110(c) and (e), that could have had real potential for deterring such violations in the future.

We agree with the presumption opinion that "the fundamental purpose of the Mine Act [is] to improve the health and safety of our nation's miners." Slip op. at 21. But we dispute the claim that our "interpretation of section 104 runs counter to, and effectively acts to defeat, [the Mine Act's] objective." *Id.* In fact, it is the *Secretary's* misguided use of S&S here that "defeats" the important objectives of the Mine Act because her S&S allegation essentially trivializes S&S insofar as the allegation lacks any legal effect. Moreover, the principle of liberal construction of remedial statutes does not give the Secretary or the Commission "'license . . . to disregard entirely the plain meaning of the words used by Congress.'" *Belland v. Pension Benefit Guar. Corp.*, 726 F.2d 839, 844 (D.C. Cir. 1984) (quoting *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 241 (D.C. Cir. 1981)).

The argument is made in the presumption opinion that we "attempt to usurp the Secretary's enforcement prerogative." Slip op. at 20. But one of the central missions of this Commission is to interpret the Mine Act and ensure that the Secretary has followed its dictates. Congress established the Commission to, among other things, "develop a uniform and comprehensive interpretation of the law . . . [to] provide guidance to the Secretary in enforcing the [Mine Act]." *Nomination Hearing Before the Senate Comm. on Human Resources*, 95th Cong., 2d Sess. 1 (1978). Congress explicitly charged the Commission "with the responsibility . . . for reviewing the enforcement activities of the Secretary." *Id.* Whether the Secretary's use of S&S allegations is consistent with the Mine Act, the question we examine here, "fall[s] squarely within the Commission's expertise." *Thunder Basin*, 510 U.S. at 214.

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[4] The Secretary's S&S designation had no impact on the penalty assessed by the judge — he found Topper's violation to be "very serious" and the result of high negligence without any reference to the S&S designation. 17 FMSHRC at 955. Nor does the S&S designation have any bearing whatsoever on the ruling announced above by the full Commission affirming the judge's penalty assessment. Slip op. at 6-7.

B. Whether Violations of Section 103(a) Should Be Presumptively S&S

Although we have found that the judge erred as a matter of law in concluding that Topper's violation of section 103(a) of the Mine Act was S&S on grounds other than those upon which he relied, we also reject the judge's conclusion that the violation was presumptively S&S. On this question, we concur with the opinion of Commissioner Beatty. *See* slip op. at 26-29. In addition to the reasons he outlines why an S&S presumption should not be adopted in this case, we add only that it is well established that the burden of establishing S&S rests on the Secretary (*Mathies*, 6 FMSHRC at 3-4), except under extraordinary circumstances not found in this case.[5] *Cf. Manalapan*, 18 FMSHRC at 1378-83 (separate, non-binding opinion of Commissioners Holen and Riley).

We are also troubled that the scheme advanced in the presumption opinion would fail to afford Topper the opportunity to rebut a newly created presumption. As with any rebuttable presumption, a new presumption here would "shift[] the burden of producing *evidence*" from the Secretary to Topper. 2 *McCormick on Evidence* § 343, at 454 (emphasis added). It follows that Topper would have to be afforded the opportunity to produce evidence to rebut any newly created presumption, rather than be held to arguments already made on a record already closed.

In determining whether Topper has had any opportunity to rebut the Secretary's presumption, the focus must be on whether, in response to the Secretary's allegations, Topper was able to build a record on which the judge could have entered a finding that the company either rebutted an S&S presumption or failed to meet its burden. The record is clear. Topper had no such opportunity because a presumption was not part of the theory of the Secretary's case until after the record closed. No presumption appears on the face of the citation at issue. No presumption is mentioned in the Secretary's pre-hearing submissions. No presumption was mentioned at trial.[6] No presumption was ever advanced as part of a motion to reopen the record. The Secretary argued for a presumption *only after the hearing* in her post-hearing brief. Once it saw the point being argued in the Secretary's post-hearing brief, Topper was under no obligation to respond because the Secretary bears the burden of proof.

We also reject the approach taken in the presumption opinion of applying a new presumption retroactively. As the Supreme Court has held, "[r]etroactivity is not favored in the

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[5] In fact, the Commission has created only one such presumption, in the *Consol Dust Case* (8 FMSHRC 890).

[6] The closest the Secretary came at trial to arguing that a presumption should have been adopted was when her inspector testified that, in the words of our colleagues' opinion, "the agency was going to 'assum[e]' that the miners had smoking materials that they had discarded at the time of the inspection." Slip op. at 15 n.7. But this is a far cry from the sweeping presumption the Secretary urges upon us, which would have us presume that any of a vast myriad of violations exists. *See* S. Br. at 26-27.

law," *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (citations omitted), a maxim the Court has repeatedly reaffirmed. *See Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. ___, 117 S. Ct. 1871, 1876 (1997); *Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891, 895 (1996) ("The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption 'is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.' . . . In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its law-making power to modify bargains it has made with its subjects."); *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) ("we apply this time-honored presumption unless Congress has clearly manifested its intent to the contrary"). In its would-be application in this case, the Secretary's presumption thus ironically runs afoul of a more fundamental presumption. The Secretary failed to advance her presumption in the adjudicatory proceeding in which the record of the case was made. Given a new presumption, the only fair and equitable way to apply it in the current proceeding would be to provide Topper an opportunity to make a record on which it could argue that it be exonerated of the Secretary's S&S allegation.

C. Conclusion

In concluding that Topper's violation was not S&S, we do not mean to suggest that the violation was not serious. In fact, this violation was extremely serious. Fields intentionally defied the express direction of the inspector not to alert the miners that inspectors were on their way to the working section. Such conduct is of the highest order of negligence. We believe, however, that the Secretary's focus on S&S is misplaced. By fixating on S&S, the Secretary appears to have lost sight of the impressive array of prosecutorial resources at her disposal. As Commissioner Beatty states, "[i]n this case, the Secretary relied *only* upon the S&S designation, and the consequences that flow from it, as a prosecutorial tool for penalizing this violation." Slip op. at 29 (emphasis in original). But as we have pointed out, no consequences flow from it — it is merely an allegation of seriousness with no deterrent or any other legal effect. Topper's violation of the Mine Act is essentially a square peg that simply cannot be forced into the round hole of S&S.

For the foregoing reasons, we find that the judge erred as a matter of law in concluding that Topper's violation was S&S, and would thus reverse his S&S holding.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
April 30, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 94-15
WAYNE R. STEEN, employed by AMBROSIA COAL & CONSTRUCTION COMPANY	:	

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

DECISION

BY: Marks, Riley, Verheggen, and Beatty, Commissioners:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 801 et seq. (1994), is before the Commission a third time. The Commission has twice previously remanded this matter for reassessment of a penalty against Wayne R. Steen, employed by Ambrosia Coal & Construction Company ("Ambrosia"). *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552 (Sept. 1996) ("*Ambrosia I*"); *Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819 (May 1997) ("*Ambrosia II*"). On second remand, the judge assessed a penalty of $2000 against Steen. 19 FMSHRC 1471 (Aug. 1997) (ALJ). The Commission granted Steen's petition for discretionary review. For the reasons that follow, we vacate the judge's penalty assessment and assess a penalty of $1200 against Steen.

I.

Factual and Procedural Background

The background facts in this proceeding are fully set forth in *Ambrosia I* (18 FMSHRC at 1553-56), and are summarized in relevant part here. On June 3, 1992, during an inspection of the Ambrosia Tipple by the Department of Labor's Mine Safety and Health Administration ("MSHA"), a highlift was found to have been operated for over a month with bad brakes. *Id.* at 1553-54. A section 104(d)(1) order was issued to Ambrosia alleging a significant and substantial ("S&S") and unwarrantable violation of 30 C.F.R. § 77.1605(b), later modified to charge a

violation of section 77.404(a).[1] *Id.* at 1554. On the basis of an MSHA special investigation, the Secretary also proposed that a $3500 penalty be assessed against Steen under section 110(c). *Id.* at 1555. Ambrosia and Steen challenged the Secretary's enforcement actions, and the matters were consolidated and proceeded to a hearing before Administrative Law Judge William Fauver. *Id.*

In his first decision, Judge Fauver found that the lack of operable brakes on the highlift amounted to an unsafe condition and that the operator had failed to remove the equipment from service despite its knowledge that the brakes were bad. *Id.* He concluded that Ambrosia violated section 77.404(a), and that the violation was S&S and the result of Ambrosia's unwarrantable failure to comply with the standard. *Id.* at 1555-56. The judge further concluded that, as foreman, Steen was a corporate agent under section 110(c) of the Mine Act, and that he had knowingly authorized Ambrosia's violation because he knew that the brakes were bad for at least five days before the inspection, yet failed to repair them or remove the highlift from service. *Id.* at 1556. The judge assessed a $4000 civil penalty against Steen. *Id.*

On review, the Commission affirmed Judge Fauver's findings of a violation of section 77.404(a), that the violation was S&S and unwarrantable, and that Steen was liable for the violation under section 110(c). *Id.* at 1556-63. Regarding Steen's penalty, the Commission concluded that the judge erred because he "failed to set forth findings applying the statutory criteria [of section 110(i) of the Mine Act] to Steen as an individual," and remanded the case with instructions to reassess the penalty. *Id.* at 1565-66. On remand, the judge stated that he "considered Respondent Steen's financial situation in [his] original decision," and found that Steen's financial obligations warranted amortizing the payment of a civil penalty which the judge assessed at $3500. 18 FMSHRC 1874, 1875, 1876 (Oct. 1996) (ALJ).

In *Ambrosia II* (19 FMSHRC at 823-25), the Commission vacated the penalty against Steen and remanded with the instruction to reassess the penalty after making specific findings on the section 110(i) criteria regarding ability to continue in business and size in accord with the Commission's decision in *Sunny Ridge Mining Co.*, 19 FMSHRC 254 (Feb. 1997). In *Sunny Ridge*, the Commission held that its "judges must make findings on each of the [statutory penalty] criteria [of section 110(i)] as they apply to *individuals*." *Id.* at 272 (emphasis in original). In *Ambrosia II*, the Commission further explained that "the relevant inquiry with respect to the criterion regarding the effect on the operator's ability to continue in business, as applied to an individual, is whether the penalty will affect the individual's ability to meet his financial obligations. . . . With respect to the 'size' criterion, . . . as applied to an individual, the relevant inquiry is whether the penalty is appropriate in light of the individual's income and net worth." 19 FMSHRC at 824.

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[1] Section 77.404(a) provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

On remand a second time, the parties submitted supplemental briefs, including financial information on Steen and his wife. 19 FMSHRC at 1472-73. In an unpublished prehearing order, Judge Fauver stated that "[s]ince Mr. Steen's tax returns are jointly filed, his income and financial obligations will be considered on the basis of household income and financial obligations." Order at 1 n.1 (June 25, 1997). The case was then reassigned to Administrative Law Judge David F. Barbour, who made findings on Steen's ability to continue in business and size. 19 FMSHRC at 1474-75.

Over the objections of Steen's counsel, Judge Barbour followed Judge Fauver's approach as to household income and financial obligations. *Id.* at 1474. Finding that Steen and his wife "do not live economically discrete lives," the judge concluded:

> I must make findings based on fiscal reality not its artificial segmentation. Therefore, I will consider their joint income as Steen's income, their joint property as his property, and their joint liabilities as his liabilities.

Id. The judge reduced Steen's penalty from $3500 to $2000, and ordered him to pay the penalty in 10 monthly installments. *Id.* at 1475-76.

II.

Disposition

Both Steen and the Secretary agree that the judge erred in failing to segregate the income and financial obligations of Steen and his wife for purposes of making findings on the section 110(i) criteria regarding ability to continue in business and size. PDR at 4-7; S. Br. at 9-10. Both parties further agree that in so doing, the judge failed to abide by the Commission's remand order to ascertain Steen's individual income and net worth. PDR at 5; S. Br. at 9.

Analogizing to common law principles of property, Steen argues that the judge erred in attributing to Steen "sole ownership . . . of the property of the marital estate." PDR at 4-5. In addition, Steen argues that the judge's findings are problematic for various reasons of public policy. *Id.* at 5-7. Finally, Steen argues that the judge's penalty is excessive. *Id.* at 7; Steen Br., passim. The Secretary argues that "while the judge properly considered Steen's family's income, expenses, and assets, he improperly failed to then adjust his findings in order to reflect Steen's *individual* financial position." S. Br. at 9 (emphasis in original). Notwithstanding her position on this issue, the Secretary argues "that a proper penalty in this case should be no less than $2,000, and no more than $3,500, especially when the judge has amortized payment of the penalty over many months." *Id.* at 10.

The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact, bounded by proper consideration of the

statutory criteria and the deterrent purposes underlying the Act's penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).[2] While "a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

At issue here is whether section 110(c) of the Mine Act, under which Steen has been found liable for violating section 77.404(a), applies to Steen as an individual or Steen's household for purposes of determining the extent of his financial liability under section 110(i). Although section 110(i) cannot help us resolve this issue since it refers to operators rather than individuals, proper construction of the provision that forms the basis for Steen's liability, section 110(c), does provide an answer.

Section 110(c) subjects "any director, officer, or agent . . . to the same civil penalties . . . that may be imposed upon a person under [sections 110(a) and 110(d)]." 30 U.S.C. § 820(c). The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). For purposes of this case, Steen is Ambrosia's agent (*Ambrosia I*, 18 FMSHRC at 1563) — but his wife clearly is not, nor has any party to the case even suggested that she be found an agent of Ambrosia. She thus cannot be subjected to financial liability under section 110(c), which is arguably the effect of the judge's decision in this case.

The judge noted that, "[l]ike most domestic partners, [the Steens] function as an economic unit. They commingle economic resources and jointly assume economic responsibilities." 19 FMSHRC at 1474. After noting that he had to "make findings based on fiscal reality not its artificial segmentation" (*id.*), the judge found that Steen had "monthly family expenses of $2,965 . . . [and] monthly family income of $3,156." *Id.* at 1475. But insofar as her

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[2] Section 110(i) of the Mine Act requires the Commission to consider six criteria in assessing appropriate civil penalties:

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

30 U.S.C. § 820(i).

earnings and share of the household net worth have been used explicitly by the judge as factors to adjust the assessed penalty, Mrs. Steen is arguably made to bear an additional and identical financial burden as that imposed by the Secretary's enforcement action against her husband, an outcome that is at odds with the plain language of section 110(c).

We recognize, of course, that any penalty against an agent under section 110(c) will always have some impact on his or her spouse. But the spouse's share of the household estate must not explicitly be used as a factor to *increase* a penalty assessed for a section 110(c) violation. On the other hand, we are *not* holding that a spouse's share of the agent's household finances is not at all relevant in assessing a penalty. In this respect, we agree with the Secretary that "[a]lthough Steen's individual financial position must be analyzed within the context of the family's financial position, Steen's position and the family's position are not the same thing." S. Br. at 9. This means that our judges must engage in a two-step analysis in cases such as this one. First, they must determine a section 110(c) defendant's household financial condition. Then they must make findings on the section 110(i) "size" and "ability to continue in business" criteria on the basis of the defendant's share of his or her household's net worth, income, and expenses. In sum, we conclude that the judge erred as a matter of law when he made findings on the basis of the financial condition of the Steen *household* rather than Steen's individual share of the household's income and financial obligations.

We disagree with our concurring colleague's statement that "the issue of how to view financial resources when setting a penalty transcends the civil/criminal distinction" (slip op. at 10 n.3), a proposition for which no authority is cited. Here, we are construing section 110(i) of the Mine Act, which does not create criminal liability and is not subject to federal criminal sentencing guidelines. More importantly, as the D.C. Circuit noted in *Coal Employment Project v. Dole*, in the Mine Act, "Congress was intent on assuring that the civil penalties provide an effective deterrent against all offenders." 889 F.2d 1127, 1133 (D.C. Cir. 1989).[3] A criminal fine, on the other hand, is *punitive* — "a sum of money exacted of a person guilty of an offense as a pecuniary *punishment*." 21 Am. Jur. 2d *Criminal Law* § 613 (1981) (emphasis added). We thus find no relevant or appropriate guidance in cases involving criminal penalties because Congress did not intend section 110(i) to be a punitive measure.[4] *See* slip op. at 9-10 and cases cited.

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[3] The Commission has also noted that "the purpose of civil penalties [under the Mine Act] is to 'convinc[e] operators to comply with the Act's requirements.'" *Ambrosia I*, 18 FMSHRC at 1565 n.17 (also citing *Consolidation Coal Co.*, 14 FMSHRC 956, 965 (June 1992), which recognized the importance of the deterrent effect of civil penalties).

[4] Our colleague cites *FTC v. Hughes* as an example of a civil penalty being assessed on the basis of the household income of a defendant and his wife. Slip op. at 10 (citing 710 F. Supp. 1524, 1530 (N.D. Texas 1989), *appeal dismissed as untimely*, 891 F.2d 589 (5th Cir. 1990)). We do not find the *Hughes* case relevant, however, because the propriety of the penalty calculation made in that case was not at issue; in fact, the wife's financial situation is not mentioned at all.

Normally, having found that a judge erred as a matter of law in considering the section 110(i) penalty criteria, we would vacate the penalty and remand the matter to the judge for assessment of a new penalty. This case, however, has simply gone on too long. In interests of justice and a speedy resolution to this litigation, instead of remanding the case, we will enter the necessary findings based on the undisputed record evidence on Steen's financial condition, and assess a new penalty. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1153 (7th Cir. 1984).

First, we note that, with respect to Steen's negligence and history of previous violations, the gravity of the violation, and whether the violation was abated in good faith, the findings made by Judge Fauver that were before the Commission in *Ambrosia II* were affirmed by the Commission and are thus the law of the case. 19 FMSHRC at 823-24. As to these criteria, the judge found that Steen's violation was due to high negligence, that he had no record of prior violations, and that the violation was serious. 18 FMSHRC at 1875. In his initial decision, Judge Fauver also found that "[s]ince the inspector red-tagged the vehicle, the question of the operator's abatement does not arise." *Ambrosia Coal & Constr. Co.*, 16 FMSHRC 2293, 2305 (Nov. 1994) (ALJ).

As to the two remaining criteria, size and ability to continue in business, we find that Steen's share of his household's net worth of $49,410 amounts to one half of the total, or approximately $25,000. Stipulation of the Parties, Ex. C. We further find that Steen's share of the household's net monthly income of $3156 amounts to roughly 54 percent of the total, or approximately $1700, and the Steen's share of the household's expenses of $2965 also amounts to 54 percent of the total, or approximately $1600. *Id.* at Ex. B-2; 19 FMSHRC at 1474-75.

Having considered these findings, we find that a penalty of $1200 will not adversely affect Steen's ability to meet his financial obligations, and is appropriate considering the gravity of the violation and Steen's income and net worth, negligence, and lack of any previous violations. We further find that in light of Steen's financial obligations, payment of the penalty may be amortized over a year, with no interest accrued other than on any late payments. *See* 30 U.S.C. § 820(j). Our penalty assessment is made on the narrowest of grounds. Our findings on the penalty criteria of size and ability to continue in business as they relate to Steen, and our ultimate penalty assessment, are based on the particular facts and circumstances of this case, and may not be applicable to the apportionment of the household finances of all married individuals found liable under section 110(c) in other cases.

III.

Conclusion

For the foregoing reasons, we vacate the judge's penalty assessment and assess Mr. Steen a penalty of $1200 for his violation of 30 C.F.R. § 77.404(a), to be paid as directed by the Secretary in twelve consecutive monthly installments of $100 each, with no interest accrued other than on any late payments.

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan, concurring:

Although I agree in result with the majority's decision to reduce Steen's penalty to $1200, I write separately because I reach this conclusion based on a completely different rationale. Unlike my colleagues, I believe the judge applied the correct analysis to determine Steen's "ability to continue in business," properly using his household income and liabilities as a touchstone. However, for reasons entirely independent from the majority's, I find that the judge abused his discretion in setting the penalty at $2000, and agree that it should be reduced to $1200.

My colleagues insist on considering Steen's income, assets and expenses as if he were a solitary financial entrepreneur instead of a family man whose assets and liabilities are hopelessly commingled with those of his wife. The majority holds that the penalty in 110(c) cases must be based on an individual's share of his or her household's assets, income and expenses.[1] This ignores the judge's undisputed finding that:

> [T]he Steens do not live economically discrete lives. Like most domestic partners, they function as an economic unit. They commingle economic resources and jointly assume economic responsibilities. They file a joint federal income tax return . . . . They jointly hold real property. . . . Personal property, such as automobiles and household property, is titled jointly. . . . They have a joint personal checking account . . . . Moreover, as may be inferred from the list of expenses, they are equally liable for most, if not all, of their debts . . . . I must make findings based on fiscal reality not its artificial segmentation.

19 FMSHRC 1471, 1474 (Aug. 1997) (ALJ).

I agree with the judge that the only equitable method of setting the penalty in this case is to acknowledge Steen's actual financial state of affairs and consider him and his wife as an economic unit, rather than pretending that he is economically independent. To evaluate the statutory penalty criteria of "size" and "ability to continue in business" (which I translate, in a 110(c) case against an individual, to mean the ability to remain solvent), one must take into account the individual's *access* to income and assets, as well as all of his or her financial liabilities. The pertinent inquiry in determining how a penalty under 110(c) will affect an

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[1] My colleagues state that they are in agreement with the Secretary's position. Slip op. at 5. Frankly, I find it somewhat difficult to ascertain what that position is since she claims that "[a]lthough Steen's individual financial position must be analyzed within the context of the family's financial position . . . an adjustment is necessary to refocus the analysis on the financial position of Steen, the individual." S. Br. at 9. By insisting on taking both family and individual financial matters into account, without an explanation of how one should relate to the other, the reasoning of the Secretary remains fairly opaque.

individual must include an assessment of the financial resources under his or her control.[2]

The majority's rationale for using only Steen's individual financial resources as a basis for the penalty is that 110(c) refers to "agent of such corporation" and it is Steen — and not his wife — who is Ambrosia's agent. I can hardly disagree. However, determining the identity of Ambrosia's agent — a fairly uncomplicated task — begs a far more intricate question: what is the most equitable way of determining that agent's penalty?

Contrary to the views of the majority, treating the Steens as the economic unit they really are does not in any way imply that Mrs. Steen has, through some sleight of hand, miraculously become an agent of Ambrosia. Slip op. at 4-5. Rather, it simply recognizes what the majority itself acknowledges: "that any penalty against an agent under section 110(c) will always have some impact on his or her spouse." *Id.* at 5. This is precisely right, and is the sole implication of the judge's decision. Under the judge's analysis, Mrs. Steen will undoubtedly bear some effect of the penalty; this does not in any way mean that she is somehow "subjected to financial liability under section 110(c)," as the majority contends. Slip op. at 4. By merging these two concepts, the majority has inexplicably intertwined the notions of an individual's statutory liability with the determination of the *effect* of that liability (the penalty) on others.

Congress, on the other hand, has had no difficulty in recognizing the difference between these two concepts. When it enacted criminal sentencing provisions regarding payment schedules for restitution, for example, it stated that a criminal defendant, in describing his or her financial resources for a presentence report, must include "the financial needs and earning ability of the defendant *and the defendant's dependents*." 18 U.S.C. § 3664(a) (1994). This statutory language hardly converts the family of a criminal defendant into convicted criminals. Rather, it is a simple recognition that a dependent's assets and liabilities are relevant in determining restitution payment schedules. *See United States v. Castner*, 50 F.3d 1267, 1278 (4th Cir. 1995) (court takes spouses' income into account in determining appropriateness of restitution orders and criminal fines).

In *United States v. Fabregat*, 902 F.2d 331 (5th Cir. 1990), the court of appeals explicitly considered the question of whether the district court erred in considering the wealth of a criminal defendant's family when setting a $50,000 fine. In this case the defendant was convicted of conspiring to possess drugs and possessing drugs with the intent to distribute. In interpreting the federal sentencing guideline factor concerning "the ability of the defendant to pay the fine . . . in light of his earning capacity and financial resources" (*id.* at 333), the Fifth Circuit stated that

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[2] The Seventh Circuit, in affirming a $100,000 criminal fine, based in part on an evaluation of assets titled in the name of the defendant's putative common-law wife, held that it would be "contrary to the intent of Congress and the Sentencing Commission to exclude from consideration property that, although titled in another's name, in fact remains within the defendant's dominion and control." *United States v. Granado*, 72 F.3d 1287, 1294 (7th Cir. 1995).

"[w]e cannot say as a matter of law that the wealth of an individual's family is never a financial resource which can be considered in determining defendant's ability to pay a fine. . . . [I]n reality, the wealth of a defendant's family can be a very significant asset to the defendant in particular cases." *Id.* at 334. The Court took note of the presentence report, stating that the defendant was a member of a wealthy upper class family with significant financial resources, and that his family paid for his college education, legal expenses and other expenses. *Id.* The Fifth Circuit did *not* find that this appreciation of the family's broader financial picture somehow turned the defendant's relatives into convicted drug dealers. Instead, the Court simply took a pragmatic approach which recognized the family's "willingness to share their significant resources" with the defendant. *Id.* It appears that this approach has also been adopted by at least one court in the civil penalty context.[3] *See FTC v. Hughes*, 710 F.Supp. 1524, 1530 (N.D. Texas 1989), *appeal dismissed*, 891 F.2d 589 (5th Cir. 1990) (in determining a defendant's ability to pay a civil penalty, pursuant to the FTC statute, judge takes into account the adjusted gross income of the defendant *and his wife*).

In determining an individual's "ability to continue in business" for purposes of setting a penalty under 110(c), the relevant inquiry must be: what is the individual's discretionary income? This determination is inevitably affected by his family situation: does the individual's spouse work? Are there dependent children? What are the household expenses? If his wife did not have any income, yet incurred sizeable expenses, would the majority insist on recognizing only Steen's individual expenses? Conversely, what if his wife earned five times the amount of annual income as Steen, and he continued to have access to all of her funds? Wouldn't a penalty that failed to take her financial situation into account provide him with a windfall discount? For these very practical reasons, therefore, I decline to place the income and expenses of an individual's family under a shield when reviewing a penalty under section 110(c).[4]

Moreover, I fundamentally disagree with the majority's interpretation of the Commission's decision in *Sunny Ridge Mining Co.*, 19 FMSHRC 254 (February 1997). When we held that judges must make findings on the section 110(i) penalty criteria as they apply to "individuals" (*id* at 272), we meant *"individuals" as opposed to "operators"* (to whom the statutory criteria were clearly directed), not individuals as opposed to families. Our opinion in

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[3] Although I recognize, of course, that this 110(c) proceeding is a civil one, the issue of how to view financial resources when setting a penalty transcends the civil/criminal distinction. Consequently, for purposes of determining whether a penalty should be based on individual or household income, both civil and criminal cases are relevant. Both types of laws permit an adjudicatory body to order monetary sanctions against the *named* civil or criminal defendant. Neither type was enacted with the intent to adversely affect the individual's family.

[4] Moreover, the majority's approach could encourage some individual mine directors, officers or agents to convert the title of assets they own or control from their names into the names of family members, so that such assets will not be considered in assessing a penalty under 110(c).

Sunny Ridge did not give judges the green light to strip an individual of his or her joint assets and expenses when setting a penalty. It simply delineated the clear difference between applying the statutory criteria to a person as opposed to a business. Similarly, when we remanded this case with instructions that, pursuant to *Sunny Ridge*, the relevant inquiry was "whether the penalty will affect the individual's ability to meet his financial obligations" (*Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 824 (May 1997)), we meant personal obligations as opposed to the business obligations of the operator.

For the foregoing reasons, I cannot find as a matter of law that the judge erred in taking Steen's household financial situation into account when setting the penalty. Nonetheless, I agree with the majority, although for different reasons than those relied on by my colleagues, that the penalty set by the judge was excessive.

In assessing Steen's financial situation, the judge determined that after meeting household expenses, Steen had available a monthly family income of $191. 19 FMSHRC at 1475. He ordered Steen to pay a $2000 penalty, at a rate of approximately $166 per month for 12 months. *Id.* at 1476. This represents approximately 90% of the Steen family's discretionary monthly income. For the Steen family, which has virtually no savings (Stipulation, Ex. C), this penalty leaves no safety net in case of a financial emergency. Even if no exigent circumstances occur, the penalty will have a severe impact not only on Steen, but on his entire family.

Although "a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *Secretary of Labor on behalf of Carroll Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 556 (April 1996) (citations omitted). Here, the judge abused his discretion in setting a penalty so excessive that it would inevitably lead to great hardship for Steen and his family. Accordingly, I would reduce the penalty, and agree with the majority that a reduction of the penalty to $1200 is appropriate.

Mary Lu Jordan, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006
April 30, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. PENN 94-50
CYPRUS EMERALD RESOURCES CORPORATION	:	

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

ORDER

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 16, 1998, Cyprus Emerald Resources Corporation ("Cyprus Emerald") and the Secretary of Labor filed with the Commission a Joint Motion for Relief from Final Judgment. For the reasons discussed below, we deny the parties' motion.

On April 26, 1994, the Secretary filed a motion to approve a negotiated settlement of several citations with Cyprus Emerald. Gov't Ex. A. Included in the motion was the parties' agreement to sever Citation No. 3658681 and transfer it to Docket No. PENN 94-23. *Id.* ¶ 3. On May 3, 1994, Administrative Law Judge William Fauver granted the motion, but neglected to sever Citation No. 3658681 which, consequently, was dismissed along with the citations on which the parties had settled. Gov't Ex. B. Pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a), the judge's dismissal order became a final order of the Commission 40 days after its issuance. On March 6, 1998, the parties filed a Joint Motion for Stay with Chief Administrative Law Judge Paul Merlin, requesting that Citation No. 3658681 be stayed pending the Commission's disposition of related citations in Docket No. PENN 94-23. Gov't Ex. C at 2. On March 10, 1998, Judge Merlin issued an order denying the parties' Joint Motion for Stay, and directing the parties to address their request for relief to the Commission. Gov't Ex. D.

The present motion requests that the Commission reopen PENN 94-23, and stay Citation No. 3658681 pending the Commission's adjudication of Docket No. PENN 94-23, which involves identical facts and similar issues, and currently is being considered by the Commission. Jt. Mot. ¶¶ 4, 7, 13. The parties assert that this relief is appropriate under Fed. R. Civ. P. 60(b)(1).[1] They provide no reason for their four-year delay in filing this motion.

The judge's jurisdiction over this case terminated when his dismissal order was issued on May 3, 1994. 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). The judge's decision became final on June 12, 1994.

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b)(1) in circumstances such as mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (stating that the Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *see, e.g.*, *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991) (vacating default order and remanding matter to judge). "The motion [under Rule 60(b)(1)] shall be made within a reasonable time, and . . . not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b). As we have previously recognized, this one-year time limit "may not be extended." *Lakeview Rock Prods., Inc.*, 19 FMSHRC 26, 29 (January 1997) (quoting *Pena v. Eisenman Chem. Co.*, 11 FMSHRC 2166, 2167 (November 1989)). The parties' motion to reopen this proceeding was filed on March 18, 1998 — nearly four years after entry of judgment and, therefore, is untimely under

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[1] Rule 60(b) provides in pertinent part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . ." Fed. R. Civ. P. 60(b).

Rule 60(b)(1). *See id.* at 28-29; *Thomas Hale,* 17 FMSHRC 1815, 1816-17 (November 1995). Accordingly, we deny the parties' motion for relief under Rule 60(b)(1).[2]

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

[2] Commissioners Marks and Beatty vote to grant the motion.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 7 1998

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 97-157-D
on behalf of	:	
WILLIAM KACZMARCZYK,	:	Case No. WILK CD 97-02
Complainant	:	
v.	:	Ellangowan Refuse Bank No. 45
	:	Mine ID No. 36-02234
READING ANTHRACITE	:	
COMPANY,	:	
Respondent	:	

DECISION

Appearances: Stephen D. Turow, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Complainant;
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, Pottsville, Pennsylvania, for the Respondent.

Before: Judge Weisberger

STATEMENT OF THE CASE

This case is before me based on a Complaint filed by the Secretary of Labor ("Secretary"), on behalf of William Kaczmarczyk, alleging that he was discriminated against by Reading Anthracite Company ("Reading") in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Act"). Pursuant to notice, the case was heard in Harrisburg, Pennsylvania, on November 18-19, 1997. On February 5, 1998, Reading filed proposed findings of fact and a brief. On February 9, 1998, the Secretary filed proposed findings of fact and a brief. On February 18, 1998, Reading filed objections to the Secretary's proposed findings, and a reply brief. On February 20, 1998, the Secretary filed a response to Readings proposed findings, and a response brief.

I. Findings of Fact

Based on the Parties' stipulations, Reading's Admissions, and the evidence of record, I find the following:

1. William Kaczmarczyk was employed by Reading Anthracite in December 1976.

2. Kaczmarczyk was classified as an electrician by Reading Anthracite in 1985.

3. In November 1989, Kaczmarczyk was injured while working at Reading. Following that injury, Kaczmarczyk was placed on workers compensation status.

4. Kaczmarczyk remained workers compensation status from the time of his injury through January 1991.

5. From January into February 1991, Kaczmarczyk returned to active duty work at Reading pursuant to its light duty program.

6. In February 1991, Kaczmarczyk left active duty and returned to workers compensation status where he remained until January 1992. During that period of time, Kazmarczyk underwent surgery and rehabilitation for the injury he had incurred in October 1989.

7. Prior to returning to work under the light duty program in January 1992, Kaczmarczyk obtained a release from his physician Dr. Keith Kuhlengel on January 2, 1992, that authorized him to return to work at Reading. Kaczmarczyk presented Dr. Kuhlengel's authorization to Frank Derrick, Reading's General Manager, and requested that he be allowed to return to work. Derrick told Kaczmarczyk that Reading would need a second opinion from another physician, and arranged for an evaluation from Dr. Robert Gunderson, a physician selected by Reading. Dr. Gunderson examined Kaczmarczyk on January 7, 1992, and determined that he was physically capable of returning to work as an electrician. Following the examination, Kaczmarczyk was permitted to return to work at Reading as an electrician.

8. In January 1992, Kaczmarczyk returned to active employment at Reading in a light-duty program. He worked in this capacity until October 15, 1993, when Reading placed him on workers compensation status.

9. On September 12, 1994, pursuant to an Order of Temporary Reinstatement issued by Arthur Judge Amchan[1], Kaczmarczyk was returned to light duty employment at Reading.

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[1]/ Judge Amchan subsequently left the Commission to serve as an Administrative Law Judge with another agency.

10. Kaczmarczyk continued to work in a light duty capacity between September 12, 1994, and September 23, 1995, when he was again placed on workers compensation status.

11. Between September 12, 1994, and September 23, 1995, David Kerstetter, Kaczmarczyk's immediate supervisor, did not offer Kaczmarczyk the opportunity to work overtime or provide him with specific assignments during the regular work week.

12. In January 1995, Kaczmarczyk requested that he be allowed to drive coal trucks on an overtime basis.

13. On January 24, 1995, Kaczmarczyk's physician, Dr. Kuhlengel, provided a letter stating as follow: "He may function as a truck driver on a temporary basis with a maximum of ten (10) hrs. per week overtime on a trial basis."

14. Kaczmarczyk presented Dr. Kuhlengel's authorization to representatives at Reading who arranged an examination with a second physician, Dr. Michael Dawson.

15. On March 30, 1995, Dr. Dawson examined Kaczmarczyk, and determined that he was physically capable of operating the haul truck on an unlimited and unrestricted basis.

16. Kaczmarczyk presented Dr. Dawson's report to Reading immediately after he received it, but Reading did not permit Kaczmarczyk to drive the truck on an overtime basis or perform any overtime work until June 1995, after Judge Amcham had issued his May 24, 1995, order permanently reinstating Kaczmarczyk to his former position.

17. On April 26, 1995, the Secretary filed an Emergency Motion to Enforce the Order of Temporary Reinstatement alleging that Reading had constructively discharged Kaczmarczyk on April 20, 1995. Judge Amchan found that Reading had violated the provisions of the order of temporary restatement, but that the environment was not sufficiently intolerable to constitute "constructive suspension."

18. On May 24, 1995, Kaczmarczyk was permanently reinstated to the light duty program at Reading pursuant to an order of Judge Amcham.

19. From June 1995 through September 23, 1995, Kaczmarczyk drove a haul truck and a water truck on an irregular basis at Reading's Maple Hill Site. His physical restrictions did not interfere with his ability to perform the tasks associated with the operation of these trucks.

20. Kaczmarczyk never refused to perform any of the duties associated with the operation of the haul truck or the water truck because of his physical conditions.

21. In evaluating Kaczmarczyk's physical abilities during the time period June through September 1995 when he drove a water truck and a haul truck, most weight was placed on the determinations of physicians who examined him, rather than the subjective understanding of Kaczmarczyk regarding these restrictions. Dr. Peter A. Feinstein, who examined him on June 10, 1994, indicated that Kaczmarczyk could continuously reach above his right shoulder, lift a maximum of 20 pounds, and frequently bend, squat, and kneel. On January 24, 1995, his treating physician, Dr. Kuhlengel indicated that Kaczmarczyk could function as a truck driver "on a temporary basis with a maximum of ten (10) hours per week of overtime on a trial basis" (Sec. Ex. 26). Dr. Michael Dawson who evaluated him on March 30, 1995, included that he was able to work as a truck driver "on an unlimited and unrestricted basis" (Sec. Ex. 10). Dr. Kuhlengel in a report dated December 20, 1995, indicated that he had examined Kaczmarczyk on that day, and that he should not lift or carry more than 10 pounds, and not do any bending, squatting, twisting, pushing, pulling, climbing, kneeling, or overhead work. Based on an examination on November 13, 1996, Dr. Kuhlengel placed the same restriction on Kaczmarczyk, but indicated that he should be able to perform work as a truck driver "as long as the position is within the stated restrictions" (Sec. Ex. 14).

22. In the time period June 1996 through September 1996, Kaczmarczyk told his immediate supervisor, Dave Kerstetter, that he was interested in driving trucks, and provided Kerstetter with a letter from Dr. Kuhlengel dated September 25, 1996, indicating that he could return to work with restrictions of lifting 10 pounds, and no bending, pushing, pulling, or performing overhead work. Dr. Kuhlengel added as follows: " . . . he is able to drive a truck with an air seat" (Sec. Ex. 13).

23. On October 19, 1996, a temporary truck driver position was posted.

24. The temporary haul truck position required the operation of a haul truck that was used to haul ash from the co-generation plant.

25. The ash from the co-generation plant was loaded onto the haul truck with a hopper, which dropped the fine ash particles from a height of about 5 to 6 feet onto the bed of the haul truck. The fine particles of the ash do not produce significant jarring or vibration that is associated with the loading of large rock and materials onto a haul truck.

26. The haul truck that was used to haul material from the co-generation plant had an automatic transmission. It also was equipped with an air seat, which reduced the effect of road bumps and cushioned the ride for the truck operator, and a steering system similar in function to power steering. In order to reach the cab of the truck that was used to haul material from the co-generation plant, an operator must climb approximately 10 steps. During the course of a workday, a haul truck driver needs to climb the steps onto the truck's cab on only one occasion.

27. Once a "bid" is posted, the job listed in the "bid" is traditionally awarded to the most senior, qualified, Reading employee who bids on the position.

28. Kaczmarczyk was the most senior Reading employee to bid on the position of temporary truck driver.

29. The temporary truck driver position was awarded to Harry Markle because Reading believed that Kaczmarczyk was physically incapable of performing the duties associated with the position, since Dr. Kuhlengel's statement explicitly releasing Kaczmarczyk to drive trucks also contained a restriction relating to bending, squatting, pulling, crawling, climbing, and lifting.

30. According to Frank Derrick, Reading's General Manager, an individual does not have to perform any activities that involve crawling in order to operate the haul truck that is the subject of this case.

31. A miner must bend to perform the preshift inspection and to check fluids on the haul trucks. Derrick indicated on cross-examination that as a result of a grievance, mechanics still service and start the haul trucks. However, Reading has no written rule directing either mechanics or truck drivers exclusively to perform these duties. Kaczmarczyk testified that when he drove the haul truck, he did not check the fluids. Kaczmarczyk testified that the mechanics performed this task ". . . because the practice is --- our Local Union 807, our job site, states that the mechanics check the fuels trucks" (sic) (Tr. 324-325). I find this testimony of one individual who worked on only one shift insufficient to establish that the practice at the site at issue was that only the mechanics were to check the fluids, service the vehicles, and start them.

32. Kaczmarczyk testified that in order to check the fluid levels, oil, and antifreeze on the haul truck, it is not necessary to bend, crawl, twist, push, or pull. He also said that it would take no more than 5 minutes to check the oil, transmission fluid, and antifreeze levels on the haul truck that was used to haul materials from the coal generation plant. Since he did not check these fluids, I do not place much weight on his testimony regarding the activities required to perform these functions. In contrast, Derrick testified that, in essence, the decision not to award the temporary truck driver position to Kaczmarczyk was based upon the conclusion that the latter could not perform the specific duties involved in operating this position such as bending, climbing, and squatting. I accept Derrick's testimony that these duties are required as it is supported by a Job Analysis[2] of the truck driver position prepared for Reading by CRA Managed Care, Inc. ("CRA"), which indicates that these activities are required 10 percent of the time. The analysis also states that the heaviest weight to be lifted one time is 15 pounds, and that lifting it above the shoulder is required.

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[2]/ A job analysis is a mechanism that allows Reading to describe in detail all of the duties associated with a particular position at the mine site in order that a physician can review the job analysis and determine whether a particular employee is physically capable of performing the duties associated with the position.

Job analyses are developed at the instruction of Derrick and compiled by Reading managerial employees who are familiar with the duties associated with a particular position or job at the mine

33. Neither Derrick nor any other Reading agent contacted Dr. Kuhlengel or another physician to determine whether Kaczmarczyk was physically capable of performing the duties associated with the truck driver position.

34. There is no evidence that Reading was obligated to contact Dr. Kuhlengel or another physician in these circumstances. The Secretary's reliance on Article 3(i)(3) of the Reading Anthracite Company Wage Agreement of 1994 (Sec. Ex. 4) is misplaced. Section 3(i)(3), supra, its applies to a miner who was "refused recall from a panel or from sick or injured status." In contrast, Kaczmarczyk was in workers compensation status, and applied not for recall but for a job as a temporary truck driver. Nor is there evidence that Reading had a practice of contacting treating physicians or making referrals to other physicians in situations similar to that of Kaczmarczyk's.

Jay Berger, a UMW District Board Member, testified that on one occasion an employee who had been off work for 8 years presented Reading with a note from his physician permitting him to return to work. Reading referred this employee to their doctor for evaluation. This instance appears to be within the scope of section 3(i)(3), supra, but insufficient to establish a practice in situations similar to the case at bar.

35. On October 16, 1996, pursuant to the collective bargaining agreement, Kaczmarczyk had a meeting with Kerstetter to appeal Reading's decision to award the temporary truck driver position to Markle. During this meeting, Kerstetter told Kaczmarczyk that he was not awarded the temporary truck driver position because his restrictions prevented him from operating the haul truck. Following the October 16, 1996 meeting, Kaczmarczyk filed grievance No. 97-01 because he believed that Reading had acted improperly in awarding the temporary truck driver position to Markle.

36. Pursuant to the terms of the collective bargaining agreement, a Step 2 grievance meeting was convened on November 6, 1996, to consider Kaczmarczyk's contention that he should have been awarded the temporary truck driver's position. During the Step 2 proceeding, Kaczmarczyk told Reading's representatives that he had a doctor's authorization to work as a truck driver, and requested that he be awarded the position.

37. Pursuant to the terms of the collective bargaining agreement a Step 3 Grievance Meeting was convened on November 14, 1996.

38. During the Step 3 meeting, Kaczmarczyk and Berger informed Lenny Haspe, Reading's representative, that Kaczmarczyk had driven the haul truck in the past "with restrictions . . . at that time also he had" (sic)(Tr. 54). Kaczmarczyk informed Reading that Dr. Kuhlengel had determined that he was physically able to perform the duties of a haul truck driver. He presented Reading with a November 13, 1996, report signed by Dr. Kuhlengel which stated that it was "acceptable" for Kaczmarczyk to drive a truck with certain restrictions.

Kaczmarczyk requested that Reading prepare a job analysis for the truck driver position in order to resolve Reading's concern that Kaczmarczyk's physical restrictions prevented him from working as a haul truck driver.

39. On December 4, 1996, Berger wrote a letter to Derrick stating that Haspe had not answered questions posed during the Step 3 proceeding regarding Reading's rationale for refusing to allow Kaczmarczyk to work as a temporary truck driver. Berger asked Reading to explicitly state its position, and reminded Derrick that Kaczmarczyk had been released by his physician to drive the haul truck, and that he had driven the truck on prior occasions.

40. On January 13, 1997, Kaczmarczyk wrote a letter to Dr. Kuhlengel regarding his ability to drive the haul truck. Dr. Kuhengel responded on January 21, 1997, and stated that Kaczmarczyk could not load or unload a truck but was "able to drive a truck with an air seat." Kaczmarczyk provided Kerstetter with a copy of this letter.

41. On January 31, 1997, Berger sent a letter to Dr. Kuhlengel seeking to obtain information for the pending Step 4 Grievance Hearing concerning Kaczmarczyk's ability to perform certain duties associated with the truck driver position.

42. On February 10, 1997, Dr. Kuhlengel responded to Berger's letter and stated that he did not feel that climbing several steps up to a truck cab "is severely restricted by his condition." He also opined that a total of 15 minutes a day to check fluid levels "is not unreasonable." He also restricted the following activities to less than 15 minutes total in an 8 hour day: bending, squatting, twisting, pushing, pulling, cralwing, climbing, and kneeling.

43. Pursuant to the terms of the collective bargaining agreement, a Step 4 Grievance Hearing was convened on February 11, 1997. An Umpire selected pursuant to the terms of the collective bargaining agreement presided at the proceeding, and heard from both parties regarding Kaczmarczyk's claim that Reading had improperly denied his bid to drive the haul truck.

44. At the Step 4 proceeding, Berger introduced the February 10, 1997, letter from Dr. Kuhengel. According to Berger, Derrick was "hot" (Tr. 98) and said "that Bill would be a downfall of Reading Anthracite Company" (Tr.95), and then "made statements about Bill filing the case with the EEOC and MSHA" (Tr. 95). In essence, Kaczmarczyk corroborated this version.

In contrast, according to Derrick, Kaczmarczyk had had gotten "out of control" (Tr. 229), and, in stating his reasons why the Umpire should continue to hear the case mentioned "that he would see us all in court. He had charges filed" (Tr. 231). According to Derrick, the Umpire became confused, and he (Derrick) told him, to "set the record straight" (Tr. 231), that Kaczmarczyk had filed charges with the Pennsylvania Human Rights Commission and MSHA. Ricardo Muntone, an accountant employed by Reading, who was present at the Step 4 proceeding, testified that after the Umpire questioned whether his decision on the grievance

would be binding, and Derrick said that Kaczmarczyk had filed similar actions with other agencies. Neither Muntone nor Derrick specifically denied that Derrick had said that Kaczmarczyk would be the downfall of Reading. Accordingly, and also based on my observations of the witnesses' demeanor, I accept the version testified to by Berger and Kaczmarczyk.

45. The statements that Derrick made at the Step 4 proceeding that Kaczmarczyk was going to be the downfall of Reading because of the cases he had filed with the Human Rights Commission and MSHA were not part of the res gesta of any offers of settlement made by Derrick.

46. On February 24, 1997, Reading sent a job analysis for the haul truck driver position to Dr. Kuhlengel. On March 7, 1997, Reading received the completed job analysis from Dr. Kuhlengel in which he stated that Kaczmarczyk's physical restrictions did not prevent him from working as haul truck driver.

47. On March 7, 1997, Reading sent Kaczmarczyk a letter informing him that Dr. Kuhlengel had determined that he was capable of performing the job of a coal truck driver, and instructed Kaczmarczyk to make arrangements to return to work.

48. On March 10, 1997, Muntone telephoned Kaczmarczyk, and informed Kaczmarczyk's wife that he should make arrangements to return to work at Reading.

49. When Kaczmarzyk reported to work at Reading on March 10, 1997, Kerstetter informed him that there was no work available as a haul truck driver, since Schuylkill Energy Resources (SER) had completed the construction of a conveyor belt system on March 2, 1997, which moved ash from the coal generation plant without the use of haul trucks.

50. As early as August 1994, Reading had become aware that SER would be constructing a conveyor to replace the coal haulage trucks.

51. Derrick thought SER would complete construction of the conveyor belt system in February or March 1997.

52. In March 1997, Kaczmarczyk felt that he was physically able to preform the duties associated with the position of a water truck driver. Between March and April 1997, Kaczmarczyk requested that a job analysis be made of the water truck position. Muntone notified Derrick that Kaczmarczyk had requested a job analysis for the water truck position.

53. Derrick instructed Muntone to prepare a job analysis for the water truck position on March 12, 1997.

54. The water truck was a haul truck modified to allow it to carry water. Operating the water truck requires climbing approximately eight times a shift, standing a total of an hour, and walking a total of an hour. Operating the haul truck requires only occasional climbing, and no standing and walking. All other physical demands of these job are the same.

55. Derrick ordered the preparation of a job analysis for the water truck position because he considered the physical demands associated with the operation of the water truck to be more significant than those associated with the haul truck, since the water truck driver needed to climb into the water truck's cab more frequently during the shift, and needed to turn a crank in order to open a value to fill the water truck with water.[3]

56. Reading completed the job analysis for the water truck position on March 13, 1997, and sent the analysis to CRA who forwarded it Dr. Khulengel on April 9, 1997.

57. On May 16, 1997, Reading received a job analysis for the water truck position from Dr. Kuhlengel. Dr. Kuhlengel concluded that Kaczmarczyk's physical restrictions did not prevent him from work as water truck driver.

58. On May 19, 1997, Kaczmarczyk returned to work at Reading as a water truck driver.

II. Analysis

A. Case Law

The Commission, in *Braithwaite* v. *Tri-Star Mining*, 15 FMSHRC 2460 (December 1993), reiterated the legal standards to be applied in a case where a miner has alleged that he was subject to acts of discrimination. The Commission, *Tri-Star*, at 2463-2464, stated as follows:

> The principles governing analysis of a discrimination case under the Mine Act are well settled. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula* v. *Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds, sub nom. *Consolidation Coal Co.*, v. *Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette* v. *United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity.

3/ In 1995, when Kaczmarczyk operated a water truck, he was able to climb into the cab of the water trunk, and he did not have any difficultly turning the value used to fill it. However, he had subsequently reinjured his back in September 1995.

Pasula, 2 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 also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. *Pasula*, 2 FMSHRC at 2800; *Robinette*, 3 FMSHRC at 817-18; see also *Eastern Assoc. Coal Corporation*, v. *United Castle Coal Co.*, 813 F.2d 639, 642 (4th Cir. 1987).

B. The Secretary's Prima Facie Case

1. Protected Activities

The parties have stipulated that the following sets forth the scope of the protected activities engaged in by Kaczmarczyk:

> On October 19, 1993, Mr. Kaczmarczyk filed a complaint with the Mine Safety and Health Administration alleging that the Respondent had unlawfully placed him on "worker's compensation" status because he had earlier engaged in a series of protected activities. The nature of these protected activities, and the details associated with his involvement in such activities, were the subject of extensive litigation[4] involving the Respondent, about which the Respondent is aware. Both the activities alleged in the discrimination complaint and the subsequent litigation, much of which occurred after September 1994, constitute protected activities under the Mine Act.
>
> On or about July 16, 1995, Mr. Kaczmarczyk reported that the No. 609 truck that he had been assigned to drive was unsafe for him to operate due to the fact that the truck had a defective air seat and a significant crack in the window on the passenger side of the vehicle. On the same date, Mr. Kaczmarczyk reported that the No. 556 truck that he had been assigned to drive was unsafe to operate due to the fact that the truck had: inadequate service brakes that would not hold the truck on the hills over which the truck traveled, a defective back-up alarm, and an inoperable latch on the driver's side door, which prevented the door from effectively remaining closed while the truck was operated. Mr. Kaczmarczyk reported these conditions to David Kerstetter in the area of the Maple Hill Garage.

4/ On September 12, 1994, following an evidentiary hearing, Reading was ordered to temporarily reinstate Kaczmarczyk (16 FMSHRC 1941) A hearing on the merits of Kaczmarczyk's complaint of discrimination was held on March 14, 1995. On May 24, 1995, a decision was issued holding that Reading discriminated against Kaczmarczyk because, but for his participation in MSHA inspections, he would not have been placed on workers compensation.

On or about July 27, 1995, Mr. Kaczmarczyk notified David Kerstetter that the pump at the pumphouse was not working and unclean water was thus flowing from the pumphouse into a near-by creek. Mr. Kaczmarczyk notified Mr. Kerstetter that this condition presented a danger to the health and safety of individuals working in, and around, the pumphouse and that the condition may also constitute a violation of state, and or federal, environmental regulations.

On or about July 30, 1995, Mr. Kaczmarczyk reported that the No. 660 ash truck that he had been assigned to drive was unsafe for him to operate due to the fact that the truck had a significant crack in the window on the driver's side of the vehicle. Mr. Kaczmarczyk reported the condition to David Kerstetter in the area of the Maple Hill Garage.

On or about August 2, 1995, Mr. Kaczmarczyk refused to operate a truck that he had been assigned by David Kerstetter to drive because the truck had a defective air-seat and operating the vehicle in this condition posed a hazard to Mr. Kaczmarczyk.

On or about August 3, 1995, Mr. Kaczmarczyk complained to David Kerstetter and a UMWA representative that dust from the hoppers at the co-generation plant was seeping into the cabs of the trucks that were being loaded with material at the hopper location and creating an unhealthy condition for himself and other truck drivers.

On or about September 13, 1995, Mr. Kaczmarczyk refused to perform a portion of job he had been assigned by Frank Derrick because he believed that performing the task as assigned would have placed him in a situation that may result in an injury. Specifically, Mr Derrick ordered Mr. Kaczmarczyk to pick up garbage in an area in which there existed a steep, 20-foot incline protected by a berm approximately 5 feet in height. While Mr. Kaczmarczyk did pick up garbage in the area, he refused to pick up garbage on the incline and the berm, since he believed that it would be dangerous for him to work in this area, given the equipment that was available to perform the task and the nature of the work site.

It also was stipulated that in the time period from September 13, 1995, to October 8, 1996, when Kaczmarczyk bid on the temporary truck job, he did not engage in any safety related or protected activities.

2. Adverse Actions

The Secretary alleges that the following constitute Reading's adverse actions: 1. On or about October 16, 1996, Reading awarded Markle the position of temporary haul truck driver, and 2. Reading denied Kaczmarczyk the opportunity to drive a water truck from March to May 1997. In essence, Reading did not dispute that it took these actions.

3. Motivation

Inasmuch as there is no dispute in the record that Kaczmarczyk engaged in protected activities, and that Reading took adverse actions, the only issue to be resolved is whether there was a nexus between the protected activities and the adverse actions. In other words in order to prevail, the Secretary must establish that the adverse action taken by Reading was motivated "in any part by that activity." (*Pasula*, supra at 2799) The prima facie case may be rebutted by Reading by showing that the adverse action was in no part motivated by protected activity.[5] If Reading cannot establish this, it may defend affirmatively by proving that it also was motivated by Kaczmarczyk's unprotected activity and would have taken the adverse action in any event based upon the unprotected activity alone. (*Tri-Star*, supra, at 2463-2464.)

Essentially it is Secretary's position that discriminatory motivation on Reading's part in taking the specific adverse actions against Kaczmarczyk, is established by evidence tending to show that Reading's rationale for these actions was merely pretextual. Reading argues that a nexus has not been established due to the long time span between protected activities and the adverse actions. In this connection it refers to the last protected activity which occurred on or about September 13, 1995, and the earliest adverse action which was taken on or about October 16, 1996, when Reading awarded another miner the position of temporary haul truck driver.

In general, the Commission in *Hicks* v. *Cobra Mining, Inc.*, et al. 13 FMSHRC 523 (1991) discussed the principles to be applied in evaluating motivational nexus.

> The Commission in previous rulings has acknowledged the difficulty in establishing a motivational nexus between protected activity and the adverse action that is the subject of the complaint. "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . 'Intent is subjective and in may cases the discrimination can be proven only by the use of circumstantial evidence.'" *Secretary o.b.o. Chacon* v. *Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), rev'd on other grounds sub nom. *Donovan* v. *Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983 quoting *NLRB* v. *Melrose Processing Co.*, 351 F2.d 693, 698 (8th Cir. 1965).

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[5]/ Reading argues that the Umpire's decision in the Grievance Procedure (RAC Exs 2 and 6) finding that (1) Kazmarczyk was not entitled to the truck driver position prior to the step 4 proceeding when he submitted the letter from Dr. Kuhlengel dated February 10, 1997, and (2) that six allegations of discrimination, which form part of the basis for the case at bar, were not discriminatory, should be dispositive of the instant proceeding. There is no indication that the parties to the grievance proceeding were provided an opportunity to fully develop the record, conduct cross-examination, or present witnesses on their behalf. More importantly, the grievance proceeding involved adjudicating rights under a union contract. It did not and can not adjudicate rights under section 105(c) of the Act, which is the exclusive jurisdiction of the Commission. Accordingly, I do not assign much weight to the decision of the Umpire.

> 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. 3 FMSHRC 2510.

Hence, as set forth by the Commission in *Hicks*, supra, coincidence in time between the protected activity and the adverse action is only one indicia of discriminatory intent, and not dispositive of that issue. Further, as noted by the Secretary, Kaczmarczyk was on workers compensation status between the date of the last protected activity alleged, and October 16, 1996, the date of the first adverse action, when he attempted to return to active duty as a temporary truck driver and the position was awarded instead to Markle. Hence, Reading did not have any opportunity to take any adverse action against Kaczmarczyk during the period when he was on workers compensation status. Accordingly, the lapse of time between the protected activity and the adverse action does not, by itself, prove disprove a nexus between the protected activities and the adverse action.

On the other hand, I accord most weight in evaluating Reading's motivation a statement made by Derrick at the Step 4 Grievance proceeding. According to Berger, after he offered a letter from Dr. Kuhlengel dated February 10, 1997, Derrick said that Kaczmarczyk "would be a downfall of Reading Anthracite Company" (Tr. 95) because of the cases that he had filed with the EEOC and with MSHA. Berger's version was in essence corroborated by Kaczmarczyk. Respondent's witnesses Derrick and Muntone presented a different version which Reading characterizes as no more than heated comments made during an attempt to resolve a contentious matter. Reading asserts that the majority of comments were no more than accurate statements of facts given to the Umpire as an explanation of the procedural posture of the matter. However, it is significant that neither Derrick nor Muntone explicitly denied the specific statement by Derrick as testified to by Berger. I therefore accept the version as testified to by Berger and Kaczmarczyk. I conclude, primarily based on this statement which evidences Derrick's state of mind and attitude towards Kaczmarczyk's protected activities, that there existed animus toward the protected activities.[6] For all these reasons I find that the Secretary has established evidence

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[6]/ I have considered Reading's argument that the claim that Derrick made discriminatory comments toward Kaczmarczyk is without merit because the Umpire who rendered the October 19-29 Grievance decision stated that he could not remember such statements being made, that because hearings are informal many irrelevant statements are made, and that the alleged statements in the context of the hearing do not show discrimination. However, I place more weight, in deciding whether the statements were made, upon live testimony of witnesses whose demeanor I was able to observe and whose testimony was subject to cross-examination. I also do not place any weight upon the conclusion of the Umpire, as the issue before him was not whether an act of discrimination occurred under section 105(c) of the Act.

of some discriminatory intent on the part of Reading when it took the adverse actions complained of. Thus I find that the Secretary has established a prima facie case (*Secretary on behalf of Robinette* v. *United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

C. Respondent's Affirmative Defense

Reading argues that based upon the treating physician's restrictions it was reasonable for it to have concluded that Kaczmarczyk was not qualified to perform the jobs for which he applied based on the job analyses of these positions until it obtained express approval from the treating physician based on a job analysis. Reading argued further as follows: (1) once the company obtained a verification from the treating physician, the positions were awarded to Kaczmarczyk; (2) any delays in obtaining reports were not attributable to the company in verifying Kaczmarczyk's fitness; and (3) Kaczmarczyk was compensated for lost wages due to any delay. The Secretary argues in his reply brief that Reading's arguments are pretextual in that it did not contact Dr. Kuhlengel, the treating physician, until February 18, 1997, 4 months after Kaczmarczyk and Berger had requested it to contact Dr. Kuhlengel, that the only motive was one of retaliation as set forth in pages 9-25 of its brief, and that Reading had abundant information available that indicated that Kaczmarczyk was capable of perform the duties involved in operating a truck. It was also argued that the back payments it made came only after it was clear that the company would be obligated to make such payment pursuant to the collective bargaining agreement, and after Kaczmarczyk had filed his present claim.

I have considered all of these arguments, as well as the balance of the Secretary's arguments as set forth in the post hearing brief. For the reasons that follows, I conclude that Reading has established its affirmative defense, and I reject the Secretary's arguments.

In light of Kaczmarczyk's prior history of medically documented back problems which restricted him from performing various duties in the past and placed him in a workers compensation status, I find that it was a legitimate business concern of Reading, acting through its agent Derrick, that Kaczmarczyk be physically capable of operating a haul truck, the position for which he bid in October 1996. The record establishes that a haul truck operator, hauling material from the co-generation plant, would be required to climb approximately ten steps up to the truck's cab only once a shift. In addition the weight of the evidence establishes that bending, climbing, and squatting are required 10 percent of the time. In addition the operator of the haul truck is required to lift up to 15 pound at one time, and to lift 15 pound above the shoulder level. The medical reports from physicians evaluating Kaczmarczyk's functional capabilities in the 12 month period immediately prior to Kaczmarczyk's bid on the haul truck position, provide a basis for a finding that it was not unreasonable for Derrick to conclude that Kaczmarczyk was restricted from performing the duties required in operating the haul truck. Dr. Kuhengel examined Kaczmarczyk on December 20, 1995. In a report dated December 20, 1995, Dr. Kuhlengel indicated that Kaczmarczyk should not lift or carry more than 10 pounds, and not do any bending, climbing and squatting. On June 5, 1996, Dr. Kuhlengel examined Kaczmarczyk. He indicated in a report dated June 5, 1996, that he gave Kaczmarczyk "... recommendations to return to work with restrictions of 10 pounds lifting and no overhead

working, no bending, pushing or pulling." Most significantly, when Kaczmarczyk expressed to Kerstetter his interest in driving a haul truck, he provided Kerstetter with a letter from Dr. Kuhengel dated September 25, 1996, stating that ". . . he is able to drive a truck with an air seat," but setting forth the same restrictions as he had set forth in his report of June 5, 1996, i.e., no lifting more than 10 pounds, and no bending, climbing, or squatting all of which are required to operate the haul truck. Hence, when Kaczmarczyk bid on the truck driver job in October 1996, it was not unreasonable for Derrick to have reached a conclusion in that the latter was medically restricted from performing all the duties of a truck driver.

Similarly, the decision by Derrick on March 12, 1997, to have a job analysis prepared for the water truck position for which Kaczymarczyk subsequently applied, which resulted in Kaczymarczyk's being denied the opportunity to drive a water truck from that date to May 1997, an adverse action, does not appear to have been an unreasonable business judgment. Although Kaczymarczyk had previously been able to perform all of the duties involved in operating a water truck in 1995, he subsequently reinjured his back in September 1995. Hence, there was legitimate concern whether he would be capable to perform the duties required in March 1997. Although the water truck was a haul truck modified to allow it to carry water, its operation required climbing eight times a shift, standing a total of 1 hour, and walking a total of an hour. In contrast, operating a haul truck required only climbing once a shift, and no standing or walking. All other physical demands of these job were the same. Thus, I find that the ordering of a job analysis, which delayed the offering of the job to Kaczymarczyk, was not such an unreasonable business decision, as to raise an inference that it was motivated by discriminatory intent.

Within the context of the above referred to evidence, I find that although the Secretary established a prima facie case, Reading has established that the adverse actions complained of would have been taken in either event based solely upon business decisions that were not unreasonable. I thus conclude that it not been established that Kaczymarczyk was discriminated against by Reading in violation of section 105(c) of the Act. Hence, the Complaint should be dismissed.

ORDER

It is **ORDERED** that this case be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

April 8, 1998

BLUE CIRCLE, INC.,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. CENT 97-181-RM
	:	Citation No. 7855639; 4/2/97
SECRETARY OF LABOR,	:	Modified 7/22/97
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Tulsa Plant
Respondent	:	Mine ID No. 34-00026

DECISION

Appearances: Greg Ruffennach, Esq., Ruffennach Law Offices, Durango, Colorado, for the Contestant;
Mary Schopmeyer, Esq., Suzanne Dunne, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for the Respondent.

Before: Judge Bulluck

This case is before me on a Notice of Contest filed by Blue Circle, Inc. ("Blue Circle") against the Secretary of Labor, acting through her Mine Safety and Health Administration ("MSHA"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. ("Mine Act"), in which Blue Circle challenges a citation that it was issued under section 104(a) of the Act.

A hearing was held in Tulsa, Oklahoma and the parties submitted post-hearing briefs. For the reasons set forth below, the citation shall be affirmed.

I. Stipulations

The parties stipulated to the following facts:

1. The Contestant is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq. ("Mine Act").
2. The presiding Administrative Law Judge has jurisdiction to hear and decide this matter.
3. The subject citation, as well as the amended citation, were properly issued and served by a duly authorized representative of the Secretary of Labor, Mine Safety and Health Administration, upon an agent of the Contestant on the date and place stated therein.

4. The Contestant has filed a timely notice of contest.

5. The abatement period, should this violation be upheld by this Court, shall be eight weeks from the date of the Court's decision.

II. Factual Background

Blue Circle operates a limestone quarry and cement plant near Tulsa, Oklahoma. The limestone is mined on site and transported overland to a bulk storage facility where two overhead cranes ("No. 1 crane" and "No. 2 crane"), traveling the length of the main bay on the same set of rails at varying speeds ranging from slow to very fast, pick up and dump rock and other bulk materials into large hoppers (Tr. 103-104, 184; Ex. R-3). Located at the end of the rails are large, 3 x 4 feet metal bumpers (end-stops), designed to prevent the wheels from derailing and causing the crane to fall some 60 feet to the ground (Tr. 25, 32, 44). One end of the building is enclosed, while the other end is completely open to the outside (Tr. 44, 80).

While similar in basic design, the cranes were manufactured by different companies (Tr. 13).[1] Each crane consists of a bridge that spans the east-west distance between the parallel rails, and runs north and south to the ends of the building (Tr. 25, 75, 132, 182). Suspended from each bridge near the center is a stationary, glass enclosed, operator's cab (Tr. 13, 26, 52, 161), as well as a trolley that travels east and west on girders affixed to and above the bridge (Tr. 13, 53-54, 182-183). The trolley supports two hoists that lift and lower a clamshell bucket, which moves the bulk materials (Tr. 13, 182). The motion of the bridge, the trolley and the bucket is controlled by use of levers located within the cab (Tr. 102-103, 184; see Ex. C-4).

The No. 1 crane, newer in design, is equipped with a hydraulic braking system, whereby its drum brake is applied by a foot pedal during operation of the crane (service brake), or by application of a console switch, which sets the brake in a parking mode (emergency brake) (Tr. 167). The No. 2 crane was originally manufactured so that its drum brake could be activated by a hydraulic foot pedal located in the cab (service brake) (Tr. 16, 65, 165-166, 177), or by electrical means when the operator pulled a lever located behind his chair, which would disconnect power to the entire crane, as well (emergency brake) (Tr. 14, 131, 137, 164-166). The crane has four motors: a motor to drive the bridge; a motor to drive the trolley; and two motors controlling hoist motion--one for holding the clamshell bucket and the other for opening/closing the bucket (Tr. 181-182).

Sometime around late 1989/early 1990, Blue Circle made modifications to the No. 2 crane, which included reconfiguring the cab by installation of a new operator's swivel chair and two emergency-stop buttons (one on either side of the operator's chair), and removal of the

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[1]Harnishfeger Industries, Incorporated, using the trade name "P&H" on some of its equipment, is the manufacturer of the No. 2 crane.

hydraulic foot pedal (Tr. 14, 139, 168-169, 171-173). At some earlier time, the actual hydraulic mechanism had been removed from the crane (Tr. 172). As a consequence of these modifications, the crane has been operated without a service brake and the sole means of activating the friction emergency/parking brake has been by pressing either of the emergency-stop buttons (Tr. 14). Since engaging the emergency brake shuts off the power to the entire crane, this violent method of stopping is reserved for emergency situations only (Tr. 20-22, 28, 130, 162-164, 189).

In order to stop the No. 2 crane during the normal course of operations, the operators use a slowing method or braking means referred to as "plugging," whereby reversing the bridge motor's torque to create a magnetic field in the direction opposite of that in which the motor is running, creates friction on the wheels by the back and forth movement, until the crane comes to a stop (Tr. 15, 70-71, 81, 194).

On April 2, 1997, MSHA Inspector Don Richards conducted an electrical inspection of the Tulsa plant, pursuant to a hazard complaint (unrelated to the operation of the crane) (Tr. 47-49). Upon his arrival, he was met by Blue Circle's safety representative Jerry Dean, who, based on safety concerns, directed the inspector's attention to the No. 2 crane (Tr. 12). During his inspection of the No. 2 crane, Inspector Richards discovered, among other things, the removal of the hydraulic foot pedal and the installation of the two emergency-stop buttons (Tr. 14). Inspector Richards then interviewed two crane operators, traveled in the crane with an operator, and conducted motion/stop tests (Tr. 14, 16, 18-20, 25-26, 28, 40). Based on his observations, interviews and test results, Inspector Richards issued section 104(a) citation No. 7855639 to Blue Circle on that day, alleging a significant and substantial violation of 30 C.F. R. §56.14101(a)(3) [later modified on July 22nd to allege a violation of §56.14100(b)], describing the violation as follows:

> The overhead, rail mounted, #2 clamshell crane, located in the south crane storage building, was observed operating without the factory equipped foot brake that had been originally installed on it. The brake was removed some months ago and no provision was made to install another brake. The crane is now stopped by plugging the drive motor. There are two cranes that operate in the south crane storage building on the same rail at the same time. They work in close proximity daily and the lack of a foot brake, as a means of stopping the crane, increases the possibility of an accident or injury. The other crane has its foot brake intact and operational (Ex. R-1).

III. Findings of Fact and Conclusions of Law

A. Fact of Violation

30 C.F.R. §56.14100(b) provides that: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to

persons." The seminal issue for resolution, then, is whether removal of the manufacturer-installed hydraulic service brake on the P&H No. 2 crane constitutes a defect that affects safety.

In discussing the broad applicability of the generally worded predecessor regulation, [2] the Commission has emphasized that the standard must be construed in consonance with the fundamental protective ends of the Mine Act, so that the "integrity of a machine is not defined solely by its proper functional performance but must also be related to the protection of miners' health and safety." *Ideal Cement Co.*, 12 FMSHRC 2409, 2414-15 (November 1990) (*Ideal I*).

1. Defect

In order to establish a violation of this regulation, the Secretary must establish that 1) there was a defect in the No. 2 overhead crane; 2) the defect affected safety; and 3) the defect was not corrected in a timely manner to prevent the creation of a hazard. Respecting the first element of this analysis, the Commission has previously adhered to the ordinary and mining industry usage of the term "defect" as a "fault, a deficiency, or a condition impairing the usefulness of an object or a part. *Webster's Third New International Dictionary (Unabridged)* 591 (1971); U.S. Department of Interior, Bureau of Mines, *A Dictionary of Mining, Mineral and Related Terms* 307 (1968)." *Allied Chemical Corporation*, 6 FMSHRC 1854, 1857 (August 1984). Moreover, the Commission has held that a missing, as well as a defective component, may constitute an equipment defect, and the defect or missing component need not affect the operation of the equipment. 12 FMSHRC 2415; 6 FMSHRC 1857. In the instant case, there is no dispute that the missing hydraulic service brake on the No. 2 crane constitutes a "defect" within the meaning of the regulation, Blue Circle concedes this point, and I so conclude (C. Br. at 9).

2. Affects Safety

The parties are in dispute, however, as to whether the defect affects safety. Respecting this element, the Commission has repeatedly stated that the "phrase 'affecting safety' in the standard has a wide reach and the 'safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach." *Ideal Cement Co.*, 13 FMSHRC 1346, 1350 (September 1991) (*Ideal II*), *citing Ideal I*, 12 FMSHRC 2415, *citing Allied Chemical Corp.*, 6 FMSHRC 1854, 1858. Recognizing that adequate notice of the conduct prohibited by the regulation must be accorded to the operator, the Commission has required that the evidence be evaluated in light of what a "reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would have provided in order to meet the protection intended by the standard." 12 FMSHRC 2415, 2416, *citing Canon Coal Co.*, 9 FMSHRC 667, 668 (April 1987); *Quinland* Coal, *Inc.*, 9 FMSHRC 1614, 1617-18 (September 1987). The

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[2] 30 C.F.R. § 56.9002 (1987) provided that: "Equipment defects affecting safety shall be corrected before the equipment is used."

Commission has provided further guidance on application of this objective test by recognizing "that the various factors that bear upon what a reasonable person would do include safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine." *BHP Minerals International Inc.*, 18 FMSHRC 1342, 1345 (August 1996), *citing U.S. Steel Corp.*, 5 FMSHRC 3, 5 (January 1983).

The Commission, in *Ideal I*, has provided a practical framework in which to make such analysis, by specifying categories of evidence to be examined in the context of the modified condition in which the equipment was being used. Within that framework, in the instant case, it is appropriate to examine, at least, the following evidence: 1) the testimony of Blue Circle employees and the inspectors regarding whether operating the No. 2 crane without the hydraulic service brake affects safety; 2) any evidence of whether the presence of the hydraulic foot pedal impeded the equipment operators' use of the equipment; 3) any evidence of the whether the operator's safety policies prohibited removal of the hydraulic service brake; and 4) any evidence of industry or manufacturer's policy on removal of the hydraulic service brake and the circumstances, if any, under which it could be removed without impairing safety. *See* 12 FMSHRC 2416.

The Secretary takes the position that, irrespective of the No. 2 crane's ability to stop/perform within national industry standards, removal of the hydraulic service brake poses a hazard to miners' safety (R. Br. at 4). Blue Circle, on the contrary, contends that removal of the hydraulic service brake does not adversely affect safety, since the crane meets national safety standards and Occupational Health and Safety Administration (OSHA) regulations, and the crane can be stopped safely under both normal and emergency conditions. Moreover, Blue Circle asserts that it has been denied fair notice (C. Br. at 7-8).

Inspector Donald Richards testified to having interviewed two crane operators who related having experienced numerous electrical problems on the No. 2 crane (blown fuses, wires burned off of connections, and power failure to the motor), and who attributed the inability to hold the crane in one place by plugging, as the cause of collisions between the clamshell bucket and the cab, knocking off the end-stops, and near-derailments (Tr. 16-17, 19, 24-26, 43). He further testified to having been told of the confusion experienced by new operators, caused by having to switch between the No. 1 and 2 cranes, with differing braking configurations (Tr. 19-20). Moreover, he stated that when he had an operator demonstrate plugging on the No. 2 crane, by running it from one end of the building to the other at high speed, the violent jumping and vibrating that occurred, accompanied by tremendous noise, "stressed everything on it" (Tr. 18, 40). In this regard, the inspector explained that, while pulling and lifting functions usually cause stress cracks on cranes, violent motion worsens these cracks which, taken to the extreme, have resulted in derailment and, ultimately, death (Tr. 19, 23-24). Additionally, Inspector Richards characterized employment of the emergency brake for stopping, as a "last ditch effort," because of its very violent nature and, due to disconnection of all power, because it deprives the operator of all control (Tr. 20-22). In his opinion, operating the crane without the availability of the hydraulic service brake poses a safety hazard, by depriving the operator of a means of immediate

stopping that does not kill the power to the crane completely. He reasoned that plugging is a slowing, rather than braking function, which requires estimates based on speed and weight of load, it neither enables the operator to hold the crane nor does it aid in checking the swing of the bucket when the operator has to stop suddenly; more importantly, in situations of total power failure and/or emergency brake failure, it renders the operator powerless, without any brake at all (Tr. 18, 27-28, 29-32). While Inspector Richards conceded that the crane stopped within OSHA guidelines,[3] he testified that the hydraulic service brake is necessary for safe operation of the crane, nevertheless, especially in light of the close proximity in which the cranes operate on the same rails, and since they have already collided (Tr. 38-42).

MSHA Inspector Stephen Dubina, an expert in electrical engineering, performed an inspection of the No. 2 crane on August 12, 1997, which included visual inspection, stop-testing using the emergency brake, and interview of crane operators (Tr. 64; see Ex. R-3). Inspector Dubina testified that, notwithstanding the fact that the crane stopped within CMAA guidelines using the emergency brake and held the crane in place (Tr. 66-67, 83, 88),[4] the bucket swung radically (Tr. 83), the crane jerked violently and "you could hear the grinding and other bad things happening inside the gear cases, so that it's not a thing that you want to stop the bridge every time using that parking brake" (Tr. 89-90). Plugging is an ineffective braking method, he explained, because it slows the conveyance, rather than holding it in a specific spot or bringing it to an immediate stop (Tr. 66-67, 69, 81-82, 86). While the inspector asserted that plugging is the accepted stopping means used in the industry during anticipated movement, he opined that during unanticipated movement of a crane (caused by wind, vibrations, or tilted rails, for example), there exists the potential for injury and the ability to hold the crane in place is crucial (Tr. 78-80, 84, 94, 96-99). The ability to hold the bridge in place is also crucial to picking up and dumping loads, he noted, in which case use of the emergency brake is essentially prohibitive because it cuts off all power to the crane (Tr. 91). He also stated that the operators expressed concerns about plugging failures in which they were unable to stop until friction actually stopped the crane or it hit something, and about new operators having difficulty switching between operating the two cranes (Tr. 68, 72-73).

The Secretary presented compelling testimony of several Blue Circle employees who have operated or serviced the No.2 crane within the last decade. Jerry Pardue, a 26 year employee and crane operator from July 1995 to July 1996 (Tr. 117), testified that, due to loss of control more than a dozen times from power failure and/or emergency brake failure, he had collided with the other crane, run into the end-stops, and on one occasion when he had gone on

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[3]Judicial notice was taken of applicable OSHA regulations at the hearing (Tr. 207; see Ex. C-2). Blue Circle concedes that MSHA is not bound by OSHA regulations (Tr. 199; C. Br. at 13, n. 11).

[4]CMAA (Crane Manufacturers of America) is a trade association with an engineering committee that writes design (industry) standards for overhead cranes (Tr. 178; Ex. R-4).

vacation, the relief operator had knocked out all the cab windows with the bucket (Tr. 105-106, 108, 111-112). Pardue asserted that, because Blue Circle did not reinstall the hydraulic service brake as he had requested, after these incidents had been reported and Pardue had removed the crane from service for approximately two weeks, he refused to operate the crane without the brake and ultimately changed jobs in mid-summer 1996 (Tr. 108-113).

25-year employee Jerold Emerson, a crane operator for 3 years (primarily on the No. 2 crane for 1½ years) (Tr. 119, 127), testified that he experiences electrical failures in the cab on an average of 1 to 2 times per week, that he has had the bucket "kiss" the cab, that depressing the emergency-stop button causes dust to fly everywhere and loss of control of the swinging bucket, that it is difficult to hold the crane in one position by plugging, that ½ of the crane operators are rookies and have problems switching between the cranes, and that plugging involves guesswork as to where the crane will stop (Tr.120-125). Additionally, he expressed his belief that an operator is better able to predict where the crane will stop by using the hydraulic service brake than with plugging, and the hydraulic service brake provides a means of stopping in situations where both plugging and the emergency brake fail (Tr. 123, 127).

David Ford, an employee of 19 years, currently an electrician who services the cranes and formerly a vacation relief operator for 8½ years (Tr. 129), testified to experiencing both plugging and emergency brake failure, having accidents in which he knocked the end-stops off the building and the crane almost derailed (Tr. 131-132), being thrown about the cab and suffering injury resulting in a 5% back disability (Tr. 130), and having another worker riding the bridge when one of the accidents occurred (Tr. 132-133, 138). Further, he explained that since the trolley is routinely serviced by workers standing atop the bridge , which "is like a big sail in the wind, it will move, " it is necessary to for an operator to have a safe means of holding the bridge in place from the cab (Tr. 142). Moreover, Ford asserted that the hydraulic service brake permits compensation for overestimates in plugging, that because the two cranes work in close proximity to each other, it is necessary to have a second method of stopping, and that production supervisor Don Jones instructed him to rely on plugging and the hydraulic service brake to stop (Tr. 134-136).

Jerry Dean, 25-year employee and former miners' union representative, testified to having received complaints from workers about unsafe conditions on the No. 2 crane, including inability to stop during power failures, and lack of control over the swing of the bucket during plugging (Tr. 144-147). Furthermore, he stated that he had reported these complaints to management (Tr. 147).

Blue Circle presented the testimony of utility supervisor Ronald Glover, a 23 year employee and former operator of the No. 2 crane in or around 1966, when it was relatively new and long before the hydraulic service brake was removed (Tr. 152-153, 155). Glover opined that removal of the hydraulic service brake did not affect safe operation of the crane (Tr. 153). He admitted, however, that he had never used the emergency-stop, nor had he experienced plugging failure (Tr. 154).

In considering the next category, whether the hydraulic service brake impeded the operators' ability to operate the crane, the evidence establishes that the hydraulic service brake was removed due to frequent leaks of hydraulic fluid (Tr. 138-139, 171). While James Kriel, senior electrical engineer at Blue Circle, testified on behalf of Blue Circle that the hydraulic foot pedal was in the way of the swivel chair that had been installed when the cab was modified (the hydraulic brake mechanism had been removed previously), there is no evidence that the foot pedal obstructed safe and comfortable operation of the controls (See Tr. 168-169).

The third category of evidence in considering whether safety is affected is whether the operator's safety policies prohibited removal of the hydraulic service brake. James Kriel also testified that he was unaware of who had made the decision to remove the hydraulic brake mechanism previously or whether Harnischfeger had been consulted, but that it was he who had made the decision to remove the hydraulic foot pedal from the cab (Tr. 172). He asserted that safety was not a concern, since the hydraulic system had been unreliable, removal did not degrade the ability to stop by plugging under normal operating conditions, and an emergency-stop system was available in adverse situations (Tr. 169, 171-172).

In considering the fourth category, industry or manufacturer's policy on removal of the hydraulic service brake, 19-year employee Gary Burch, a maintenance welder and console operator, provided credible and unchallenged testimony for the Secretary on this issue. Burch stated that he had received a week of training on the No. 2 crane in late 1996/early 1997, and that in response to the question of whether the hydraulic service brake should have been removed, the instructor, a representative of Harnischfeger Industries, responded that "they're not supposed to do away with anything that was manufactured on the crane that has to do with the operation or the safety on it" (Tr. 149-150). Burch also stated that he had related this information to Blue Circle's safety and maintenance departments (Tr. 150). Moreover, Inspector Richards testified that, of the overhead cranes he had inspected, none but the No. 2 crane had had the hydraulic service brake removed (Tr. 49). Andrew Toth, Blue Circle's expert, testified that he would not recommend removal of hydraulic service brakes on cranes similar to the No. 2 crane as a general practice, since "there are applications where it's advantageous to use the hydraulic brake for accurate positioning" (Tr. 215-216). Harnischferer's letter of April 18, 1996, to Blue Circle does not address the circumstances under which the hydraulic service brake could be removed without compromising safety, but suggests how the P&H No. 2 crane, in its modified configuration, could fulfill OSHA requirements. While Harnischfeger noted that new P&H cranes are equipped with adjustable frequency electrical controls (designed to automatically brake them without the use of foot applied brakes) and parking/emergency brakes, it is clear from the record that the No. 2 crane is not equipped with this technology (See Ex. R-3 at 8-9).

Andrew Toth, a retired 35-year employee of Harnischfeger, designed assemblies for overhead cranes and hoists (Tr. 176-177). Pursuant to Blue Circle's request that he examine the No. 2 crane, Toth rode in the cab with the operator (without a load) in order to test the crane's braking means and systems (Tr. 185, 208; see also Ex. C-1). He testified that, according to his test measurements, the crane stopped within industry and OSHA standards when plugged, as

well as when the emergency brake was employed (Tr. 186-188, 198-201).[5] He noted, however, that while the crane stopped smoothly when plugged, the stopping action associated with the emergency brake was violent (Tr. 189). He asserted, therefore, that the emergency-stop system should be utilized only when all else fails (Tr. 189). In his testimony, Mr. Toth also emphasized the pervasive use of plugging in the industry, as an accepted braking means on bridge and trolley motions (Tr. 190). Although he concluded that the crane is meant to be plugged and that removal of the hydraulic service brake does not affect safety, he acknowledged that, during his observation, the operator was unable to hold the crane in position, nor did he, Toth, observe any tract clamps or other hold-down devices, which he had referenced in his testimony as alternative holding means (Tr. 202, 205 211; see Ex. C-1). Moreover, Mr. Toth stated that he only talked to the operator on duty, and that he did not ask his opinion as to whether the missing brake posed a safety problem (Tr. 209).

It is important to note, at this juncture, that all of the witnesses were credible, and gave clear and concise accounts of their experiences which, with minor exceptions, were unrebutted. Based on the personal accounts of power failures, accidents and near-misses by the operators, notwithstanding the ability of the crane to stop within industry and OSHA guidelines, it is clear that there are times when the ability to hold the crane is crucial. James Kriel even acknowledged that hydraulic brakes were designed "from an operational point, to allow you to precisely maneuver the crane to an exact point" (Tr. 174). The evidence of record is overwhelmingly contrary to his conclusion, however, that "[i]n our operation, we don't have to precisely maneuver it to an exact point" (Tr. 174). While Blue Circle seeks to minimize the personal accounts of those crane operators whose very lives have been placed on the line by diminished to non-existent ability to stop and/or control the crane, their cumulative testimony, when considered in conjunction with the enormity of the crane, its suspension on the rails and tandem operation with the other crane, establishes the need for the highest degree of maneuverability that is technologically possibly, as opposed to reduction of any safety devices that have already been provided for that purpose. Moreover, the record is replete with credible accounts of power failures and failed systems that have left the miners to the mercy of the crane coasting to a stop on its own. For all the obvious reasons that it is unfathomable that an automobile driver lack control of his vehicle in any aspect of its operation, on a larger scale, it is all the more obvious that a crane operator must be provided with all available means of controlling this enormous machinery, especially when life and limb are in jeopardy (See Tr. 21, 69-71). To the extent that Blue Circle has premised its position solely on the functional performance of the crane in terms of industry standards, it has neglected to duly consider the electrical system and/or emergency brake failures which have already occurred and cannot be ruled out in the future, and, therefore,

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[5]Judicial notice taken of applicable ASME (American Society of Mechanical Engineers) standards at the hearing (Tr. 207). ASME is a professional association of manufacturers, users and other interested parties that writes consensus (safety) standards in performance language which, after distribution and comment under procedures accredited by the American National Standards Institute (ANSI), become American National Standards (Tr. 178-179; Ex. C-3).

it has failed to prioritize the safety of the miners, as required by the standard. By so doing, it has deprived them of the enhanced protection that the hydraulic service brake was designed to provide. I am persuaded that plugging is generally accepted in the industry as the preferred stopping means under normal conditions, but I am equally persuaded that, under extraordinary circumstances, the emergency brake alone (stressing the crane and non-performing on occasion) does not provide the level of protection that was envisioned by the original design of the crane. I find, therefore, that removal of the hydraulic service brake comes within the ambit of the "wide reach" covered by §56.14100(b), and is a defect affecting safety.

3. Timely Correction

Respecting the last element in establishing a violation, whether the defect was corrected in a timely manner, it is a matter of record that Blue Circle has not attempted to replace the hydraulic service brake, nor has any intention of doing so. Accordingly, I find that the safety defect was not corrected in a timely manner.

4. Conclusion

Section 56.1 of the regulations, 30 C.F.R. §56.1 makes known that: "The purpose of these standards is the protection of life, the promotion of health and safety, and the prevention of accidents." If Blue Circle was unaware of the necessity of the maintaining the hydraulic service brake on the crane at the time it elected to remove it, it certainly became aware that the brake should be reinstalled when the operators reported the power failures, emergency brake failures and accidents, and when Jerry Pardue removed the crane from service. I find that a reasonably prudent person, familiar with the mining industry and the purpose of the regulations, would have reinstalled the hydraulic service brake on the No. 2 crane, at least, immediately after Jerry Pardue reported the simultaneous plugging/emergency brake failure, or while it was red-tagged by Pardue for two weeks to prevent future accidents, such as those that have caused David Ford's back disability and the Missouri fatality referenced by Inspector Richards in his testimony (Tr. 19). Therefore, I conclude that Blue Circle violated section 56.14100(b) of the regulations.

B. Significant and Substantial

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

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety

hazard--that is, a measure of danger to safety--contributed to by the violation; 3) a reasonable likelihood that the hazard contributed to will result in an injury; and 4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-104 (5th Cir. 1998), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria. Evaluation of the third criterion, the reasonable likelihood of injury , should be made in the context of "continued mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1998). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988).

Inspector Richards found the violation to be S&S. He testified that he had determined it "reasonably likely" that an injury would occur, based on information that he had received from the crane operators that they had already had incidents of a broken light and knocked off end-stops due to inability to stop, and that such injury would result in "lost workdays or restricted duty," since the crane operators, without seatbelts, could be thrown about the enclosed metal cab (Tr. 26-27). I find, based upon the evidence, that there was a reasonable likelihood that collision with the other crane or the end-stops, and/or collision between the bucket and cab, contributed to by the removal of the hydraulic service brake, would result in an injury of a reasonably serious nature. Therefore, I conclude that the violation was "significant and substantial."

ORDER

Accordingly, Citation No. 7855639 is hereby **AFFIRMED**, and this Contest Proceeding is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 10 1998

ASSOCIATED ELECTRIC COOPERATIVE, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	Docket No. CENT 97-164-R
v.	:	Citation No. 4264782; 6/23/97
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA),	:	Docket No. CENT 97-165-R
	:	Order No. 4264783; 6/23/97
	:	
Respondent	:	Thos. Hill Energy Center
	:	Mine ID 23-02155

DECISION

Before: Judge Feldman

These contest proceedings concern Associated Electric Cooperative, Inc.'s (AECI's), refusal to allow the entry of a Mine Safety and Health Administration (MSHA) inspector into AECI's electric power generating facilities at Thomas Hill located in Randolph County, Missouri. At issue is whether AECI's coal handling operations at its Thomas Hill facilities constitute the "work of preparing coal" as contemplated by section 3(h)(1) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 802(h)(1), thus subjecting AECI to Mine Act jurisdiction. Section 3(h)(2)(i) of the Mine Act defines the "work of preparing coal" as ". . . the breaking, crushing, sizing, cleaning, washing, drying, mixing, storage, and loading of bituminous coal, lignite, or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine."

The nature of the coal preparation process performed by AECI at Thomas Hill is not in dispute and is set forth in the parties' stipulations. Briefly stated, AECI's Thomas Hill power plant receives by rail approximately 83,000 tons of coal weekly from mines located in the State of Wyoming operated by Powder River Coal Company, a subsidiary of Peabody Holding Company. Coal extracted from the Wyoming mines is crushed prior to shipment to a size such that the largest pieces of coal will pass through a 2½ inch hole.

Upon arrival from Wyoming, each trainload of coal passes through AECI's "Car Dumper Building" where coal is dumped into hoppers one carload at a time. At the top of each hopper a "grizzly", or grate, removes large clumps of coal or other material that could block the hoppers. From the dump hoppers, coal is transported through the Sample Building, Transfer House No. 3 and, ultimately, Transfer House No. 1, by means of a conveyor system with a series of electromagnets installed to remove any scrap metal and other impurities from the coal. It is important to remove metal debris such as tools, bulldozer bucket teeth, railroad spikes, etc., so

that AECI's equipment used later in the process, e.g., coal crackers, crushers, pulverizers and burner units, is not damaged.

After moving through Transfer House No. 1 the coal is directed by conveyor in one of two directions for final coal preparation tailored for the requirements of three of Thomas Hill's individual generating units. At Units 1 and 2, coal is conveyed to the Crusher House where two Pennsylvania hammer mill crushers crush the coal to a size of ¼ inch. At Unit 3 the coal is initially conveyed through coal crackers that break larger clumps of coal into smaller sizes. The coal is then conveyed into a granulator (ring crusher) to ensure sizes no greater than 1½ to 2 inches. The sized coal is then stored in silos for the different generating units. The storage silos are located in the power generation building.

In September 1995, the Occupational Safety and Health Administration (OSHA) received a complaint from a Thomas Hill Energy Center employee concerning hazards associated with the inhalation of suspended coal dust as well as hazards related to potential combustion of accumulated coal dust at the track hopper feeder and in conveyor belt tunnels. After visiting Thomas Hill, OSHA informed AECI that it was referring the complaint to MSHA. As a result of OSHA's referral, in March 1977, MSHA, after several consultations with AECI officials, issued a jurisdictional determination citing the boundary between OSHA and MSHA jurisdiction at the point where coal is unloaded using the rotary car dumper onto conveyors that ultimately transport coal into the power generation building. In June 1977, MSHA offered to meet with AECI for the purpose of discussing the Mine Act and regulations. However, AECI informed MSHA that it would refuse to permit an inspection because it objected to MSHA jurisdiction.

On June 23, 1997, MSHA Inspector Larry G. Maloney was refused entry to the Thomas Hill power plant. Maloney issued Citation No. 4264782 alleging a violation of section 103(a) of the Mine Act, 30 U.S.C. § 813(a), which requires mine operators to permit MSHA representatives to enter mine property. AECI was given 30 minutes to abate the alleged violation. Having failed to do so, Order No. 4264783 was issued pursuant to the provisions of section 104(b) of the Mine Act, 30 U.S.C. § 814(b), that require timely abatement of cited violations by mine operators.

As a consequence of AECI's continued refusal to submit to an MSHA inspection, on July 3, 1997, pursuant to section 108(a)(1)(D) of the Act, 30 U.S.C. § 818(a)(1)(D), the Secretary filed a civil action for injunctive relief with The United States District Court for the Eastern District of Missouri.[1] Unaware of the initiation of the civil action, on July 16, 1997, AECI mailed its Notice of Contest with respect to the subject citation and order.

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[1] Section 108(a)(1)(D) authorizes the Secretary to seek permanent or temporary injunctive relief in the district court of the United States for the district in which the coal mine is located whenever an operator refuses to permit inspection.

On September 15, 1997, AECI filed a motion to stay these contest proceedings, asserting the pending civil injunctive action and these proceedings create a "multiplicity of litigation." AECI's stay request was denied by the undersigned on October 8, 1997. The stay was denied because the issue before the District Court, *i.e.*, whether temporary injunctive relief should be granted, was distinguishable from the ultimate jurisdictional issue before me.

In view of the extensive and detailed stipulations filed by the parties and the absence of outstanding unresolved material issues of fact, I had anticipated disposing of this case by summary decision. However, on February 24, 1998, the Secretary furnished the February 18, 1998, decision of the U.S. District Court for the Eastern District of Missouri permanently enjoining AECI from refusing to permit MSHA inspections at the Thomas Hill Energy Center. *Herman v. Associated Electric Cooperative, Inc.*, No. 2:97CV39-DJS (E.D. Mo. Feb. 18, 1998). The District Court noted section 108(a) of the Mine Act expressly provides primary district court jurisdiction when the Secretary seeks injunctive relief to enjoin habitual violations of health and safety standards. *Slip op.* at 2. The District Court also concluded it had concurrent jurisdiction with this Commission with respect to the underlying jurisdictional issue because disposition of this matter rests upon stipulated facts, and resolution of this case is "largely controlled by precedent of both the [Federal Mine Safety and Health Review] Commission and Courts of Appeals." *Id.* at 4.

In view of its primary and concurrent jurisdiction, the court declined to defer to the Commission by issuing a preliminary injunction pending the disposition of this administrative proceeding. Rather, the court exercised its jurisdiction by consolidating its consideration of the preliminary and permanent injunctions, and, permanently enjoined AECI from refusing to permit MSHA inspections at its Thomas Hill facility. *Id.* at 15. AECI has filed a Notice of Appeal of the District Court judgement.

I construed the Secretary's February 24, 1998, submission of the District Court's decision as an assertion that the doctrine of collateral estoppel applies in these matters. Consequently, on March 6, 1998, AECI was ordered to show cause why it should not be precluded from prosecuting its contests of the subject citation and order given the District Court's resolution of the jurisdictional issue.

AECI responded to the order to show cause on March 27, 1998. AECI, citing case law that collateral estoppel is only applicable where the original judgement was rendered by a court of competent jurisdiction, asserts the court did not have jurisdiction to issue a permanent injunction in this case. Consequently, AECI urges this Commission to address, prior to applying the doctrine of collateral estoppel, whether the District Court was a court of competent jurisdiction.

Alternatively, notwithstanding the question of district court jurisdiction, AECI contends the Commission should exercise its discretion and not apply collateral estoppel in this matter because AECI did not have "a full and fair opportunity to litigate the ultimate [jurisdictional] fact issue . . ." that is now before the Commission because it believed the only pending issue before the District Court was a preliminary injunction.

Finally, AECI requests this matter be stayed pending the outcome of its appeal of the District Court's decision if the Commission declines to issue a decision on the merits.

The Secretary responded to AECI's response to the order to show cause on April 2, 1998. The Secretary asserts collateral estoppel should apply because the District Court had the discretion to permanently enjoin AECI from refusing to allow MSHA inspections rather than delaying its issuance of a permanent injunction until a Commission decision on the merits. With respect to AECI's claim that it did not have a full opportunity to be heard in district court, the Secretary points out that the detailed stipulations filed in this proceeding are identical to the stipulations filed in the injunctive relief matter. Moreover, the parties filed extensive briefs devoted to the "merits" question in district court.

Discussion

The doctrine of collateral estoppel provides that, once an issue is actually and necessarily determined by a court of competent jurisdiction, the determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). Collateral estoppel serves "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party . . . and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979) *citing Blonder-Tongue Lab, Inc., v. University of Ill. Found.*, 402 U.S. 313, 328-29 (1971).

As a threshold matter, AECI's assertion that the District Court decision is not dispositive is in stark contrast with its September 15, 1997, motion to stay this administrative proceeding wherein it stated:

> Contestant did not intend to cause a multiplicity of litigation and may not have filed the Notice of Contest [initiating this administrative contest proceeding] if it had been aware of the fact that the [Secretary had] already [filed in] District Court.
>
> The [Secretary] has correctly stated to the District Court that resolution of this matter will turn chiefly on the court's determination of issues of law. It is anticipated that the issues of law will be submitted to the court on an agreed or substantially stipulated record of facts. The court will not require this [Commission's] expertise to find the facts and will not be bound by the [Commission's] conclusions of law.
>
> For judicial and administrative economy and to spare expense to the government and this citizen, this administrative proceeding should be stayed. (Contestant's Stay Motion, pp. 1-2).

Undaunted by the above cost-benefit analysis advanced in support of its motion for stay concerning unnecessary multiplicity of litigation, AECI now argues the Commission should not give recognition to the court's adverse decision. AECI, however, has provided no adequate justification to preclude the applicability of collateral estoppel. While, as AECI contends, a party may collaterally attack the validity of a judgement for lack of subject matter or personal jurisdiction, it is clear that these deficiencies were not present in the court proceeding. In addition, an administrative proceeding is not the proper forum for collaterally attacking a federal court decision. Rather, the jurisdictional issue in this matter is where it belongs -- in the Eighth Circuit.

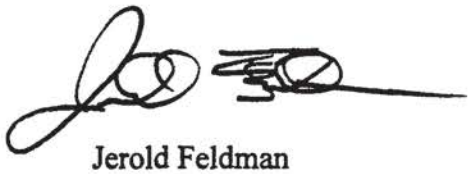
Moreover, as proceedings under the Mine Act are subject to federal appellate review, it would be inappropriate for this Commission to substitute its judgement for that of a court of appeals as to whether a district court had jurisdiction to render permanent injunctive relief. In addition, section 106 (a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), provides that Commission decisions are reviewable in the circuit in which the violation allegedly occurred, or, in the D.C. Circuit. Thus, given the pending appeal in the Eighth Circuit, a Commission decision on the merits in this case could result in appeal of the same issue in different appellate circuits.

Finally, I am not persuaded by AECI's contention that the Commission should exercise its discretion and decide this case on the merits despite the court decision because AECI did not have "a full and fair opportunity" to be heard. As noted above, AECI has previously opined before this Commission that the court was fully capable of resolving this jurisdictional question. Moreover, the court relied on the same stipulations and arguments that have been presented by the parties in this matter. Contrary to AECI's assertion, the court's decision, which sets forth the pertinent, well settled Commission and federal case law, reflects this jurisdictional question was fully presented and thoroughly considered.

Finally, AECI has presented no basis for staying this matter pending its Eighth Circuit appeal of the permanent injunction as long as the permanent injunction remains in force.

ORDER

Accordingly, the doctrine of collateral estoppel applies in this contest matter. Consequently, **IT IS ORDERED** that Associated Electric Cooperative, Inc.'s contests of 103(a) Citation No. 4264782 in Docket No. CENT 97-164-R, and 104(b) Order No. 4264783 in Docket No. CENT 97-165-R, on the basis of its assertion that it is not subject to Mine Act jurisdiction, **ARE DISMISSED** with prejudice, as long as the attached judgement permanently enjoining AECI from refusing to permit MSHA inspections at its Thomas Hill power plant remains in effect.



Jerold Feldman
Administrative Law Judge

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FALLS CHURCH, VIRGINIA 22041

APR 13 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 97-321
Petitioner	:	A. C. No. 15-02263-03539
v.	:	
	:	Docket No. KENT 98-9
LONE MOUNTAIN PROCESSING, INC.,	:	A. C. No. 15-02263-03540
Respondent	:	
	:	Darby Fork No. 1 Mine

DECISION

Appearances: Mary Sue Taylor, Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Frenchette C. Potter, Esq., Arch Mineral Corporation, Saint Louis, Missouri, for the Respondent.

Before: Judge Weisberger

These cases, consolidated for hearing, are before me based on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (Petitioner) alleging violations by Lone Mountain Processing, Inc. (Respondent) of mandatory safety regulations set forth in Title 30 of the Code of Federal Regulations. Pursuant to a notice, these cases were heard in Johnson City, Tennessee, on January 14, 1998. Petitioner and Respondent each filed proposed findings of fact and a brief on February 20, 1998.

FINDINGS OF FACT AND DISCUSSION

I. Docket No. KENT 97-321

A. Citation No. 4074103

At the hearing, Petitioner indicated that Citation No. 4074103 was vacated and moved to withdraw the citation. Based on Petitioner's assertions at the hearing, the motion was granted directing that citation be dismissed.

B. Citation No. 4581438

1. Violation of 30 CFR § 75.370(a)

Lawrence Rigney, an MSHA inspector and health specialist, inspected Respondent's Darby Fork No. 1 underground coal mine on June 11, 1997. Upon his arrival at the mine at the beginning of the day shift, he placed dust pumps on the miner operator, two roof bolters, and the scoop operator. Rigney then rode inby to the working section with these miners and the remaining crew. The men traveled in a rubber-tired diesel-powered mantrip inby in the roadway entry. The entry was ventilated by air which coursed in the entry inby, but exited the entry through a regulator at a point outby the face.

According the Rigney, as the mantrip commenced to travel inby he noticed the roadway was "rather dusty," (Tr. 20). It was Rigney's testimony that as the mantrip proceeded further inby the mantrip's wheels stirred up dust, and dust hung over the mantrip. Rigney then put on a dust respirator. Rigney also saw dust in the beam of his cap light. According to Rigney, the roadway was not damp and was "extremely dry and dusty" (Tr. 23). He indicated that the roadway, up to four to five brakes outby the face was"okay," but further outby at that point it became dusty. Rigney indicated that there was an area of dust in the air that commenced 15 to 20 crosscuts from the face and continued 10 to 15 crosscuts.[1] He estimated that it took 8 to 10 minutes for the mantrip to travel through the area of dust. Rigney issued a citation that initially alleged a violation of 30 C.F.R. § 75.360(a)(1), but was subsequently amended to allege a violation of 30 C.F.R. § 75.370(a)(1), which requires the operator to follow its ventilation plan. The ventilation plan provides, as pertinent, as follows: "Dust will be controlled at the following locations by: * * * [r]oadways and travelways where equipment is operated [c]leanup, [r]ock dusting and water to dampen" (sic) (Jt. Ex. 6, P 6-22).

John Richardson, the mine superintendent, traveled inby along the same roadway as the inspector but 15 minutes after the inspector, and in another mantrip. Richardson indicated that he did not see any dust in the roadway and that Rigney did not tell him that he was going to issue any citation, nor did Rigney tell him that he saw any dust. According to Richardson, commencing at the face and running outby approximately three quarters of the roadway distance, the condition of the roadway was real muddy, and there was standing water present. He said that the balance of the roadway was damp. Richardson explained that the roadway floor in the area that he described as being real muddy, had been cut lower than the rest of the roadway, and that water accumulates there. He noted that approximately one month prior to June 11, 1997, underground water pipes had broken, and on one day there were seven breaks. According to Richardson, the roadway was damp, rock dusted, and had been cleaned.

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[1] The crosscuts were at 80 foot centers.

Michael Ray Ellis, Jr., the day shift section foreman, operated the mantrip the inspector traveled in on June 11. According to Ellis, the inspector sat directly behind him facing inby. Ellis described the roadway as being "damp to extemely wet, muddy" (Tr. 123), and referred to the same area as noted by Richardson. He opined that the roadway was clean, rock dusted, at least damp, and "muddy in most areas" (Tr. 127). He did not note any dust settling on his clothing, or on the mantrip which was white in color. He also testified that Rigney did not have his respirator in place. In essence, according to Ellis, the only dust that he noted while traveling inby occurred in a damp area, when the mantrip was stopped to retrieve equipment that had fallen from the mantrip. According to Ellis, a small amount of dust appeared and remained in the area for 2 to 5 seconds.

Tommy Shackelford II, a section repairman, traveled in the mantrip sitting next to Ellis. Shackelford corroborated Ellis' testimony regarding the dust that arose when the mantrip was stopped to retrieve an article of equipment. He was asked to describe the quantity of dust that arose in the air, and he said it was "very little" and something like the dust that kicks up when a player slides into a home plate. He described the roadway as being damp, with water holes, and that the entire roadway was "more or less sloppy mud" (Tr. 150). However, the areas outby were not as muddy. He did not see any dust settle on any clothes of those persons in the mantrip.

I observed Rigney's demeanor and found his testimony credible regarding the dust in the air that he observed. There is no evidence in the record to impeach this testimony on the basis of bias or any other improper motive. Further, I find the testimony of Respondent's witnesses regarding their observations to be of insufficient weight to rebut or outweigh the inspector's testimony. Richardson traveled in another mantrip 15 minutes after the inspector, and thus was not in a position to negate the testimony of the inspector as to what was observed by him at the specific time of his observation. Further, upon cross examination, it became apparent that the degree of attention to which Richardson paid the condition of the roadway was not the same as the inspector. In this connection, I note the following testimony of Richardson:

> Q. So is it possible you weren't paying the kind of attention to the roadways you would have been if you had noticed that somebody thought that they were dusty going in?
>
> A. If somebody would have told me or I would have notice it, yeah, I would have paid more attention, yes (Tr. 110).

It appears from further cross examination that Richardson's testimony regarding the condition of the roadway on June 11 was predicated upon observations that he had made on June 12, rather than upon a specific examination or observation on June 11. The pertinent testimony is as follows:

> Q. But you're relying on what you saw on June the 12th for an assumption that it was like that on June the 11th?

A. I didn't see it June the 11th because I wasn't paying any attention to it.

THE COURT: Pardon?

THE WITNESS: I didn't pay any attention to it June the 11th. I didn't see anything.

BY MS. TAYLOR:

Q. But you're relying on what it was like on June the 11th based on your memory of June the 12th; is that correct?

A. Well, I went back and looked at it - I mean, I looked at it for sure on June the 12th, close (sic) (Tr. 115).

Although both Shackelford and Ellis, who traveled with the inspector, described the roadway as being at least damp and in many places real muddy, they both noted dust when the mantrip was stopped to retrieve a piece of equipment. Moreover, neither Ellis nor Shackelford rebutted the specific testimony of the inspector regarding the existence of dust in the air for a distance of approximately 10 to 15 crosscuts commencing at a point approximately 15 to 20 crosscuts outby from the face and continuing outby from that point.

I note that respiratory dust sampling of miners who traveled in the mantrip and were supposedly exposed to dust, failed to indicate that the quantity of respirable dust was not in compliance with the appropriate standard. According to the inspector, it took about 10 minutes for the mantrip containing the miners who wore dust pumps, to travel through the area of dust. Hence, their exposure to the dust was not for any significant period of time. Accordingly, I find the dust pumps they wore did not accurately sample the amount of dust exposure in the dusty area.

A pump located in an adjacent belt entry similarly did not indicate respirable dust accumulations not in compliance with the appropriate standard. Such evidence, by itself, is insufficient to negate the testimony of the inspector. This entry and the roadway entry at issue were in the same split of air, and there were no physical barriers between these two entries, thus allowing for air to travel between these two entries. However, it is significant to note, as indicated by Ellis in his cross examination, that, due to the placement of a regulator to the left of the roadway entry (looking inby), the path of the air travel from the roadway to the belt entry adjacent on the right is not the path of least resistance. Moreover, the area the inspector cited was located approximately 15 to 20 crosscuts and one entry removed from the pump. I thus find that the evidence of negative dust sampling results is not sufficient to negate the inspector's testimony.

For all the above reasons, I find that it has been established that there was dust in the air as observed by the inspector. According to the inspector, and not contradicted by Respondent's witnesses, dust is placed in the air by the action of the mantrip's tires grinding particles of dust material that had accumulated on the floor. Since there was dust in the air, I conclude that the roadway floor, in part, was not dampened sufficiently. I thus find that the ventilation plan was not complied with, and that Respondent did violate Section 75.370(a) supra as alleged.

2. Significant and Substantial

According to Rigney, he saw drawrock in the roof on June 11. He opined that small particles constantly fall from drawrock which he described as consisting of shale. He also indicated that previous testing had indicated excess silica in the roof. According to Rigney, exposure to silica can lead to silicosis. None of these assertions were impeached or contradicted by Respondent, and hence they are accepted.

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

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

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

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

Applying the criteria test set forth above, I find that, in the context of Rigney's uncontradicted testimony, it has been established that the violation was significant and substantial, considering the continuance of normal mining operations, which would have led to an increase in exposure time to the violative dust.

3. Penalty

Since the violation could have led to silicosis, I conclude that the gravity was of a relatively high level. There is no evidence as to how long the violative conditions of insufficient dampness had existed. In this connection, Rigney opined that it could not have gotten that way in a "short period of time" (Tr. 44). Respondent did not impeach or contradict this testimony, I thus find that Respondent's negligence was moderate. The violation was timely abated. I find that a penalty of $595.00, is appropriate.

II. Docket No. KENT 98-9

A. Citation No. 4581439

Rigney testified that as he was traveling to the 003 section, he came to a point approximately 10 breaks from the face that, extending 10 to 12 breaks, was extemely dry. Also, he observed dusty conditions. He issued a citation alleging a violation of section 75.370(a)(1) supra.

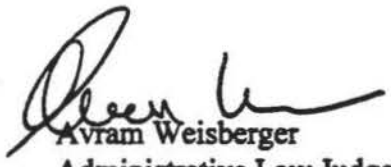
Richardson, who traveled with Rigney to the 003 section, indicated that he did not notice any dust in the roadway. He described the condition of the outby roadway as being "just damp." Richardson testified that traveling outby from the section, he did not notice any dust on the roadway and the inspector did not say anything about a citation. In summary, he stated that the roadways were damp, rock dusted, and clean.

Herbert Kimberlin, Jr., the day shift production foreman, was with Rigney going to the 003 section. He said that the latter did not say anything regarding dust on the roadways. He described the roadway as wet to damp, clean and rock dusted. He specifically said that he did not see any dust on the roadway.

Essentially, the evidence presented regarding the conditions on the 003 section is the same as that presented regarding the 002 section. Hence, I find that, for the reasons stated above, I(B)(1)(2) supra, that Respondent did violate section 75.370(a), supra, and that the violation was significant and substantial. In the same fashion, for the reasons set forth above, I(B)(3) supra, I find that the violation was of a relatively high level of gravity, and Respondent's negligence was of a moderate level. I find that a penalty of $595 is appropriate.

ORDER

It is **ORDERED** that Citation No. 4074103 be **DISMISSED**. It is further **ORDERED** that, within 30 days of this decision, Respondent shall pay a civil penalty of **$1,190.**



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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APR 14 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. LAKE 97-46
Petitioner	:	A.C. No. 11-02440-03776
v.	:	
	:	Marissa Mine
PEABODY COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Gay F. Chase, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois, for the Secretary;
Caroline A. Henrich, Esq., Peabody Coal Company, Charleston, West Virginia, for Respondent.

Before: Judge Weisberger

This civil penalty proceeding, commenced by the Secretary of Labor (Petitioner) by the filing of a Petition for Assessment of a Penalty, presents, as the only issue for resolution, whether an MSHA inspector abused his discretion when he issued an order, pursuant to Section 104b of the Federal Mine Safety and Health Act of 1977 ("the Act") to Peabody Coal Company (Respondent) based on his determination that a previously issued citation alleging a violation of 30 C.F.R. Section 75.400 had not been abated, and an extension in abatement time was not warranted.[1] Subsequent to notice, the case was heard in St. Louis, Missouri, on October 28-29, 1997. On February 27, 1998, the parties each filed proposed findings of fact and a brief. On March 24, 1998, reply briefs were filed by the parties.

1/ At the hearing, the parties advised that they had reached a settlement regarding the remaining citation in this case, No. 4575855. A motion to approve the settlement was filed on February 27, 1998, along with Petitioner's brief.

Findings of Fact and Discussion

I. Petitioner's Evidence

Respondent operates the Marissa mine, an underground coal mine. On November 25, 1996, Ronald Zara, an MSHA inspector, inspected a No. 26 Simmons Rand Scoop that was located inby the 005 working section in the 3 West Section of the mine. At approximately 6:00 p.m., he observed that there were various permissibility violations on the scoop, and it was leaking oil in several places. He issued citations for these conditions, and these citations are not at issue herein. Upon closer examination of the scoop, Zara found pooled hydraulic oil, as well as oil saturated coal dust and gob up to 1 inch deep on the valve bank compartment floor. He observed hydraulic oil running off the scoop and pooling on the cab floor, as well as accumulations of oil-soaked coal on the cab floor. In the pump compartment he observed numerous oil leaks causing an accumulation of oil. He said that the material that he observed on the floor was primarily saturated gob with some coal, and coal dust and oil "puddled up" (Tr. 37). He said that he measured the accumulations with a 3-inch probe and it was found to be up to 2 inches deep. According to Zara, he reached into all these three areas, felt the material that had accumulated, and concluded it consisted of oil saturated coal, and coal dust. Zara issued Citation No. 4575486 alleging a significant and substantial violation of 30 C.F.R. § 75.400. Respondent does not contest these findings.

According to Zara, upon issuance of the permissibility, leaking, and accumulation citations, he met with B.J. Williams, the face boss. It was agreed that the permissibility and leaking violations would be abated by midnight, and the accumulation violation would be abated by 8:00 a.m., on November 26. Later on that evening, Zara met with Melvin R. Kiehna the mine manager, and informed him that the abatement for the accumulations had been set for 8:00 a.m., and asked him to so inform the next shift manager. According to Kiehna, he told Zara that the oil leaks and the permissibility violations would be immediately worked on to be abated, and that he would make every effort to clean the accumulations by 8:00 a.m. There is no evidence that either Kiehna, Williams, or any other of Respondent's agents sought an abatement time beyond 8:00 a.m., or indicated that the 8:00 a.m. deadline was not reasonable or feasible.

On the morning of November 26, Zara returned to the mine and went underground. Zara was accompanied by William Mulholland, the Union safety committee man, but was not accompanied by anyone representing the Respondent. At approximately 8:30 a.m., he observed that the subject scoop had been moved approximately 75 feet outby. No one was working on the scoop at the time. Two miners, William Gibson and James Van Doren were in the area of the scoop. When asked whether they were sent to wash the scoop, they informed Zara that they were told only to put the scoop back in service if he were to abate the violation. They also informed him that after they arrived on the section at approximately 7:30 a.m., no one worked on cleaning the scoop.

Zara spent approximately 15 minutes examining the scoop. He noted that the permissibility violative condition and the leaks had been repaired, and he abated those citations. According to Zara, there was evidence that the scoop had been washed and the oil that had pooled was no longer present. However, he indicated that, in general, the same accumulations still existed in the same amounts as observed by him on November 25. Specifically, he testified that up to 1 inch of the materials remained in the valve bank compartment, that there was up to 1 inch of oil soaked coal around the perimeter of the cab, and there was solid and semi solid combustible material up to 2 inches deep in the pump compartment. Zara reached into the scoop at the junction of the cab and pump compartment, and took a large handful of material. He characterized the material as being clay-like. Zara testified that he formed a ball of the material and squeezed it. He said that oil exuded out of the material, and ran down his arm. He opined that the material was combustible based upon his experience, and "the appearance of the material" (Tr. 55). He said he had felt it, looked at it, and smelled it.

According to Zara, in essence, he decided to verbally issue a section 104(b) order to Mulholland, as the abatement time period had expired, and the combustible materials that he had cited on November 25, still existed in the same amounts and in the same areas. In this connection, he indicated that the same fire hazards contributed to by the violative conditions on November 25, still remained the next morning. He noted that the presence of moving parts in the pump compartment in combination with heat generated by the pump, constituted an ignition source. He opined that since the accumulations contacted the drive shaft motor, electrical conduits, and hydraulic hoses, all of which generate heat " to some degree," the accumulations could have ignited.

According to Zara, he considered granting an extension of the abatement time but decided not to. This decision was based on the following considerations: no one was working to abate the violation when he arrived, and no abatement efforts were performed subsequent to 7:30 a.m.[2] On November 26, none of Respondent's agents requested an extension, none of Respondent's agents informed him that there were any problems abating the violation, and none of Respondent's agents explained to him why the scoop had not been cleaned better.

According to Zara, when he was tagging the scoop after he had orally issued the 104(b) order to Mulholland, Jeffrey Gurley, the safety supervisor, approached him and said, ". . . you don't have to do this. We will go ahead and finish cleaning this machine" (Tr. 116). Zara testified that he asked Gurley why they had not done the job correctly to begin with, and Gurley said that he did not know.

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[2]/ On cross examination, Zara indicated that when he issued the 104(b) order he did not know what action Respondent took after he had written the original citation on the evening of November 25. Only after he issued the 104(b) order, on the afternoon of November 26, he was informed that a miner had worked approximately 4 hours after midnight November 26 cleaning the scoop, and that this worker had to obtain a washer from another section as there were problems with the washer on the subject section.

II. Respondent's Evidence

At approximately 9:00 p.m., on November 25, Melvin R. Kiehna, the mine manager of the 4 p.m. to 2 a.m. shift informed Dennis Gladson, the third shift mine manager, that work was in progress abating the permissibility and oil leak violations, but that the scoop needed to be washed to abate the accumulation violation. Gladson said he selected David Bottrell to clean the scoop as he's "very very good at what he does" and "will spend all day on whatever he's doing until it's done" (Tr. 356). Gladson then informed James Park, the repair foreman, of the work that had to be done. Park assigned Bobby Hicks, a repairman, to work on abating the oil leaks and permissibility violations as a priority. Hicks testified that when he observed the scoop at approximately 10:35 p.m., on November 25, it contained dirt, shale, slate, fine clay, "probably even some coal" (Tr. 298), and oil leaks. Hicks finished abating the oil leaks and permissibility violations at approximately midnight. He then attempted to turn on the high pressure washer for Bottrell, but the breaker did not stay on. Hicks then informed Park of the problem, and told him that they needed another washer. Park, who was then in another unit, checked out the washer located there, and directed that it be hauled back to where the scoop was located. The washer arrived at about 1:00 a.m. at which point Bottrell commenced cleaning the scoop.

Bottrell described the scoop as being dirty, and greasy. He said the scoop had oil and coal on it. Bottrell used a detergent (swoop) to loosen the oil. According to Bottrell, he sprayed the cab with a pressure washer until it was clean. He indicated that after he finished, the area looked clean. He was asked whether he saw any oil or grease on the floor and he said "not that I remember" (Tr. 387). He indicated that there was no oil on the hoses and conduits after he finished washing them. He stated that after he cleaned the valve bank compartment no oil or coal remained. According to Bottrell, he cleaned the scoop continuously for 3 to 4 hours. He indicated that when he finished cleaning the scoop it looked clean, and no additional cleaning was necessary.

Gladson testified that at approximately 5:00 a.m., on November 26, he checked the scoop and found that an area adjacent to the valve bank compartment was not yet washed, and he told Bottrell to wash it. Gladson indicated that he could see the floor of the pump compartment, and did not see any oil or combustible material. He indicated that he did not see oil or grease in the cab. He said he was able to see the floor of the valve compartment, and he did not see any oil coal or combustible substances. According to Gladson, he saw the distinctive color of the hoses, and there were no accumulations around them. He told Bottrell he had done a good job.

Hicks saw the scoop again at approximately 5:30 a.m., and indicated that it "looked a lot better" (Tr. 307). According to Hicks, the coal, slate, and oil that he had previously observed was no longer present. He indicated that he did not see 2 inches of oil and coal, and the other conditions set forth in Zara's section 104(b) order. However, on cross-examination, it was elicited that when he looked in the scoop after it had been washed, he could not see the floor of the valve bank and pump compartments, as it was covered with water. He indicated that he did not believe that he looked in the cab after Bottrell completed cleaning the scoop.

James Park, a repair foreman, testified that when he was in the area of the scoop sometime around 5:30 a.m., on November 26, Bottrell told him that he had finished washing the scoop and he (Park) checked it out. He indicated that the hoses on the valve bank compartment floor were visible and clean, and he did not see oil or grease on the floor. He told Bottrell that he had done a good job. He indicated that he did not see the pump motor compartment.

Gurley, who was present on November 26, testified that he saw Zara pick up some material from the area at the junction between the cab and the pump compartment, and it looked like mud. According to Gurley, he saw muddy water run down the arm of Zara, and he did not see any oil or coal. Gurley indicated that after the section 104(b) order was issued, he examined the scoop before it was cleaned by Dale Harstick. He was asked if he saw 2 inches of oil soaked coal and hydraulic oil on the compartment floor. He answered as follows: "If there had been two inches there, those half inch hoses would have been covered by an inch and a half" (Tr. 249). He also indicated that he did not see coal or oil soaked gob in the pump and valve bank compartments.

Before Respondent cleaned the scoop to abate the section 104(b) order, Gurley took photographs of the affected areas. He testified that the pictures depict, inter alia, hoses that were not covered with accumulations (Ex. R2-9).

Melvin R. Kiehna, the mine manager of the 4:00 p.m. to 2:00 a.m. shift, observed the accumulations on November 25, but not on November 26. He compared the conditions he had observed to photographs of the cab (Ex. R2), taken on November 26, prior to the cleaning of the scoop. According to Kiehna, there were accumulations in the cab on November 25, which do not appear in the photograph.

Hicks compared a picture of the pump compartment taken on November 26, to what he had observed on November 25, before the scoop was washed. He stated that in contrast to the picture, on November 25, there was a lot of oil at the bottom of the compartment and the hoses could not be seen. He also stated that on November 25, when he observed the area across from the operator's cab before it was washed, he "couldn't hardly see any hoses" (Tr. 313), and there was "a lot" of coal and "quite a bit of oil," especially on the floor (Tr. 313). In contrast he said that a photograph taken on November 26, shows hoses that appear to had been cleaned. Hicks examined a photograph, taken on November 26, of the valve bank compartment that he had observed on November 25. He indicated that the loose material consisting of coal, fine clay, slate, and oil which he had noted then was not present in the picture. Similarly, he testified that on November 25, he observed oil, and accumulations on hoses and components under the valve bank, which were not apparent in the pictures taken on November 26.

Dale Harstick, a roof bolter, cleaned the scoop after the section 104(b) order was issued. He indicated that he spent most of his time cleaning the cab and the pump compartments with a high pressure washer. He described the materials located there as a mixture of fire clay, wet rock dust, and a black substance that could have been coal or slate. He said that he worked on the scoop for about 3 to 4 hours.

III. Discussion

A. Applicable Law

Section 104(b) of the Act provides as pertinent, as follows:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation . . . has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring . . . all persons . . . to be withdrawn from . . . such area. . . .

In *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509 (1989) the Commission held, in interpreting section 104(b), supra, as follows:

> When the validity of a section 104(b) order is challenged by an operator, it is the Secretary, as the proponent of the order, who bears the burden of proving that the violation described in the underlying citation has not been abated within the time period originally fixed or as subsequently extended. We hold, therefore, that the Secretary establishes a prima facie case that a section 104(b) order is valid by proving by a preponderance of the evidence that the violation described in the underlying section 104(a) citation existed at the time the section 104(b) withdrawal order was issued. The operator may rebut the prima facie case by showing, for example, that the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred.

B. Analysis

1. Abatement of the violative conditions described in the citation issued on November 25

I observed Bottrell's demeanor and found his testimony credible that he spent approximately 4 hours after 1:00 a.m., November 25, cleaning the accumulations in the scoop with a high pressure washer and a detergent solution. Since Petitioner did not proffer any direct

testimony to contradict Bottrell, nor did Petitioner impeach or rebut this testimony, I accept it. Further, Respondent's witnesses who observed the scoop after it was cleaned testified that there were no accumulations of oil saturated material in the areas cited by Zara on November 25. However, it is significant to note that Kiehna, Hicks, and Park did not inspect all of the areas that were cited by Zara. On the other hand, on November 26, Zara spent approximately 15 minutes inspecting the areas he previously cited. Further, his opinion that the material that remained was still saturated with oil, was based upon the fact that he reached into the material squeezed it and noted that oil ran out of it. He further explained that his conclusion that it was oil, was based on his experience and the fact that he smelled it. Mulholland essentially corroborated Zara's observations. Also, he took a sample of the material and rubbed it between his fingers. He stated that ". . . it was obvious to see that there was oil running out of it" (Tr. 165). In contrast, Gurley, who opined that the liquid that ran out of the material when squeezed by Zara was water and not oil, neither touched nor smelled the material. I thus do not accord much wieght to his testimony, and give more weight to Zara's testimony based on the extent of his observations and examinations of the conditions at issue.

On November 26, Gurley took photographs of the conditions in the scoop at the areas cited by Zara on November 25. Gurley, Kiehna, Hicks, and Bottrell all interpreted the photographs and indicated that the accumulations observed on November 25, could not be seen in these pictures. However, I do not assign much probative weight to the pictures due to their lack of depth, and the presence of shadows which obfuscates the clarity of the photographed items. Further, it is significant that whereas Zara was convincing in his testimony regarding accumulations that were still present on the floor in the three compartments cited, the pictures do not depict the floor. For all these reasons, I find that although Respondent clearly acted in good faith, not all the accumulations cited by Zara on November 25, were eliminated by 9:00 a.m., on November 26. I conclude that the violative conditions described in the underlined citations were not completely abated within the time originally set for abatement i.e., 8:00 a.m. See, *Martinka Coal Co.*, 15 FMSHRC 2452 (1993).

2. Extension of the abatement.

At issue is whether Zara acted unreasonably on November 26, in not extending the time for abatement. Fore the reasons that follow, I find that Zara's failure to extend the time for abatement was reasonable.

The original time set for abatement i.e., 8:00 a.m., November 26, was set by Zara upon talking with Kiehna and Gurley. Neither of them, nor any other representative, or Respondent requested that the abatement should be set for a later time. When Zara arrived at the section at approximately 9:00 a.m., on November 26, and observed accumulations that had not been abated, no one was engaged in washing the scoop. Also, Zara had been told by Gibson and VanDoren that no one washed the scoop subsequent to their arrival on the section at approximately 7:30 a.m., on November 26. Further, based upon this information, when Zara determined to issue a section 104(b) order, none of Respondent's agents had requested an extension, informed

him that there were any problems with abating the violative conditions, or explained to him why the scoop had not been cleaned better. Moreover, according to Zara, when he was tagging out the scoop he asked Gurley "why they had not done the job correctly" (Tr. 116), and Gurley said he did not know.

The failure to timely completely clean the accumulations posed a hazard to miners. In essence, according to Zara, the continued existence of combustible materials on November 26, presented a fire hazard. I accept this opinion having found above, III(B)(1), supra, that oil saturated material still remained.

For all the above reasons, I conclude that the time set for abatement was reasonable, and that Zara acted reasonably in determining not to extend the time to abate the violation previously cited on November 25.

IV. Citation No. 4575855

Petitioner filed a motion to approve a settlement agreement regarding this citation. A reduction in penalty from $431 to $259 is proposed. I have considered the representations and documentation submitted, and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. I therefore approve the settlement and grant the motion.

ORDER

It is **ORDERED** that, within 30 days of this Decision, Respondent shall pay a total civil penalty of $1,716.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 15 1998

INLAND STEEL MINING COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. LAKE 97-86-RM Order No. 7809214; 4/28/97
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 97-87-RM Citation No. 7809215; 4/28/97
	:	Minorca Mine Mine ID No. 21-02449
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 97-103-M A. C. No. 21-02449-05609
v.	:	
INLAND STEEL MINING COMPANY, Respondent	:	Minorca Mine

SUMMARY DECISION

Before: Judge Hodgdon

These cases are before me on Notices of Contest and a Petition for Civil Penalty pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Contestant/Respondent, Inland Steel Mining Company, has filed a Motion for Summary Decision under Commission Rule 67, 29 C.F.R. § 2700.67. The Secretary opposes the motion. For the reasons set forth below, the motion is granted.

Citation No. 4557691, in Docket No. LAKE 97-103-M, alleges a violation of sections 56.5001(a) and 56.5005 of the regulations, 30 C.F.R. §§ 56.5001(a)and 56.5005, because:

> A welder in the weld shop was exposed to 147.06 $\mu g/m^3$ of copper welding fumes from 0700-0800 on August 21, 1996.[1] This exceeds the STEL (exposure limit) of 100 $\mu g/m^3$ times the sampling factor (1.08) for welding fume sampling and elemental analysis. Analytical results were received and the citation issued on September 23, 1996. The employee was air arcing in a shovel bucket and visible fumes were produced during this process. The engineering controls in use were a 12" exhaust tube to a 23" wall-mounted exhaust fan, a 20" box fan placed near the work area, and both overhead doors in the shop were open. The welder was wearing a respirator, and a respirator program meeting the requirements of ANSI Z88.2-1969 was in place. The abatement date is for the implementation of further engineering and administrative controls.

Order No. 7809214, in Docket No. LAKE 97-86-RM, alleges that the company had "not made a good faith effort to establish measures for control of exposure to metal fumes produced during air-arcing operations" and, therefore, had not abated Citation No. 4557691. Citation No. 7809215, in Docket No. LAKE 97-87-RM, alleges that the Inland violated section 56.5002, 30 C.F.R. § 56.5002, by failing to take "health samples . . . of air arcing operations to monitor the welder's exposure to harmful metal fumes since the citation was issued on August 21, 1996."[2]

Section 56.5001(a) provides, in pertinent part, that,

> the exposure to airborne contaminants shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the 1973 edition of the Conference's publication, entitled "TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973," pages 1 through 54, which are hereby incorporated by reference and made a part hereof. . . . Excursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference.

Threshold limit values (TLVs) "refer to airborne concentrations of substances and represent

---

[1] The symbol "μg" means "microgram," "[o]ne millionth of a gram." U.S. Department of Interior, Bureau of Mines, *A Dictionary of Mining, Mineral, and Related Terms* 703 (1968). Thus, the allegation is that the welder was exposed to 147.06 microgams of copper welding fumes per cubic meter of air.

[2] The Respondent has filed a Motion to Withdraw its notice of contest on this citation.

conditions under which it is believed that nearly all workers may be repeatedly exposed day after day without adverse effect." *TLV's Threshold Limit Values for Chemical Substances in Workroom Air Adopted by ACGIH for 1973* 1 (1973) (*1973 TLV's*). TLV's are the "time-weighted [average exposure] concentrations for a 7 or 8-hour workday and 40-hour workweek." *Id.* Time-weighted averages (TWA) "permit excursions above the limit provided they are compensated by equivalent excursions below the limit during the workday." *Id.* at 1-2.

It is apparent that Citation No. 4557691 refers to exceeding neither the TLV for copper fumes nor the permissible excursion level above the TLV. Instead it alleges that the short term exposure limit (STL) was exceeded. STL's are not mentioned in the regulation, however, an STL for copper fumes is found at page S-29 of the Mine Safety and Health Administration's (MSHA) *Metal and Nonmetal Health Inspection Procedures Handbook* (1990). The STL is accompanied by a footnote that states: "Short-term limit from Pennsylvania Rules." *Id.*

It is Inland's position that the Pennsylvania Rules (Pennsylvania STLs) were not adopted by the American Conference of Governmental Industrial Hygienists (ACGIH) for 1973, that they, therefore, are not incorporated by reference into section 56.5001(a), and that, accordingly, the citation does not set out a violation of the regulations. While the Pennsylvania Rules are mentioned in the *1973 TLV's*, I conclude that they were not adopted by the ACGIH and are not part of section 56.5001(a) by incorporation or otherwise.

A. Regulatory History

The limiting of exposure to airborne contaminants was first proposed by the Secretary of the Interior in 1969. In a January 1969 Notice of Proposed Rulemaking, the Secretary put forward section 55.5-1, 30 C.F.R. § 55.5-1, which stated: "Where airborne concentrations of dust, gas, mist and fumes are encountered which exceed threshold limit values adopted by the American Conference of Governmental Hygienists, and persons are exposed to such concentrations, control measures shall be adopted to maintain concentrations below such threshold limit values." 34 Fed. Reg. 656, 658 (January 16, 1969). There is no discussion in the notice of incorporation by reference or exactly what threshold limit values are to be covered by the regulation. Furthermore, when the proposed rules became final, section 55.5-1 had been deleted and the rules stated that that section was "reserved." 34 Fed. Reg. 12503, 12505 (July 31, 1969)

In 1970, a new section 55.5-1 was proposed. It provided that:

> The exposure to airborne contaminants of a person working in a mine shall not exceed, on the basis of a time-weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists, as set forth and explained in the most recent edition of the Conference's publication entitled "Threshold Limit Values of Airborne Contaminants." Excursions above the listed threshold limit values shall not be of a greater

> magnitude than is characterized as permissible by the Conference. This paragraph (a) does not apply to airborne contaminants given a "C" designation by the Conference--for example, nitrogen dioxide.

35 Fed. Reg. 10299, 10300 (June 24, 1970). The text is similar to the present regulation, except that it specifically states that some of the values are not included within it. There was no discussion in the notice of what specifically was included in the regulation. This became a mandatory standard, as proposed, in December 1970. 35 Fed. Reg. 18587, 18588 (December 8, 1970). Again, there was no discussion of the regulation.

In July 1974, a regulation identical to the current one became final. 39 Fed. Reg. 24136 (July 1, 1974). There was no discussion of the new regulation either when it was promulgated or when it was adopted. The rules were recodified in 1985 and section 55.5-1 became 56.5001(a). 50 Fed. Reg. 4048, 4062 (January 29, 1985). No changes were made in the rule and there was no discussion of the rule itself.

B. Discussion

As can be seen, STLs have never been mentioned in the rule. Nor have they been included in any discussion concerning the proposal or adoption of the rule. On its face, the rule is clearly limited to threshold limit values *adopted* by the ACGIH in 1973 and excursions above the listed thresholds characterized as *permissible* by the ACGIH. Therefore, unless the STLs set out in the Pennsylvania STLs have been *adopted* by the ACGIH, they are not included in the rule, and exceeding them does not violate the rule. I find the evidence that they were not adopted to be overwhelming.

STLs are mentioned in two places in the *1973 TLVs*. The first appears in the Preface at pages 6-7 and is set out in full below:

> *Short-Term Limits (STLs).* Because many industrial exposures are not continuous, 8-hour daily exposures, but are short-term, or intermittent, to which the TLVs do not necessarily apply, STLs for 5, 15, or 30 minutes for 142 substances have been put into the regulations of the Pennsylvania Department of Health (Chapter 4, Art. 432, Revised Jan. 25, 1968). These STLs represent the maximal average atmospheric concentration of a contaminant to which a worker may be exposed for the stipulated time. The concentration represents an upper limit of exposure and assumes that there is sufficient recovery between exposures before another is initiated. The daily average exposure including that provided by the STL shall be such that the TLV shall not be exceeded.

> Similar STLs for a more restricted number of substances have been recommended by the American National Standards Institute. This standard-setting body refers to these short-term limits as "peaks."

The TLVs are set out following the Preface, under the heading "Adopted Values," which begins at page 10 and continues through page 35. There is no mention of STLs in this section.

A "Notice of Intended Changes (for 1973)" begins on page 36 and states: "These substances, with their corresponding values, comprise those for which either a limit has been proposed for the first time, or for which a change in the 'Adopted' listing has been proposed." Interestingly, "copper fume" is included in this section proposing that value be changed to 0.2 mg/M^3.[3]

Finally, Appendix D "Permissible Excursions for Time-Weighted Average (TWA) Limits" begins on page 51. The definitive language of the appendix, on page 51, is set out below:

> The Excursion TLV Factor in the Table automatically defines the magnitude of the permissible excursion above the limit for those substances not given a "C" designation, i.e., the TWA limits. Examples in the Table show that nitrobenzene, the TLV for which is 1 ppm, should never be allowed to exceed 3 ppm. Similarly, carbon tetra-chloride, TLV 10 ppm, should never be allowed to exceed 20 ppm. By contrast, those substances with a "C" designation are not subject to the excursion factor and must be kept at or below the TLV ceiling.
>
> These limiting excursions are to be considered to provide a "rule-of-thumb" guidance for listed substances generally, and may not provide the most appropriate excursion for a particular substance . . . .

Then, the appendix goes on to observe, on page 52: "For appropriate excursions for 142 substances consult Pa. Rules & Regs., Chap. 4, Art. 432, and 'Acceptable Concentrations.' ANSI."

The Table, on page 52, sets out the excursion factors, which are multipliers based on various TLV ranges, to be used to determine permissible excursions for a substance.

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[3] These values are in "milligrams," not "micrograms."

There is no mention in the Preface that the STLs for 142 substances in the Pennsylvania Rules are being adopted by the ACGIH. They are not listed in the "Adopted Values" section. While they are mentioned in Appendix D, it is apparent that this is for information purposes since the first sentence in the appendix clearly states that "[t]he Excursion TLV Factor in the *Table* automatically defines the magnitude of the permissible excursion above the limit . . . ." (emphasis added). Nowhere does it state that the Pennsylvania STLs define the magnitude of the permissible excursion.

The Secretary argues that because the regulation refers to "permissible excursions" and because Appendix D, which deals with "permissible excursions," mentions the Pennsylvania STLs, then the Pennsylvania STLs must be included in the regulation. This argument is unpersuasive. The statement in the regulation is that "[e]xcursions above the listed thresholds shall not be of a greater magnitude than is characterized as permissible by the Conference." The first sentence in Appendix D is explicit that the *Table* defines the magnitude of permissible excursions. The *Table* is the only method the Conference uses for characterizing permissible excursions. The language in the regulation clearly conforms to the first sentence in Appendix D. Since neither the ACGIH nor the regulation mention STLs, there is no basis for concluding that they were incorporated into the regulation.

The Secretary also argues that the ACGIH uses the terms "permissible" and "appropriate" interchangeably, and that, therefore, when Appendix D refers to "appropriate excursions for 142 substances" it is incorporating those STLs into the appendix. This argument is also flawed. In the first place, "permissible" and "appropriate" are not synonymous. "Permissible" means "that may be permitted." Webster's Third New International Dictionary 1683 (1986). "Appropriate" means "specially suitable." *Id.* at 106. In the second place, it ignores the fact that the *Table* is the only method set out in the Appendix for determining a permissible excursion.[4]

The fact that nowhere in the *1973 TLVS* does the ACGIH state that it is adopting the Pennsylvania STLs, even though in all other instances it explicitly describes what it is adopting, that STLs are only mentioned in the Preface and in Appendix D, and in the appendix only after it unequivocally declares how permissible excursions are defined, to illustrate that what is *permissible* may not necessarily be *appropriate,* is persuasive that the STLs were not adopted by the ACGIH and, therefore, not part of section 56.5001(a). However, if that were not enough, the ACGIH has conclusively confirmed that it did not adopt the Pennsylvania STLs in the *1973 TLVs.*

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[4] The Secretary's argument that if the terms *permissible* and *appropriate* are ambiguous, I must defer to her interpretation of them is misplaced. The terms are not ambiguous. Even if they were, it is not the Secretary's regulation that is being interpreted, but an ACGIH document. Therefore, the Secretary has no greater expertise in interpreting the document than anyone else and there is no basis on which to defer to her.

The report of the 1973 ACGIH meeting states that "the subcommittee on Short-Term Limits was expanded . . . . They were charged with the responsibility to report progress on reviewing the present 142 short-term limits with their documentation, State of Pennsylvania, for incorporation in the TLV Booklet." *Transactions of the 35th Annual Meeting of the American Conference of Governmental Industrial Hygienists* 35 (1973). ACGIH's *Documentation of the Threshold Limit Values and Biological Exposure Indices* 336 (6th Ed. 1991) discloses that the conference has never adopted an STL for copper fumes and that it did not adopt one for copper dusts and mists until 1976 (which it rescinded in 1986). The document also states that: "STELs are not recommended for the fume or the dusts and salts of copper until additional toxicological data and industrial hygiene experience become available to provide a better base for quantifying on a toxicological basis what the STEL should be." *Id.* Finally, in the Annals of the American Conference of Governmental Industrial Hygienists, Vol. 9, *Threshold Limit Values--Discussion and Thirty-five Year Index with Recommendations* 421 (1984) it states: "The first STEL list was published in 1976."

C. Conclusion

Accordingly, I conclude that the ACGIH did not adopt the Pennsylvania STLs in 1973 and that, therefore, they could not have been incorporated in section 56.5001(a) of the regulations. Consequently, Citation No. 4557691 must be vacated for failure to state a violation of the Secretary's regulations. Since Citation No. 4557691 fails to state an offense, Order No. 7809214, which was issued for failing to abate Citation No. 4557691, must also be vacated.[5]

ORDER

The Respondent's Motion for Summary Decision in Docket Nos. LAKE 97-86-RM and LAKE 97-103-M is **GRANTED**, Citation No. 4557691 and Order No. 7809214 in Dockets No. LAKE 97-86-RM and LAKE 97-103-M are **VACATED** and the cases **DISMISSED**. The Respondent's Motion to Withdraw its notice of contest in Docket No. LAKE 97-87-RM is **GRANTED** and that case is **DISMISSED.**

T. Todd Hodgdon
Administrative Law Judge

[5] Order No. 7809214 also mentions that when readings were taken to determine if the company had reduced copper fumes to permissible levels it was determined that both copper and iron fumes were above exposure levels. While iron fumes were not cited in the original citation, to the extent that they are relevant to whether the company had abated the original citation, MSHA's reliance on the Pennsylvania STLs for iron suffers from the same infirmity as copper.

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APR 16 1998

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. LAKE 98-37-D
on behalf of **SHERRY UDE** and	:	LAKE 98-38-D
BRETT UDE,	:	
Complainants	:	VINC CD 97-01
v.	:	
	:	Razor Back Mine
ILLINI ENERGY RESOURCES, LLC.,	:	Mine ID 11-03002
Respondent	:	

ORDER OF CONSOLIDATION AND DECISION APPROVING SETTLEMENT

Before: Judge Bulluck

These cases concern discrimination proceedings filed pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c)(2). Pursuant to unopposed motion of the Secretary, these cases are hereby consolidated for administrative processing.

The Secretary, on behalf of Sherry Ude and Brett Ude, alleges that the Udes were unlawfully denied work opportunities and terminated on or about May 9, 1997, as a result of Sherry Ude having engaged in protected activity. The Secretary seeks reinstatment of the Udes to their former positions with backpay (including overtime) and interest, employment benefits and seniority, and expungement of any reference to the protected activity from their personnel records. Additionally, the Secretary seeks orders directing Respondent to cease and desist discrimination of the Udes, posting of a notice of violation, and payment of a $9,000.00 civil money penalty.

The parties have filed a Joint Motion to Approve Settlement and Dismiss Action. I have reviewed the settlement agreement. Under its terms, the Respondent is required to take the following actions:

1. pay Sherry Ude backwages in the amount of $17,000.00;

2. pay Brett Ude backwages in the amount of $3,00.00; and

3. pay a civil money penalty in the amount of $3,000.00 for the discrimination violation.

The settlement is appropriate and is in the public interest. **WHEREFORE,** the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that the Respondent comply with the terms set forth above and pay a penalty of $23,000.00 in seven installments, within and not to exceed 6 months, as specified in the settlement agreement. Upon Respondent's full compliance with all terms of the settlement, these proceedings are **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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APR 24 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 95-29-M A. C. No. 03-01640-05511
v.	:	
REB ENTERPRISES, INC., Respondent	:	Docket No. CENT 95-30-M A. C. No. 03-01640-05512 REB Enterprises
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 95-239-M A. C. No. 03-01640-05517-A
v.	:	
HAROLD MILLER, employed by REB ENTERPRISES, INC., Respondent	:	REB Enterprises
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 95-240-M A. C. No. 03-01640-05518-A
v.	:	
RICHARD E. BERRY, employed by REB ENTERPRISES, INC., Respondent	:	REB Enterprises

DECISION ON REMAND

On March 30, 1998, the Commission issued a decision in these civil penalty proceedings vacating my initial findings that violations by REB Enterprises, Inc. ("REB") of 30 C.F.R. §§ 57.14131(a) and 56.14130(g) were not the result of REB's unwarrantable failure, and remanding the matters to me for further analysis. In addition, the Commission reversed my finding that REB did not violate 30 C.F.R. § 56.14130(a)(3), and remanded the matter for a determination as to whether the violation was as a result of REB's unwarrantable failure, and an

assessment of an appropriate civil penalty. Lastly, the Commission vacated my dismissal of an order, amended to cite a violation of section 56.14130(g), supra, and remanded the matter for a determination as to whether the violation was a result of REB's unwarrantable failure, and an assessment of an appropriate civil penalty.

1. Citation No. 4327776.

The Commission remanded this matter to evaluate the Secretary's hearsay evidence regarding the issue of REB's unwarrantable failure, and to determine if it was reliable and entitled to any probative weight.

In essence, the only evidence submitted by the Secretary to support its position that the violation cited was an unwarrantable failure consisted of hearsay testimony proffered by Inspector Enochs. This testimony consisted of second-hand information he had received from another inspector, who did not testify at the hearing, regarding an industrial assistance session at which time hand-outs were passed out, and the importance of the use of seat belts was discussed with REB's supervisors. Enochs also testified that he had a conversation with Ron Alexander, the operator of the cited vehicle, in which he asked Alexander why he was not wearing his seat belt, and the latter told him that "nobody made a big deal about it" (Tr. 34).

In weighing this testimony as it relates to the issue of the degree of REB's negligence, I note that the record does not contain any corroborating evidence relating to facts set forth in the declarants' out of court statements. Also, there is no evidence that REB exercised the right of subpoena to cross-examine these declarants. (See, *Mid-Continent Resources, Inc.* 6 FMSHRC 1132, at 1136-1137.) I thus do not assign Enochs' hearsay testimony any probative value. I place more weight upon the testimony of Richard Berry, REB's president, whose demeanor I carefully observed. I found his testimony credible that a sign is posted outside the building where employees check in advising them of the need to wear seat belts, and that such a notice was also posted in REB's office. This testimony was not contradicted or impeached. Within this context I find that the seat belt violation was not the result of REB's aggravated conduct, and hence can not be characterized to have been an unwarrantable failure.

2. Order No. 4327622

The Commission vacated my initial finding that REB's violation of section 56.14130(g) supra, was not as a result of its unwarrantable failure, and remanded the matter to evaluate the reliability and probative value of the Secretary's hearsay testimony. The evidence tending to establish REB's unwarrantable failure consists of the inspector's testimony that the operator of the cited vehicle told him that sometimes he wears a seat belt, and sometimes he does not. In contemporaneous notes taken by Enochs he indicated that Bill Jacobs, the operator of the cited vehicle, stated that no one makes a big deal about wearing a seat belt. Jacobs did not testify. Also, Enochs testified that he was told by another inspector, who did not testify, that in an industrial assistance session he had warned REB's supervisory personnel, including REB's foreman Raymond King, of the importance of seat belt use.

Dale St. Laurent, who previously had served as an MSHA special investigator, testified that Jacobs has told him that REB did not have a seat belt policy, and that no one ever made him wear a seat belt. He also testified that he was told by a REB serviceman, a Mr. Yates, that in the year prior to the inspection, he never saw either of the two bulldozer operators wearing a seat belt, and nobody made him wear seat belts. Additionally, St. Laurent testified that Yates had told him that there was no company policy regarding seat belts, that he did not recall anyone at REB telling anyone else to wear a seat belt, and that Jacobs told him (Yates) that neither Harold Miller, the lead-man at the site, nor Berry ever told him (Jacobs) to wear a seat belt.

On the other hand, I observed the demeanor of Miller, and found his testimony credible that, on the date cited, he had only been at the site for approximately 10 minutes prior to the inspector's issuance of the order at issue, and had not observed that Jacobs was not wearing a seat belt. I note that when Enochs observed Jacobs not wearing a seat belt, he was 10 yards closer to Jacobs than Miller was. There is no evidence that Miller was in any position to have observed that Jacobs was not wearing a seat belt. There is not any direct evidence that King, or Miller had notice or knowledge that Jacobs was not wearing a seat belt. There is no evidence that King, prior to Enochs' issuance of the order at issue, was in any position to have observed that Jacobs was not wearing a seat belt. Also, as discussed above, the credible evidence establishes that REB had posted information in its office regarding the requirement for its employees to wear seat belts while on the job. Although Miller had indicated that prior to the date of the issuance of the order at bar he had not enforced the seat belt rules, there is no evidence that Miller, on the date the order was issued, had any official duties or responsibilities towards enforcing compliance with the mandatory seat belt standard. Thus, considering all of the Secretary's evidence, including hearsay evidence, I find it insufficient, within the above context, to have established that the violation herein was as a result of REB's unwarrantable failure.

3. Order No. 4327625.

The Commission vacated the initial determination that the violation of section 56.14130(g), supra, was not an unwarrantable failure, and remanded to evaluate the Secretary's hearsay evidence to determine whether it was reliable, and entitled to any probative weight. The Secretary's evidence consisted of Enochs' testimony that the violation was obvious, that it was the fourth citation or order he had issued that day involving the failure to wear seat belts, and that REB had not taken any corrective action. Also, St. Laurent testified to a conversation, concerning the use of seat belts by employees, that he had with an individual who operated equipment for REB. The individual told him that "the normal posture was . . . that if a guy wanted to wear them fine, and if he didn't want to wear them then that was okay too" (Tr. 246). This individual was not called by the Secretary to testify. St. Laurent also testified that Miller had told him that he usually did not wear a seat belt when he operated equipment, and that he usually let employees do what they wanted to do regrading the wearing of a seat belt. Essentially, for the reasons set forth above, (1, 2, supra) I assign less weight to the totality of the Secretary's evidence as it contains out of court statements, and there is no direct evidence corroborating the facts set forth in the declarants' out of court statements, nor is there evidence

that REB exercised its right to subpoena and cross-examine these individuals. I assign more weight to the direct testimony of REB's witness as set forth above (1, 2 supra). I find that the Secretary's evidence was insufficient to establish that the violation cited was the result of REB's unwarrantable failure.

4. Order No. 4327631.

The Commission vacated the initial finding that it was not established that the violation of 30 C.F.R. § 56.14107(a) resulted from REB's unwarrantable failure, and remanded for further analysis of the issue of unwarrantable failure.

The inspector's conclusion that the violation was as a result of REB's unwarrantable failure was based, inter alia, upon information provided to him by another inspector, a Mr. Hermstein, who did not testify, who told him that at a meeting King was given a handbook on guarding. In analyzing this hearsay testimony of the inspector, I note that there is no corroborating evidence relating to the activities of Hermstein. In the absence of either Hermstein or King testifying, and being subject to cross-examination, and in the absence of evidence corroborating the facts set forth in the declarants' out of court statements, I find Enochs' hearsay testimony insufficient to positively establish that King had been given a handbook on guarding. Enochs further testified that he concluded that the violation was as a result of REB's unwarrantable failure because King knew he was creating a violative condition when he removed the guard from the pulley, because of the seriousness of the danger of exposure to a wing type pulley, and because there was a lot of traffic in the area. I find that the probative value of this testimony is diluted by the testimony of Berry, whose demeanor I observed and whom I found to be a credible witness, that, in essence, the only time a miner would have a need to go to the area of the tail pulley in issue was to perform maintenance on the belt, and in that event the belt would not be in operation. For these reasons, I find that the evidence adduced by the Secretary is insufficient to establish that the violation was as a result of REB's unwarrantable failure.

5. Order No. 4327626.

The Commission vacated the initial decision dismissing the order at issue, and finding that the evidence established that REB did violate 30 C.F.R. § 56.14130(a)(3), and remanding the matter for determination whether the violation was unwarrantable, and an assessment of an appropriate civil penalty.

In explaining his reasons for concluding REB's negligence was high, the inspector testified that there were not any mitigating circumstances. He indicated that the cited vehicle ". . . could be seen easily that it was obvious that there was no seat belt on the machine" (sic.) (Tr. 258). Also, he indicated that he was not sure that a preshift inspection of the equipment had been performed before it was put into use.

REB did not present any testimonial or documentary evidence to contradict the testimony of the inspector. Although the lack of a seat belt was obvious, there is no evidence when, and for what purpose, the seat belt had been removed. Also, there is no direct evidence as to how frequently the cited vehicle is used, and there is no evidence as to the last time it was used before it was cited. I thus find that REB's negligence was not of such a high level as to have constituted aggravated conduct. I thus conclude that the violation was not unwarrantable.

According to the inspector, the terrain in the plant was mostly level, but that if the operator of the vehicle would be bumped, he could fall off his seat, and suffer a nonfatal injury. I thus find that the level of gravity of the violation was more than moderate. However, for the reasons set forth above, I find that it has not been established that REB's negligence was more than moderate. I find that a penalty of $700 is appropriate for this violation.

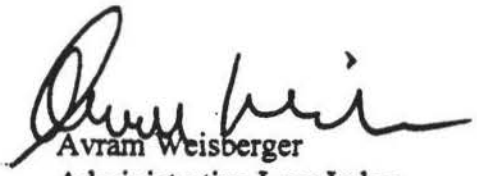
6. Order No. 4327628

The Commission, in its decision, vacated the dismissal of Order No. 4327628, and remanded the matter for determination as to whether the violation was the result of REB's unwarrantable failure, and an assessment of an appropriate civil penalty.

The inspection opined that REB's negligence was high because he had yet to find anybody on the property who was wearing a seat belt. He indicated, in essence, that he had nothing to add to his testimony regarding negligence other than what he testified to regarding the other seat belt violations. Hence, my conclusion regarding negligence and unwarrantable failure is the same as set forth above (1, 2, supra). For the same reasons, I find that it has not been established that REB's negligence was more than moderate. I further find that the driver of the cited vehicle was not wearing a seat belt, and could have been seriously injured should the vehicle have hit another object. I thus find that the violation constituted more than a moderate level of gravity. I find that a penalty of $700 is appropriate for this violation.

ORDER

It is **ORDERED** that Citation No. 4327776, Order Nos. 4327622, 4327625, 4327631, 4327626, and 4327628 were not the result of REB's unwarrantable failure. It is further **ORDERED** that within 30 days of this decision, REB shall pay a civil penalty of $1,400 for the violations cited in Order Nos. 4327626 and 4327628.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., 6TH FLOOR
WASHINGTON D.C. 20006-3868
April 29, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-23-M
Petitioner	:	A. C. No. 24-00500-05512-A
	:	
v.	:	
BRIAN FORBES, EMPLOYED BY	:	Hamilton Rock Production Pit & Plant
HAMILTON ROCK PRODUCTS,	:	
Respondent	:	

ORDER DENYING MOTION TO REOPEN

This case is before me pursuant to an order of remand by the Commission dated February 6, 1998.

The petitioner, Brian D. Forbes, filed a motion with the Commission to reopen a penalty assessment of the Mine Safety and Health Administration (hereafter referred to as "MSHA") that had become final by operation of law. The Commission held that on the basis of the record before it, a determination could not be made on the merits of the motion. Accordingly, the case was remanded for a determination whether petitioner met the requirements for relief.

On September 22, 1993, a citation was issued to petitioner's employer, Maricorp, Inc., for a violation of 30 C.F.R. § 57.14130 (g). According to petitioner's affidavit, dated October 22, 1997, the citation was served on petitioner who was the operator's manager. He forwarded the citation to the person designated by the operator to represent it in such matters.

On March 28, 1994, MSHA sent petitioner a letter by certified mail advising him that he was subject to a proposed civil penalty assessment under section 110(c) of the Act, 30 U.S.C.A. § 820(c).[1] This letter was addressed to petitioner at Maricorp, but he had left the employ of that company. The letter was returned with the notation on the envelope that he was no longer there.

Attached to an affidavit executed on December 9, 1997, by Barbara Renowden, an MSHA supervisory investigator, is a memorandum dated May 16, 1994 from Ms. Renowden to the Administrator for Metal and Non Metal Safety and Health. The memorandum recites that after the March 28 letter was returned, petitioner was contacted on his mobile phone and told that MSHA was trying to reach him to advise that he could have a conference on the violation. According to the memorandum, petitioner was hostile and uncooperative. On April 1, 1998, Ms. Renowden executed a second affidavit stating that at the time she wrote the memo of

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[1]Attachments A and B to affidavit dated December 11, 1997 of C. Bryan Don, Chief of Penalty Compliance Office, Office of Assessments, MSHA.

May 16, 1994, she knew the facts therein to be true and accurate, but that she does not have a current recollection of who in her office spoke to petitioner. In an affidavit dated April 10, 1998, petitioner states that prior to receiving a notice dated August 8, 1997, he had absolutely no knowledge that a citation had been issued.

The postmaster of Marion, Montana, in an affidavit dated March 26, 1998, states that petitioner is a customer of the post office and since 1982 has continuously rented a post office box there. According to the postmaster, the Postal Service places Form 3849 in the postal box to notify the box customer of the delivery of certified mail. She further recites that up to three notices may be provided before the Postal Service returns the certified letter to the sender as "unclaimed" and the date of each notice is written on the envelope. Finally, the postmaster advises that the Form 3849 stays in the box until the customer picks it up and that even if the mail is returned to the sender, the form still stays in the box.

On April 26, 1994, MSHA sent petitioner a letter regarding a proposed 110(c) penalty assessment by certified mail addressed to his post office box in Marion, Montana.[2] According to the postmaster's affidavit, the first notice was placed in his box on April 28, 1994, the second notice was placed there on May 4, 1994, and the letter was returned to MSHA on May 12, 1994.

On July 12, 1994, MSHA sent petitioner the notice of civil penalty assessment by certified mail addressed to his post office box.[3] According to the postmaster's affidavit, the first notification was placed in his box on July 25, 1994, the second was placed there on August 5, 1994, and the letter was returned on August 10, 1994.

Thereafter, on June 20, 1995, MSHA sent petitioner a letter by regular mail addressed to his post office box advising him that legal action would commence against him, unless he made immediate arrangements to satisfy the unpaid civil penalty.[4] This letter was not returned to MSHA.

On September 27, 1995, MSHA sent petitioner a letter, by certified mail addressed to his post office box, seeking payment of the debt, giving the amount due including accrued interest, and stating the continued nonpayment of the debt would result in referral to the Internal Revenue Service.[5] According to the postmaster's affidavit, the first notice was placed in his box on October 5, 1995, the second was placed there on October 11, 1995, and the letter was returned on October 24, 1995.

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[2] Attachments C and D to Don affidavit.

[3] Attachments E and F to Don affidavit.

[4] Attachment G to Don affidavit.

[5] Attachments H and I to Don affidavit.

Another certified mail letter dated October 25, 1996, was sent to petitioner at his post office box again seeking payment of the debt, giving the amount due including accrued interest, and stating that continued nonpayment would result in referral to the Internal Revenue Service.[6] According to the postmaster's affidavit, the first notice was placed in his box on November 4, 1996, the second notice was placed there on November 8, 1996, and the letter was returned on November 19, 1996.

On August 8, 1997, the Department of the Treasury sent petitioner a letter by regular mail advising him that MSHA had referred the debt for collection and that aggressive legal action would be commenced against him unless he made payment.[7] On September 4, 1997, petitioner telephoned the Civil Penalty Compliance Division, Office of Assessments, in MSHA and requested information regarding the civil penalty assessment and delinquent debt. On the next day relevant documents were sent to him.[8] Petitioner's attorney then wrote MSHA and the Department of the Treasury on September 10, 1997, seeking to contest the proposed penalty assessment.[9] However, he was informed by MSHA on September 25, 1997, that the proposed assessment was final and petitioner could file a motion for relief with this Commission.[10]

Pursuant to my order dated February 24, 1998, petitioner's wife executed an affidavit dated April 10, 1998, wherein she avers as follows: she and Mr. Forbes have been married since 1974; they have maintained a permanent residence in Marion, Montana since the 1970s; when her husband is out of town it is her practice to pick up their mail at the post office; if Mr. Forbes receives letters addressed just to him, it is her practice to forward such mail to him at his current work site; she never opens mail addressed in his name only; she has never signed for any certified or registered mail because she is never certain how long it might take before such mail is delivered to him at his work site; if certified letters were returned to MSHA by the Post Office marked unclaimed, it is because they were in her husband's name only; she has never signed for or picked up any certified or registered letters addressed to her husband; she has no recollection of ever receiving or picking up any notice from the Department of Labor except for the letter dated August 8, 1997, which she forwarded to him at his work site.

As already noted, petitioner also executed an affidavit on April 10, 1998, wherein he alleges that before the August 8, 1997, he had no notice that a citation had been issued and that he has never wilfully or intentionally tried to avoid service.

In the brief filed on petitioner's behalf, his counsel represents the following: petitioner's wife and son occupied their home during the son's attendance at Flathead High School; petitioner owned property, land and structures in Flathead County, Montana; petitioner has vehicles registered in Montana, and petitioner has paid the Montana personal property tax. In addition,

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[6] Attachments J and K to Don affidavit.

[7] Attachment L to Don affidavit.

[8] Attachment M to Don affidavit.

[9] Attachment N to Don affidavit.

[10] Attachment O to Don affidavit.

attached to the brief is documentation showing that petitioner worked outside Montana for these periods: May 21, 1994, to June 4, 1994; June 13, 1994, to November 6, 1994; August 18, 1995, to March 22, 1996; April 8, 1996, to December 4, 1997; and March 2, 1998 to the present. These dates do not cover the period from April 26, 1994, to May 12, 1994, when delivery of the first notice addressed to his post office box, was attempted. Also, the record, as presently constituted, does not indicate whether petitioner returned home during these periods of employment.

Applicable Law

Section 110(c) of the Act, supra, provides as follows:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

It is under section 110(c) that MSHA proposed a penalty assessment against petitioner.

Section 105(a) of the Act, 30 U.S.C.A. § 815(a), provides in pertinent part as follows:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. * * * If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, * * * the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

See also 30 C.F.R. § 100.7; 29 C.F.R. § § 2700. 25, 2700.26 & 2700.27.

It is pursuant to section 105(a) and the cited regulations that MSHA argues the proposed penalty assessment against petitioner has become final and is not subject to review.

Rule 60(b) of the Federal Rules of Civil Procedure provides as follows:

> On motion and upon such terms as are just, the court may relieve a party * * * from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which

subparagraph(6), supra, which states that a judgment may be reopened at any time for any other reason justifying relief. The Supreme Court has held that subparagraphs (1) and (6) are mutually exclusive and that a party who fails to take timely action due to "excusable neglect" may not seek relief after more than a year later by resorting to subparagraph(6). Pioneer, at 393. To justify relief under subparagraph (6) a party must show "extraordinary circumstances", suggesting that the party is faultless in the delay. Ibid., See also Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 863-864 (1988); Ackermann v. United States, 340 U.S. 193, 197-200 (1950); Klapprott v. United States, 335 U.S. 601, 613-614 (1949).

Bearing these principles in mind, we turn to petitioner's request. In Mullane v. Central Hanover B. & T. Co., 339 U.S. 306 (1950), the Supreme Court set forth the standards under which adequacy of notice is judged, stating in pertinent part as follows:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections * * * But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied.

Id. at 314-315.

The Court further stated that the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish notice and that the reasonableness and hence constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably likely to inform those affected. Id. at 315.

Mullane has been the touchstone for the development of a substantial body of law which holds that the appropriate inquiry is whether or not the method used to effectuate service is reasonably calculated under all the circumstances to apprise the interested party of the pendency of the action. Certified mail has been held to satisfy the due process due a litigant or prospective litigant. Fuentes-Argueta v. I.N.S., 101 F.3d 867, 872 (2nd Cir. 1996); U.S. v. Clark 84 F.3d 378, 381 (10th Cir. 1996); Sarit v. U.S. Drug Enforcement Admin., 987 F.2d 10, 14-15 (1st Cir. 1993). Moreover, the courts have repeatedly approved the use of regular first-class mail as a constitutionally adequate means of service. In Re Blinder, Robinson & Co., Inc., 124 F.3d 1238, 1243 (10th Cir. 1997); Weigner v. City of New York, 852 F.2d 646, 650 (2nd 1988). Even more importantly, the courts recognize that due process does not require that the interested party actually receive notice. In Re Blinder, Robinson & Co., Inc., supra at 1243; Fuentes-Argueta v. I.N.S., supra at 872; U.S. v. Clark, supra at 381; Katzson Bros., Inc. v. U.S.E.P.A., 839 F.2d 1396, 1400 (10th Cir. 1988); Weigner v. City of New York, supra at 650; Stateside Machinery Co., Ltd v. Alperin, 591 F.2d 234, 241 (1979). An individual who moves and does not provide his new address, cannot challenge service by certified or regular mail on the basis there was no actual notice. Fuentes-Argueta v. I.N.S., supra at 872; U.S. v. Perez-Valdera, 899 F. Supp. 181, 184 (S.D.N.Y. 1995); U.S. v. Estrada-Trochez, 66 F.3d 733, 735 (5th Cir. 1995). An exception to the foregoing principles is made only when the notifying party sends the notice to an address it has reason to know will not accomplish notice. Small v. U.S., 136 F.3d 1334, 1336-1337 (D.C. Cir. 1998); U.S. v. Rodgers, 108 F.3d 1247, 1253 (10th Cir. 1997); Torres v. $36,256.80 U.S. Currency,25 F.3d 1154, 1161 (2nd Cir. 1994); Aero-Medical, Inc. v. U.S., 23 F.3d 328, 330-331 (10th Cir. 1994).

by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud * * *, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

It is under rule 60(b) that the Commission has held that it has jurisdiction in appropriate cases to reopen penalty assessments that have become final pursuant to section 105(a), supra. Brian Forbes, Employed by Hamilton Rock Products, 20 FMSHRC 99, 100 (February 1998); Rocky Hollow Coal Co., 16 FMSHRC 1931, 1932 (September 1994); Jim Walter Resources, Inc., 15 FMSHRC 782, 786-89 (May 1993).

Discussion and Analysis

For purposes of deciding petitioner's motion on the present record, the representations and allegations made by him and his wife will be accepted as true.[11] The gravamen of petitioner's case is that he did not receive actual notice of the penalty assessment made against him.

Petitioner's motion to reopen was not filed within one year of the date the proposed penalty assessment became final pursuant to section 105(a), supra. Accordingly, the motion cannot be considered under subparagraph (1) of Rule 60(b), supra, which provides for relief in circumstances of excusable neglect when the request is made within one year. Pioneer Investment Services Co. v. Brunswick Associates LTD. Partnership, 507 U.S. 380, 393 (1993). Subparagraphs (2) through (5) do not apply. Therefore, the motion can only be considered under

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[11]This does not mean, of course, that the petitioner's statements and those of his wife would not present serious questions of credibility, were they not being accepted as true for purposes of the motion. For instance, petitioner's wife avers that she forwarded regular mail to petitioner, but that she did not sign for certified mail addressed to him because she was not certain how long it would take before such mail was delivered to him at his work site. Any worry about delivery time would apply to regular mail as well as certified mail and she admittedly forwarded regular mail to him. Also, concern about delivery time would not be lessened by refusing the mail. On the contrary, refusal insured that the mail would not be received. And no reason is given why petitioner's wife did not open any mail addressed to him, regardless of where the mail came from and despite the fact they have been married over 20 years. In assessing the validity of the allegation that she did not remember receiving or picking up any notice from MSHA, account would have to be taken of the postmaster's statement that notices of certified mail are left in the post office box even when a letter is returned. Eight such notices were left in petitioner's box, but his wife states she does not remember any of them. In short, the statements made on the petitioner's behalf would raise serious questions of credibility if a determination of their truthfulness were necessary to a resolution of this matter. In addition, as already noted, petitioner has not accounted for his whereabouts when attempts were made to deliver the first notice addressed to him at his post office box.

It is clear that under these principles, petitioner's claim fails. Over a 2½ year period MSHA sent four notices by certified mail to petitioner at the post office box which he had maintained for many years and which was located in the town of his permanent residence. These mailings satisfy due process under the Mullane decision, because they were reasonably calculated under all the circumstances to tell the petitioner of the penalty assessment against him. Indeed, it can fairly be said that the repeated certified mailings addressed to the petitioner at the post office box he continually maintained in the town where his permanent home was located, constituted the means best calculated to reach him. The claim for relief is based upon the absence of actual notice. However, the case law set forth supra, demonstrates that actual notice is not necessary where, as here, the method of notification was reasonably calculated to advise the individual. Finally, petitioner has only himself to blame for his lack of actual notice. Even accepting the questionable statements and arguments made on his behalf, it is clear that the petitioner is at fault for failing to furnish a forwarding address or otherwise provide for his receipt of all mail sent to him. Indeed, any rational evaluation of the practices and procedures adopted by petitioner and his wife leads to the inescapable conclusion that their modus operandi would defeat virtually any attempt to achieve actual notice by certified mail.

In addition, petitioner is not entitled to relief under Rule 60(b)(6). As set forth supra, relief is available under extraordinary circumstances suggesting that the movant is without fault. Pioneer, at 393. There are no such extraordinary circumstances here. On the contrary, petitioner's own arrangements for his mail are responsible for the defeat of all attempts to notify him by certified mail.

I recognize that the Commission has held that default is a harsh remedy. Kentucky Stone, 19 FMSHRC 1621, 1622 (October 1997); Peabody Coal Company, 19 FMSHRC 1613, 1614 (October 1997); Jim Walter Resources, 19 FMSHRC 991, 992 (June 1997); See Coal Preparation Services, Inc., 17 FMSHRC 1529, 1530 (September 1995). Following the Commission's teachings, I have reopened many cases. M & Y Services, Inc., Docket No. PENN 97-93-M, Unpublished Order dated April 8, 1997; Eastern Associated Coal Corp., Docket No. WEVA 97-81, Unpublished Order dated March 24, 1997; Del Rio, Inc., Docket No. KENT 97-138, Unpublished Order dated March 12, 1997; R B Coal Company, 17 FMSHRC 2153 (November 1995). But the Commission has never decided that defaults are never to be imposed and has itself denied reopening in appropriate cases. Lakeview Rock Products, Inc., 19 FMSHRC 26 (January 1997); Thomas Hale, Employed by Damon Corp., 17 FMSHRC 1815 (November 1995); Jim Walter Resources, Inc., 15 FMSHRC at 789-791. Relief is to be accorded in those instances where it is available under substantive legal principles and the Federal Rules. Where such relief is not warranted, the Secretary's right to finality must prevail. If ever a case justified a finding of finality, the instant one does. As already set forth, MSHA attempted many times to notify petitioner and petitioner himself was to blame for the fact that these attempts were unsuccessful.

In light of the foregoing, it is **ORDERED** that the motion to reopen is **DENIED**.

Paul Merlin
Chief Administrative Law Judge

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/gl

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

APR 30 1998

JIM WALTER RESOURCES, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. SE 98-14-R
	:	Citation No. 4482278; 9/23/97
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	No. 7 Mine
	:	Mine ID No. 01-01401

DECISION

Appearances: R. Stanley Morrow, Esq., Birmingham, Alabama, and Guy Hensley, Esq., Jim Walter Resources, Inc., Brookwood, Alabama, for Contestant;
William Lawson, Esq., Office of the Solicitor, Department of Labor, Birmingham, Alabama, for Respondent.

Before: Judge Hodgdon

This case is before me on a Notice of Contest filed by Jim Walter Resources, Inc., against the Secretary of Labor, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The Company contests the issuance to it of Citation No. 4482278. A hearing on the contest was held on March 5, 1998, in Birmingham, Alabama. For the reasons set forth below, I affirm the citation.

Factual Setting

A "Code-A-Phone" message was received in the Mine Safety and Health Administration (MSHA) district office on September 9, 1997, alleging that Jim Walter was putting coal and float coal dust accumulations in the No. 2 entry of the No. 1 longwall panel in Mine No. 7, where the

dinner hole was located.[1] Coal Mine Inspector Gregory McDade went to the mine to investigate the complaint on September 10, 1997. He went to the longwall section and found an accumulation of coal behind a check curtain in the No. 2 entry. It appeared to him that the coal had been pushed from the entry crosscut between the No. 2 and No. 3 entries into the No. 2 entry.

He was advised by miners working in the area that the accumulation had been in the No. 2 entry for about 24 hours before a ventilation curtain (curtain 2) had been placed in front of it. Prior to the coal accumulation being placed in the entry, it had served as a parking place for the "tool car" and as the dinner hole. Behind the curtain and the accumulation, McDade observed another curtain (curtain 1), which until curtain 2 was put up had served to direct air to the longwall face.

Based on what he had observed and been told, the inspector believed that the coal accumulation was a violation of the regulations. However, to be sure, he returned to the district office to discuss the situation with his supervisor. They concluded that it was a violation and on September 23, 1997, Inspector McDade issued Citation No. 4482278 to the company. It alleges a violation of section 75.400, 30 C.F.R. § 75.400, because:

> Coal dust, including float coal dust and loose coal and other combustible materials such as wood and paper was allowed to accumulate in the No. 2 Entry of the active No. 1 longwall panel. These accumulations were pushed, hauled and deposited in the No. 2 Entry by scoop against a ventilation drop. The accumulation of coal dust, float coal dust, loose coal and other combustible materials was 43' feet in length, 19 feet in width and 6 feet in height, 58 feet inby survey station 111317.

(Govt. Ex. 1.)

Findings of Fact and Conclusions of Law

Section 75.400 provides, in pertinent part, that: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials shall be cleaned up and not be permitted to accumulate in active workings . . . ." The parties agree that the facts

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[1] "Code-A-Phone is a toll-free 'hot line' to the MSHA headquarters in Arlington, Virginia, that is used to request an inspection of a mine, to report safety or health problems, or to report possible violations of the mandatory safety and health standards. MSHA's policy is not to reveal the source of a Code-A-Phone request or report." *Stillion v. Quarto Mining Co.*, 12 FMSHRC 932, 933 n.2 (May 1990). A transcript of the call is faxed to the MSHA district office nearest the mine for investigation.

are as set out above. It is the Contestant's position that there was no violation of the regulation because the accumulations were behind curtain 2 and were, therefore, not in the "active workings" of the mine.[2]

When the "tool car" and the dinner hole were in the No. 2 entry, the area was clearly within the active workings of the mine. Miners regularly went to the "tool car" to retrieve and replace tools, miners regularly ate in the area and the area up to curtain 1 had to be examined at least weekly. When the accumulations were pushed into the entry, but before curtain 2 was installed, the accumulations were within the active workings of the mine. The dinner hole was still in the entry, right in front of the accumulations, and curtain 1 still had to be examined at least once a week to make sure it was functioning properly.

Inspector McDade concluded, based on what he was told, that the accumulations were in the entry for at least 24 hours before curtain 2 was put up. His conclusion was corroborated by the testimony of Danny Joe Nelson, a Jim Walter employee, who stated that he was working the 11:00 p.m. to 7:00 a.m. shift on Sunday night-Monday morning when he first noticed the accumulations in the No. 2 entry. At that time, curtain 2 had not been installed. The next night, when he came to work, the curtain had been placed in front of the accumulations. Therefore, I find that the accumulations were in the active workings of the mine for at least 24 hours.

Since the accumulations were in the active workings for at least 24 hours, I conclude that Jim Walter violated section 75.400. The Secretary wishes to go further, however. She argues that even after curtain 2 was installed, the accumulations violated section 75.400 because curtain 2 was only put up to hide the accumulations and circumvent the rule.

There is evidence to support the Secretary's theory. Inspector McDade testified:

> The first check curtain was in good shape. There would have been no reason for installing the second check curtain at that point. When I went through check curtain number two and examined the area behind it, the coal was there. It was a large pile of coal pushed back there and other debris and materials.
>
> And traveling on back to check curtain number one, the check curtain number one was in very good shape too. So, I made an examination for methane but there was none, and there was ventilation somewhat moving across the area. But I suspect that it was not a good mining practice because it accesses an area where methane could accumulate.

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[2] "Active workings" are defined in section 75.2, 30 C.F.R. § 75.2, as "[a]ny place in a coal mine where miners are normally required to work or travel."

Q. In your 20 some years of inspecting underground coal mines and your previous years of supervisory and labor work for U.S. Steel and Drummond, have you ever seen two check curtains installed in such a manner as depicted in Government's Exhibit 2; that is, within 43 feet of each other?

A. No, I haven't.

(Tr. 90-91.) Kenneth W. Ely, a MSHA Ventilation Expert, also testified that he had never seen ventilation curtains installed this way and opined that it was a bad mining practice to have accumulations between two ventilation curtains in an essentially unventilated area.

The company did not present any evidence to rebut MSHA's inference. Michael A. Evans, Longwall Coordinator, the only witness presented by Jim Walter, stated that he was not present when the inspection was made. He further related that if a ventilation curtain is performing its ventilation function, a new curtain would not normally be installed 43 feet in front of it and that he did not know who had installed curtain 2. He did not testify as to the reason curtain 2 had been put up.

In another case concerning Jim Walter, involving a combustible material accumulation located behind a check curtain, Commissioner Riley stated in a concurring opinion: "We hope responsible operators would not resort to sweeping their problems behind a curtain separating 'active workings' from inactive areas. While such a move may comply with the letter of applicable regulations, it falls short of the spirit of the law, which is intended to prohibit the accumulation of combustible materials that present an avoidable risk to miners." *Jim Walter Resources, Inc.*, 18 FMSHRC 508, 514 (April 1996). It appears that that is exactly what Jim Walter did in this case.

It is one thing for accumulations to naturally occur in inactive workings, through roof falls and rib sloughing, it is quite another for accumulations to be deliberately placed in inactive workings or to be placed in active workings which are then made inactive by the hanging of a ventilation curtain. The former is clearly not a violation of section 75.400. I find that the latter is.

It is a violation because when the accumulations are placed in inactive workings, placing them there makes the area a place where miners are required to work or travel. Or, as in this case, when accumulations a placed in active workings and then the area is made inactive, the accumulations are in active workings while they are being deposited. Thus, the very act of trying to hide the accumulations is a deliberate violation of section 75.400.

It does not appear that there is any way that combustible accumulations can be intentionally placed either in inactive workings or in active workings that will be made inactive without violating the regulation during the placement. While placing accumulations behind

curtains or similar barriers may make them harder to detect, once discovered, problems of proof should be no more difficult than they were in this case. Furthermore, since this is clearly a bad mining practice, it should be expected that operators interested in the safety of their miners would not follow such a practice. Finally, because this can only occur as the result of an intentional act, those who are not concerned with the safety of their miners are opening themselves to charges of "reckless disregard" for the safety of miners and "unwarrantable failure" citations and orders.[3]

ORDER

Accordingly, I conclude that the accumulation of combustible materials in the No. 2 entry violated section 75.400. Citation No. 4482278 is **AFFIRMED**.

T. Todd Hodgdon
Administrative Law Judge

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[3] Since Jim Walter may have been mislead by the Commission's decision in *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996), into thinking that such activities were acceptable, even though the Commission did not specifically address this issue, I am concurring with the inspector's finding that this violation involved "moderate" negligence.

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