

APRIL 2000

COMMISSION DECISIONS AND ORDERS

04-04-2000	BR & D Enterprises, Inc.	KENT 2000-90	Pg. 479
04-04-2000	Collier Stone Company	PENN 2000-88-M	Pg. 483
04-07-2000	Northern Kansas Rock, Inc.	CENT 2000-162-M	Pg. 486
04-14-2000	Anthony Saab v. Dumbarton Quarry Associates	WEST 97-286-DM	Pg. 491
04-28-2000	L & T Fabrication & Construction	EAJ 99-1	Pg. 509

ADMINISTRATIVE LAW JUDGE DECISIONS

04-04-2000	RAG Emerald Resources Corporation	PENN 99-2-R	Pg. 519
04-14-2000	Florida Canyon Mining Inc.	WEST 2000-24-M	Pg. 523
04-14-2000	Rosebud Mining Company	PENN 99-307	Pg. 525
04-18-2000	Donald L. Ribble v. T&M Development Co.	LAKE 2000-25-DM	Pg. 535
04-19-2000	Earl Begley employed by Manalapan Mining	KENT 99-233	Pg. 537
04-20-2000	Justis Supply & Machine Shop	CENT 99-272	Pg. 544
04-25-2000	Bryce Dolan v. F & E Erection Company	CENT 97-24-DM	Pg. 554
04-28-2000	Contractors Sand & Gravel, Inc.	EAJ 96-3	Pg. 561

ADMINISTRATIVE LAW JUDGE ORDERS

04-04-2000	Sec. Labor on behalf of Royal Sargent v. The Coteau Properties Co.	CENT 2000-96-D	Pg. 563
04-05-2000	Cox Transportation Corporation	WEST 99-155-RM	Pg. 568
04-06-2000	Plateau Mining Corporation	WEST 99-196	Pg. 572

APRIL 2000

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

Northern Illinois Supply Company v. Secretary of Labor, MSHA, Docket Nos. LAKE 99-78-RM, LAKE 99-120-M. (Chief Judge Barbour, February 28, 2000)

Secretary of Labor, MSHA v. Virginia Slate Company, Docket No. VA 99-8-M. (Judge Weisberger, March 3, 2000)

Secretary of Labor, MSHA on behalf of Grant Nor, Jr., v. J & C Mining, LLC, and Manalapan Mining Company, Docket No. KENT 99-248-D. (Judge Melick, March 17, 2000)

There were no petitions filed in which Review was denied during the month of April

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 4, 2000

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

BR&D ENTERPRISES, INC.

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Docket No. KENT 2000-90
A.C. No. 15-18028-03513

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

ORDER

BY: Jordan, Chairman; Riley and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 18, 2000, the Commission received from BR&D Enterprises, Inc. ("BR&D"), a letter requesting that the Commission reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by BR&D.

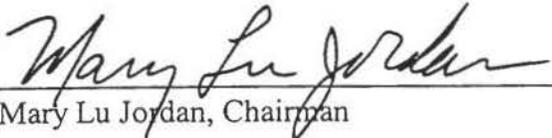
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed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

In the February 18 letter, Mr. Roan asserts that BR&D timely filed its hearing request on December 27, 1999, via certified mail, but that for some unknown reason it was not successfully delivered to the Civil Penalty Compliance Office at the Department of Labor's Mine Safety and Health Administration ("MSHA"). Mot. BR&D claims that it never received the return receipt for its mailing and that it is coordinating with the U.S. Postal Service to ascertain why it was

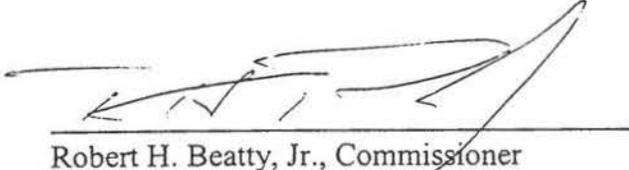
never delivered. *Id.* BR&D attached to its February 18 letter various documents, including a U.S. Postal Service receipt for certified mail showing that BR&D mailed a package to MSHA's Civil Penalty Compliance Office in Arlington, Virginia on December 27, 1999; a letter from MSHA to BR&D dated January 4, 2000; MSHA's proposed penalty assessment and a delinquent payment notice from MSHA; and a letter dated February 18, 2000 from BR&D to MSHA's Civil Penalty Compliance Office. Attach. A-D. According to its February 18 letter to MSHA, BR&D mailed hearing requests for the proposed penalty assessment it currently seeks to reopen, along with another proposed penalty assessment in a separate case, on December 27, 1999. Mot.; Attach. A. It received a letter from MSHA dated January 4, 2000 regarding the second case. Attach. C. BR&D requests an opportunity to contest the proposed penalty assessments. Mot.

We have held that, in appropriate circumstances and pursuant to Rule 60(b), we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Drummond Co.*, 17 FMSHRC 883, 884 (June 1995).

On the basis of the present record, we are unable to evaluate the merits of BR&D's position.¹ The receipt for certified mail does not indicate what BR&D sent to MSHA's Civil Penalty Compliance Office in Arlington, Virginia. In the interest of justice, we remand the matter for assignment to a judge to determine whether BR&D has met the criteria for relief under Rule 60(b). If the judge determines that relief under Rule 60(b) is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. See *Western Aggregates, Inc.*, 20 FMSHRC 745 (July 1998) (remanding to a judge where the operator alleged that it mailed its request to the wrong MSHA office, attaching its correspondences with MSHA and a Federal Express "sender activity summary" which failed to indicate what had been sent).


Mary Lu Jordan, Chairman


James C. Riley, Commissioner


Robert H. Beatty, Jr., Commissioner

¹ In view of the fact that the Secretary does not oppose BR&D's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 4, 2000

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

COLLIER STONE COMPANY

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Docket No. PENN 2000-88-M

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

ORDER

BY: Jordan, Chairman; Riley and Beatty, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 23, 2000, the Commission received from Collier Stone Company ("Collier") a request to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Collier.

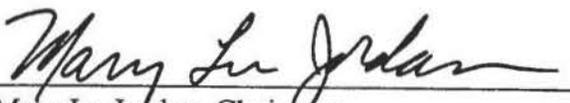
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

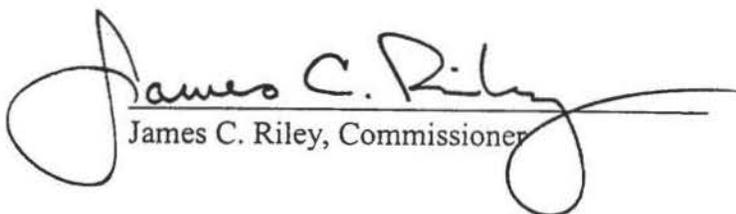
In its request, Collier asserts that the proposed penalties are excessive and unreasonable in relation to the size and profitability of its operations, and the nature of the violations. Mot. It also states that it is experiencing financial, operational, and emotional difficulties due to the recent death of its co-founder and former quarry foreman, and that the proposed penalties would have a severe financial impact on its operations. *Id.* Accordingly, Collier requests an opportunity to contest the proposed penalty assessments. *Id.*

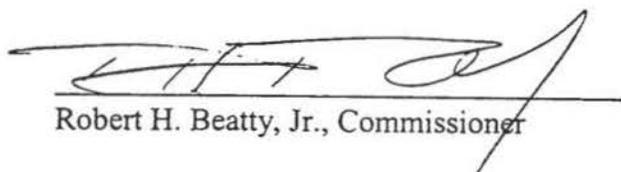
We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, eg., Kenamerican Resources, Inc.*, 20 FMSHRC 199, 201 (March 1998); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that

default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preservation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

On the basis of the present record, we are unable to evaluate the merits of Collier's position.¹ In the interest of justice, we remand the matter for assignment to a judge to determine whether Collier has met the criteria for relief under Rule 60(b). *See Tigie Constr. Co.*, 21 FMSHRC 9 (Jan. 1999) (remanding where the operator's vice-president, allegedly responsible for handling MSHA-related matters, was hospitalized for quadruple bypass surgery); *Wolf Creek Sand & Gravel*, 21 FMSHRC 1 (Jan. 1999) (remanding where the responsible employee was out of the office for an extensive period of time due to her husband's hospitalization). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Mary Lu Jordan, Chairman


James C. Riley, Commissioner


Robert H. Beatty, Jr., Commissioner

¹ In view of the fact that the Secretary does not oppose Collier's motion to reopen this matter for a hearing on the merits, Commissioners Marks and Verheggen conclude that the motion should be granted.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 7, 2000

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket No. CENT 2000-162-M
	:	(A.C. No. 14-01488-05510)
	:	
NORTHERN KANSAS ROCK, INC.	:	

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

ORDER

BY: Marks, Riley, and Verheggen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 28, 2000, the Commission received from Northern Kansas Rock, Inc. ("Northern Kansas") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose the motion for relief filed by Northern Kansas.

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

In her February 18 letter, Bobbie Goebel states that she and her husband are owners of Northern Kansas and claims that it is a "Mom & Pop company." Mot. She asserts that Northern Kansas' failure to file a hearing request to contest the proposed penalties was due to their absence as a result of her husband's illness. *Id.* Mrs. Goebel explains that Mr. Goebel was unable to work because of knee pain, and that Mr. and Mrs. Goebel went on vacation from December 11, 1999 to January 23, 2000. *Id.* She states that when they returned, Mr. Goebel underwent knee surgery, and that she was ill following the surgery. *Id.* Mrs. Goebel asserts that while she and Mr. Goebel were on vacation, their son signed the return receipt for the subject

proposed penalty assessment on January 11, but because of the course of events that took place, they were unable to file the hearing request prior to the 30-day deadline for filing. *Id.* As a result, the proposed penalty assessment became a final order of the Commission on February 10, 2000. Attached to the request to reopen is a copy of the hearing request dated February 17, 2000. Mrs. Goebel requests an opportunity to contest the proposed penalties. *Id.*

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g., Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See National Lime & Stone, Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996).

Here, it appears that Northern Kansas intended to contest the proposed penalty assessments in this matter and that, but for the medical condition of Mr. and Mrs. Goebel, it would have timely submitted the hearing request and contested the proposed assessments. In these circumstances, Northern Kansas' failure to timely file a hearing request qualifies as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See Tigue Construction Co.*, 21 FMSHRC 9, 10-11 (Jan. 1999) (granting operator's request where serious illness of vice-president resulted in operator's failure to timely file); *Kenamerican Resources*, 20 FMSHRC 199, 201 (Mar. 1998) (granting operator's motion to reopen when operator's failure to timely file hearing request was due to recent surgery performed on its safety director).

Accordingly, in the interest of justice, we grant Northern Kansas' unopposed request for relief and reopen these penalty assessments that became final Commission orders. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Marc Lincoln Marks, Commissioner



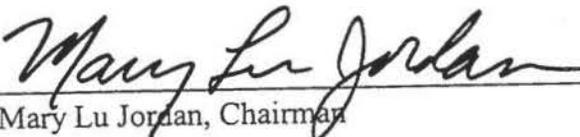
James C. Riley, Commissioner

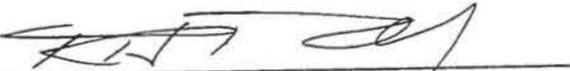


Theodore F. Verheggen, Commissioner

Chairman Jordan and Commissioner Beatty, dissenting:

On the basis of the present record, we are unable to evaluate the merits of Northern Kansas' position and would remand the matter for assignment to a judge to determine whether Northern Kansas has met the criteria for relief under Rule 60(b). See *Wolf Creek Sand & Gravel*, 21 FMSHRC 1, 1-2, 3 (Jan. 1999) (remanding to judge to determine whether operator's claim that it failed to timely file due to secretary's absence as a result of husband's health problems met criteria for relief under Rule 60(b)); *Miller employed by Mid-Wisconsin Crushing Co.*, 16 FMSHRC 2384, 2385 (Dec. 1994) (remanding where the movant claimed he failed to timely file his hearing request due to secretary's absence because of her mother's terminal illness). We also note that Northern Kansas has failed to provide any affidavits or other sufficiently reliable documents to substantiate its allegations.


Mary Lu Jordan, Chairman


Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 14, 2000

ANTHONY SAAB :
 :
 v. : Docket No. WEST 97-286-DM
 :
 DUMBARTON QUARRY ASSOCIATES :

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

DECISION

BY: Jordan, Chairman; Riley and Verheggen, Commissioners

In this discrimination proceeding, Administrative Law Judge Richard Manning concluded that Dumbarton Quarry Associates (“Dumbarton”) did not violate section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1994) (“Mine Act” or “Act”), when it laid off employee Anthony Saab on March 18, 1997, and April 4, 1997. 20 FMSHRC 508, 517 (May 1998) (ALJ). The Commission granted Saab’s petition for discretionary review challenging the judge’s determination. For the reasons that follow, we affirm.

I.

Factual and Procedural Background

Dumbarton operates a gravel pit in Fremont, California that makes aggregate and asphalt. 20 FMSHRC at 508. Saab was hired on June 20, 1995 from Teamsters Local 291 to drive a haul pack¹ and a water truck. *Id.* He complained in late July or early August 1995 that a loader operator was slamming other employees’ vehicles with the bucket of his machine. *Id.* at 509; Tr. I 10. On or about October 22, 1996, Saab sent a letter to Clay Buckley, the production operations manager at the quarry, complaining that loader operator Steve Hamblin used his loader to pick up

¹ Haul packs are large off-road dump trucks used to transport material from the pit to the crusher. 20 FMSHRC at 508.

Saab's haul pack. 20 FMSHRC at 509; Tr. I 14; Ex. C-1. The company's safety officer spoke to employees at the pit after the letter was sent and told Saab that that activity would never happen again. 20 FMSHRC at 509; Tr. I 14, 16. The unsafe equipment operator was later given a "write up" for other unsafe behavior. Tr. I 19.

On March 5, 1997, Saab called the Department of Labor's Mine Safety and Health Administration ("MSHA") to complain that the highwall had become too high and steep, and about the lack of berms on some of the haul roads. 20 FMSHRC at 509; Tr. I 19-21, 23-24, 58. On March 10-12, 1997, MSHA inspected the quarry. 20 FMSHRC at 509; Ex. C-2. At the time of the inspection, Saab raised safety issues about mobile equipment at the quarry with MSHA inspectors. 20 FMSHRC at 509; Tr. I 31. MSHA issued 17 citations during the inspection, including one citation concerning the condition of the highwall, one citation due to the lack of berms on a roadway, and several citations for violative conditions on mobile equipment. 20 FMSHRC at 509; Ex. C-2. On March 18, the day Dumbarton cleaned the highwall benches with a crane to abate the highwall violation, Saab and Larry Meyer, the other haul pack driver at Dumbarton, were laid off for the day. 20 FMSHRC at 509; Ex. R-1; Tr. I 38, II 66-70.

On March 25, Saab complained to Buckley that Mike Grant, an independent contractor, threw a rock at him from behind. 20 FMSHRC at 510. Buckley spoke with Grant about the incident, and Grant denied throwing the rock. *Id.* Buckley prepared an incident report with a safety officer stating that, "due to the lack of eyewitnesses, 'the event could not be proven as stated by Saab.'" *Id.* (quoting Ex. C-4). On March 26, Saab videotaped Grant at work to try to elicit an admission that Grant threw a rock at him. *Id.* Grant did not make any statements concerning the incident, but told Saab that he should start looking for another job. *Id.* On April 3, Saab observed an unidentified person in a van photographing him, which he considered to be harassment in retaliation for his complaints to MSHA. *Id.* (citing Tr. I 53-54, II 32); Tr. II 55.

On April 2, Dumbarton began making arrangements to move the spare water truck to another mine owned by its parent company, DeSilva Gates, in response to a memorandum from DeSilva Gates stating, *inter alia*, that Dumbarton must remove all excess equipment from the mine site by August 1. 20 FMSHRC at 512. On the afternoon of April 3, the operator of the primary water truck complained that the truck was not operating properly, and later that afternoon the truck broke down. *Id.* Dumbarton immediately arranged for delivery of a rental truck to perform necessary watering work. Tr. II 84-85. On April 4, when Saab arrived at the quarry, an independent contractor hired by Dumbarton was watering the roads with his own truck. 20 FMSHRC at 511. Buckley informed Saab that Randy Heuvel, a more senior Teamster at the quarry, had bumped him off the haul pack onto the water truck, and that Saab was laid off effective that day. *Id.* at 510. Also on April 4, the spare water truck was moved from Dumbarton to Curtner Quarry, another facility owned by DeSilva Gates. *Id.* at 511. The same day, Grant prepared an estimate stating that repairing the primary water truck would cost the company nearly \$16,000. *Id.* at 513. DeSilva Gates' chief financial officer advised Buckley not to repair the primary water truck. *Id.* On April 7 or 8, Buckley also told Saab that the primary water truck would not be usable for a few weeks. *Id.* at 511; Tr. I 62. Saab believed that he

would be called back to work once the water truck was repaired, but the water truck was never repaired and Saab was not called back to work on a full time basis. 20 FMSHRC at 511. Dumbarton offered Saab work for a few days in June, 1997, but Saab turned these offers down because he was employed elsewhere. *Id.* at 513. At some point after April 4, Dumbarton decided not to repair the primary water truck, and permanently subcontracted its watering work. *Id.* Within six months, all of DeSilva Gates' quarries subcontracted their watering work. *Id.*; Unpublished Order Den. Recons. at 1 (June 12, 1998).

On April 10, 1997, Saab filed a discrimination complaint with MSHA pursuant to section 105(c)(2) of the Mine Act, asserting that his one-day layoff on March 18 and his layoff on April 4 were discriminatory.² In a September 10, 1997 letter, MSHA informed Saab and Dumbarton that, based upon its investigation, there had been no violation of section 105(c). On September 19, Saab brought the instant proceeding under section 105(c)(3) of the Act.³

The judge determined that Saab's one-day layoff on March 18 was not in retaliation for his safety complaints. He credited Buckley's testimony that Dumbarton laid off Saab and the other haul pack driver because Buckley did not want anyone working in the pit on the day a crane was used to abate the highwall violation. The judge rejected Saab's contention that he should have been allowed to bump into a water truck operator position. He further found that, even if proven to have occurred, neither Grant's alleged rock throwing nor the photographing of Saab by an unidentified individual in a van was attributable to Dumbarton. 20 FMSHRC at 515.

Regarding Saab's layoff on April 4, the judge found that "Saab presented evidence that his termination was motivated at least in part by his protected activity." *Id.* at 514-15. However, he determined that Dumbarton successfully rebutted the prima facie case. *Id.* at 515-17. The judge rejected Saab's suggestion that Dumbarton planned events in order to lay him off in retaliation for his discussions with MSHA. *Id.* at 516. He also found that, although Buckley and Grant had a close working relationship, Saab did not prove that they conspired to harass him or cause him to be laid off. *Id.* at 515. Rather, the judge credited Buckley's version of events: that Dumbarton removed the spare water truck from the mine site due to Dumbarton's new policy of removing excess equipment from the mine; that Dumbarton removed its primary water truck from the mine site after its chief financial officer refused to pay the high cost of repair; that the operator of the primary water truck bumped Saab; and that Saab was laid off because he had the

² Section 105(c)(2), 30 U.S.C. § 815(c)(2), provides, in pertinent part: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination."

³ Section 105(c)(3), 30 U.S.C. § 815(c)(3), provides, in pertinent part: "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"

least seniority of the three Teamster employees at the mine. *Id.* at 511, 513, 516. The judge also rejected Saab's contention that Dumbarton's decision to use an independent contractor to water the roads did not make economic sense. *Id.* at 516.

Finally, the judge issued an order denying Saab's motion for reconsideration, in which he acknowledged that his finding that DeSilva Gates' other facilities had already subcontracted their watering work by the time Dumbarton decided to do so may have been erroneous. Order Den. Recons. at 1. However, the judge concluded that, even if De Silva Gates' other facilities subcontracted their watering work after Dumbarton, he would nonetheless have dismissed Saab's complaint. *Id.*

II.

Disposition

Saab argues that the judge erroneously placed on him the burden of affirmatively defending against the prima facie case. S. Supp. Br. at 2-5.⁴ Saab also contends that undisputed record evidence mandates overturning several factual findings crucial to the judge's dismissal of Saab's claims. PDR at 1-2, 11. Saab submits that the judge improperly restricted testimony regarding Dumbarton's history of adverse treatment of employees who make safety complaints. S. Supp. Br. at 5-6. Saab further asserts that other employees affected by Dumbarton's abatement of the highwall violation on March 18, 1997 were offered work in other areas of the quarry. *Id.* at 6-7. Finally, Saab challenges several of the judge's factual findings, and maintains that Dumbarton's claim that it laid him off on April 4 because all its water trucks were unavailable is pretextual. PDR at 2-3, 7-11.

Dumbarton responds that the judge correctly determined that Saab engaged in protected activity but that his layoff was in no part motivated by that activity. D. Resp. Br. at 7. Dumbarton disputes Saab's assignments of error related to the judge's findings, and maintains that Saab has failed to set forth adequate reasons to overturn the judge's determination that neither Saab's one-day layoff on March 18 nor his layoff on April 4 violated section 105(c) of the Mine Act. *Id.* at 9-18.

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. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The

⁴ Pursuant to Commission Procedural Rule 75(a), 29 C.F.R. § 2700.75(a), Saab designated his PDR as his brief. Saab also filed a supplemental brief.

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. *See 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. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

A. Exclusion of Evidence

Saab contends that the judge erroneously placed the burden of affirmatively defending the case on him. S. Supp. Br. at 2-5. However, the judge's conclusion of his analysis at the rebuttal phase of the Commission's discrimination framework foreclosed any affirmative defense analysis. 20 FMSHRC at 517. At the rebuttal phase of the Commission's discrimination analysis, the burden remains on the complainant. *See Robinette*, 3 FMSHRC at 818 n.20. Accordingly, we affirm the judge's allocation to Saab of the rebuttal phase burden.

We decline to consider Saab's allegation (first raised in his supplemental brief) that the judge improperly limited Saab's testimony regarding Dumbarton's alleged pattern of "failing to respond to and adversely treating employees who exposed safety violations." S. Supp. Br. at 5. 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(g); *see Broken Hill Mining Co.*, 19 FMSHRC 673, 678 n.9 (Apr. 1997). Saab did not raise the issue of the judge's limitation of his testimony in his petition for discretionary review, nor did the Commission direct review of this question sua sponte. Therefore, Saab's challenge to the judge's limitation of his testimony is not properly before the Commission. Contrary to our dissenting colleague, we do not consider Saab's generalized plea that the judge's decision was not based on an "accurate set of facts" to even implicitly raise the evidentiary question which Saab subsequently addressed in his brief. Nor do we share the concern of our concurring colleague that our holding here may appear to be at odds with the broad reading we have accorded petitions filed in *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 (Sept. 1997) and *Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998), *aff'd in relevant part*, 170 F.3d 148 (2d Cir. 1999). Unlike those cases, the question of the exclusion of evidence does not follow analytically from the sweeping language in Saab's petition.

B. March 18 Layoff

We are not persuaded by Saab's challenges to the judge's determination that Saab's layoff on March 18 did not violate section 105(c) of the Act. We find meritless Saab's argument that the judge erred in finding that Buckley's decision to switch Heuvel to the water truck in February was unrelated to Saab's complaints. PDR at 8. Heuvel's February move to the water truck preceded Saab's March safety complaints, and Saab conceded that no events prior to those complaints motivated his layoffs by Dumbarton. Tr. I 11-17. Thus, Buckley's decision to switch

Heuvel to the water truck could not possibly have been motivated by Saab's safety complaints. Accordingly, we affirm the judge's finding that Saab's complaints and Heuvel's move to the water truck were unrelated.

Regarding Saab's claim that the collective bargaining agreement entitled him to bump Heuvel, a more senior Teamster, off the water truck on March 18 (PDR at 8), we conclude that substantial evidence⁵ supports the judge's rejection of Saab's claim. The judge found no evidence that junior employees are contractually entitled to bump senior employees. 20 FMSHRC at 515. The union contract on its face permits senior Teamsters to bump junior Teamsters from positions for which the senior Teamster is qualified, not vice versa. Ex. R-6 at 9. Thus, Saab, as the least senior Teamster at Dumbarton, was not entitled to bump anyone. 20 FMSHRC at 515-16. Accordingly, we affirm the judge's finding that Saab was ineligible to bump on March 18, the day of his one-day layoff.

We are also not convinced by Saab's suggestion that Dumbarton's provision of work to other employees on March 18 was discriminatory. The judge found that Dumbarton laid off Saab on March 18 because he was a haul pack operator and there was no available work for haul pack operators that day due to the operator's abatement of the highwall violation. *Id.* at 515. It is undisputed that haul pack drivers at Dumbarton work beneath, and come within ten feet of, the highwall. Tr. I 23, 113. Because it would have been dangerous for employees to work beneath the area of the highwall being abated on March 18, that area was bermed off and other equipment operators were assigned to other areas of the facility. 20 FMSHRC at 512; Tr. I 113, 143, II 69-70. Buckley also testified that loader and dozer operators have other duties which do not necessitate being near the pit. Tr. II 70-71. In fact, Meyer, the other haul pack operator, conceded that the loader and dozer operators may also have been affected by the March 18 highwall abatement, but that Dumbarton "probably had something else for them to do." Tr. I 114. Buckley added that, when enough material is stockpiled — as was the case on March 18 — haul packs are not needed. Tr. II 69.⁶ Accordingly, substantial evidence supports the judge's finding that Dumbarton laid off Saab on March 18 solely because there was no available work for haul pack drivers that day.

⁵ 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)).

⁶ Meyer and Saab admitted that neither was at the quarry on March 18 and that neither knows what happened there that day. Tr. I 143-44, II 52.

C. April 4 Layoff

Saab submits that the primary water truck could have been partially repaired to operative condition without great expense, and that Dumbarton decided “to not repair the truck which broke down and to get rid of the spare truck, so it would have an excuse to fire [Saab].” PDR at 5; S. Reply Br. at 2-3 (citing Ex. C-2). Dumbarton states that its primary water truck had a cracked frame, and that it would have been unreasonable for it to engage in only a partial repair, particularly given the recent MSHA inspection. D. Resp. Br. at 13, 17.

The Commission’s “function is not to pass on the wisdom or fairness of [an operator’s] asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.” *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). Here, while the judge made no specific finding regarding Saab’s claim that Dumbarton improperly declined to partially repair the primary water truck, his finding that the operator’s actions related to the primary water truck were in no part motivated by Saab’s complaints implicitly rejected Saab’s contention. 20 FMSHRC at 517.

The judge found that Buckley was aware of the numerous mobile equipment citations MSHA had recently issued to Dumbarton. *Id.* at 516. He also found that MSHA advised Dumbarton that cracked frames would be cited and that anything that was installed by the manufacturer of equipment had to be operational. *Id.* at 513 (citing Tr. II 87). Buckley testified that several factory items on the primary water truck were inoperative and required repair. Tr. II 87. While Saab testified that there were no defective items other than the pump, the judge stated that “a lot of the [items requiring repair] could be things that an operator of a piece of equipment wouldn’t even be aware of.” Tr. I 70. The judge also credited Buckley’s testimony regarding the events which preceded Saab’s termination, including that repairing the primary truck to comply with MSHA standards would cost nearly \$16,000, and that Dumbarton did not repair the primary water truck because Ernie Lampkin, its chief financial officer, did not authorize the money necessary to make the repairs. 20 FMSHRC at 516; Tr. II 81. Finally, we note that Lampkin told Buckley that Dumbarton had to make many purchases to secure renewal of the conditional use permit allowing Dumbarton to continue operating, and that repairing the primary water truck was not a high priority. Tr. II 81, 88-89.

In essence, Saab asks the Commission to overturn the judge’s decision to credit Buckley’s testimony related to Dumbarton’s reasons for declining to repair the primary water truck. 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 [or she] is ordinarily in the best position to make a credibility determination.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)).

We find no compelling reason to overturn the judge's credibility determination. Accordingly, we conclude that substantial evidence supports the judge's finding that Dumbarton's decision not to repair the primary water truck was based on valid business considerations, not Saab's protected activity.

Saab also challenges the judge's finding that the spare water truck was removed because of a memorandum from DeSilva Gates stating that all excess equipment must be removed. PDR at 7. Dumbarton maintains that the spare water truck was "essentially non-operational," and was removed as excess equipment. D. Resp. Br. at 5 n.1.

The judge credited Buckley's testimony that the spare water truck needed significant repairs and was removed as excess equipment pursuant to a memorandum from its parent company. 20 FMSHRC at 516. Buckley further testified at the hearing that Heuvel told him that the spare water truck had "serious rear end problems" and would not pass inspection. Tr. II 79-80. Buckley further explained that both the spare water truck and a third truck needed repair, and that they were "red tagged" before the inspection to prevent MSHA from inspecting them. Tr. II 80, 114.

As with the judge's disposition related to the primary water truck, we find no basis for overturning his decision to credit Buckley's testimony regarding Dumbarton's reasons for removing the secondary water truck from the mine site. Accordingly, we conclude that substantial evidence supports the judge's finding that the secondary water truck was removed pursuant to the memorandum from Dumbarton's parent company.

We are also unconvinced by Saab's argument that, in light of the judge's erroneous finding that DeSilva Gates' other mines subcontracted their watering work before Dumbarton, the judge erred in finding that Dumbarton's decision to subcontract its watering work was not motivated by Saab's safety complaint. The judge based his dismissal of Saab's complaint on record evidence; his crediting of Buckley's testimony regarding the events of April 3 and 4, and his discrediting of Saab's alternative explanations for his termination. 20 FMSHRC at 516. Furthermore, in his denial of Saab's motion for reconsideration — where Saab raised the same argument he now raises before the Commission — the judge stated that his decision "is not affected by the order in which various quarries affiliated with DeSilva Gates began using independent contractors to water down roads." Order Den. Recons. at 1.

Dumbarton does not dispute that, at the time it contracted its watering work, the other two DeSilva Gates facilities had not yet done so. D. Resp. Br. at 14. Rather, it explains that DeSilva Gates subcontracted the watering work at its La Vista quarry after the engine broke on its water truck, and subcontracted the watering work at its Curtner quarry on the day that facility opened. Tr. II 118. Thus, evidence in the record undermines Saab's suggestion that DeSilva Gates subcontracted the watering work at its other facilities to "cover its tracks to try to make the excuses for the layoff look legitimate," (PDR at 5), and supports the judge's decision to place

little weight on the order in which DeSilva Gates' facilities subcontracted watering work. Accordingly, we find that the judge's error in chronology is harmless.

We are also not persuaded by Saab's claim that subcontracting the watering work was more costly than awarding this work to Teamster employees. *Id.* at 8-9. The judge discredited Saab's testimony regarding the cost of subcontracting, finding Saab's testimony "not very convincing because it was rather simplistic and did not consider all of the costs borne by an employer." 20 FMSHRC at 516. Buckley testified that the \$60 per hour rate at which Dumbarton initially contracted watering work included costs of maintenance and repair of equipment, insurance, fuel, tires, and union benefits to the driver. Tr. II 91. Buckley also stated that Dumbarton pays approximately \$42 per hour straight time for Teamster water truck labor, including benefits and social security, but that when the other costs borne by the company — including repair, maintenance, depreciation, fuel, tires, and vehicle insurance — are considered, the cost rises to approximately \$53 to \$60. Tr. II 108-11. Buckley testified that, while he agrees that the cost of renting water trucks was "exorbitant," all the water trucks were busy at the time the decision to subcontract was made, and that only later was he able to negotiate a more favorable rate. Tr. II 90-91, 110. Moreover, Saab does not dispute that Dumbarton's continued use of its employees to water the roads would have required that the operator pay the cost of repairing the primary water truck. Thus, substantial evidence supports the judge's rejection of Saab's claim that Dumbarton's decision to subcontract its watering work did not make economic sense.

Saab next claims that the judge disregarded Grant's bias towards Dumbarton and his motivation to retaliate against Saab. S. Supp. Br. at 7. Saab testified that Grant called him demeaning names and threw a rock at him. Tr. I 47-48. Saab also testified that Grant told him approximately one week prior to his layoff that he "better hope the hall has some work down there" and that he believed that this statement indicated that Grant knew Saab would be laid off imminently. Tr. I 60. Saab believes that Grant's actions are attributable to Dumbarton because Grant frequently went into Buckley's office, and because Grant had "made it known to everyone that he was tight with Clay, and if he didn't get along with you, you wouldn't get along with Clay." Tr. I 60-61, II 54.

As the judge stated, the endeavor Saab contends Dumbarton undertook to discriminatorily terminate him would have required at least the cooperation of Buckley and Grant. 20 FMSHRC at 516. The judge found that, while Buckley and Grant had a close working relationship, there was no showing of collusion between them to discriminatorily terminate Saab. *Id.* at 515. Buckley testified that Grant does not speak for him and that "Grant doesn't tell [him] how to do [his] job or how to run [his] operation. He's just a mechanic who works on the site." Tr. II 101. Buckley further testified that discussions between himself and Grant mainly concerned scheduling and paying for repair and maintenance of equipment. Tr. II 101-02. Regarding Grant's statement to Saab that he should be prepared to find other work, this statement was made during a discussion videotaped during work hours by Saab on the day after Saab complained to Buckley that Grant threw a rock at him. Tr. I 60. While Grant's reasons for making this

statement are unclear, Saab offered no other evidence that Grant possessed any knowledge that Saab would be bumped. Accordingly, substantial evidence supports the judge's finding that no collusive relationship existed between Grant and Buckley.⁷

On appeal, Saab attempts to weave his various assignments of error into a claim that Dumbarton's stated reasons for laying him off on April 4 were a pretext for his discriminatory layoff, PDR at 3, challenging the judge's finding that he was laid off due to lack of work and lack of seniority. 20 FMSHRC at 517. It is not our role to reweigh the evidence or to enter findings based on an independent evaluation of the record. *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993). Furthermore, as we have recently recognized, "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent . . . [a] finding from being supported by substantial evidence." *Secretary of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 958 n.6 (Sept. 1999) (citation omitted).

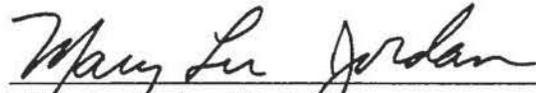
Accordingly, since we have affirmed the challenged findings on substantial evidence and credibility grounds, we thus conclude that substantial evidence supports the judge's determination that Saab's April 4 layoff did not violate section 105(c) of the Act.

⁷ From our affirmance of the judge's finding that Dumbarton's decisions related to the primary and secondary water trucks were not motivated by Saab's protected activity, together with his supported finding that no collusive relationship existed between Grant and Buckley, it follows that we find no merit in Saab's allegation (S. Reply Br. at 2) that Grant's repair estimate was inflated as part of a scheme to terminate Saab.

III.

Conclusion

For the reasons set forth above, we *affirm* the judge's determination that neither Dumbarton's one-day layoff of Saab on March 18, 1997, nor its layoff of him on April 4, 1997, violated section 105(c) of the Mine Act.



Mary Lu Jordan, Chairman



James C. Riley, Commissioner



Theodore F. Verheggen, Commissioner

Commissioner Beatty, concurring:

I concur in the result reached by the majority and in all aspects of the majority's decision with the exception of Section II.A, concerning Saab's claim that the judge improperly excluded evidence concerning his prior protected conduct and Dumbarton's response thereto. Based on my review of the current Commission case law on this issue, it appears that the majority's holding is seemingly at odds with the broad reading this body has accorded petitions filed pursuant to Rule 70 of the Commission's procedural rules, 29 C.F.R. § 2700.70. *See, e.g., Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 (Sept. 1997) and *Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998), *aff'd in relevant part*, 170 F.3d 148 (2d Cir. 1999).¹ In this respect, I share the concerns raised by Commissioner Marks, in his dissent.

As a practical matter, I do not think it is appropriate for the Commission to engage in the practice of broadly interpreting petitions for discretionary review in determining whether issues have been properly raised before the Commission under Rule 70(d).² This position is seemingly at odds with the plain language set forth in Rule 70(d) which states in relevant part that "[e]ach issue *shall* be separately numbered and *plainly and concisely* stated, and shall be supported by detailed citations to the record, when assignments of error are based on the record, and by statutes, regulations, or other principal authorities relied upon." 29 C.F.R. § 2700.70(d) (emphasis added).

Clearly, Rule 70(d) mandates that parties filing petitions for discretionary review before the Commission must do so with particularity. Unfortunately, it appears that in recent years we have not monitored this situation closely enough to assure that parties adhere to this fundamental requirement. The Commission's decision in *Fort Scott* is a perfect example of how this phenomenon has become all too commonplace. In order to insure objectivity in our decision making process, we must eliminate the need to second-guess the parties in determining the issues being appealed.

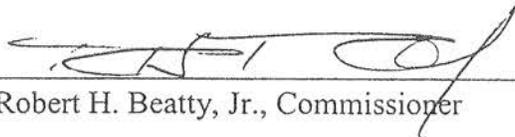
I would reject Saab's argument based upon the judge's exclusion of evidence on alternative grounds because I believe that Saab's counsel waived the right to have the evidence concerning his client's prior safety complaints considered by the trier of fact as evidence of discrimination. At the hearing, Saab's attorney attempted to elicit testimony from him regarding how Dumbarton treated him after he made complaints in late July or early August 1995 and on October 22, 1996 about a fellow equipment operator's unsafe actions. Tr. I 10-17. After an

¹ Both the *Fort Scott* and *Rock of Ages* cases were decided prior to my tenure with the Commission.

² The only exception to this should be when a party appears pro se before the Commission. In these types of cases, the Commission should continue its practice of granting some leeway to the pro se litigant in interpreting the language of the petition for discretionary review.

objection by Dumbarton, Saab's attorney stated that the proposed testimony regarding these events was offered as background to establish Saab's "prior history of reporting to his supervisor what he considered unsafe conditions at the quarry" and for purposes of "credibility," and that no claim was being made that Saab "was laid off in retaliation for these [pre-March 5, 1997] complaints." Tr. I. 11, 17.

Moreover, Saab's attorney elected not to pursue further direct examination of him regarding the 1995 incident. Tr. I 10-12. The judge did permit testimony as to Saab's October 1996 safety complaint "strictly as background." Tr. I 10, 13-16. Saab's counsel then attempted to clarify his intention in adducing the testimony related to his client's prior complaints: "It's credible if there were actions in the past taken against [Saab] in retaliation for making safety complaints, it's more credible that later on there was action taken in retaliation for him making safety complaints." Tr. I 17. The judge then sustained Dumbarton's objection when Saab's attorney asked him if he suffered adverse action after his October 1996 complaint. Tr. 17-18. By characterizing this evidence solely as "background" with respect to Saab's credibility, and *not* relevant to Dumbarton's motivation for laying off Saab, his counsel essentially waived the right to have the evidence considered for anything other than the judge's credibility determinations.³



Robert H. Beatty, Jr., Commissioner

³ To the extent that the judge credited the version of events provided by Dumbarton's witnesses over that of Saab, he obviously determined that Saab's testimony in this regard was not entitled to dispositive weight on credibility questions. As the majority notes in its decision, a judge's credibility determinations are entitled to great weight and may not be overturned lightly. Slip op. at 7, and cases cited. I find no compelling basis for overturning the judge's credibility determinations in this case.

Commissioner Marks, dissenting:

I disagree with the majority (slip op. at 5), and believe that Saab's petition for discretionary review adequately raised the issue of whether the judge erred in preventing Saab from testifying on other instances in which Dumbarton had shown hostility to complaints about safety violations. Furthermore, I agree with Saab that the judge incorrectly excluded this evidence. Accordingly, I would vacate and remand the judge's decision to permit Saab to present his testimony on this matter.

During the hearing, Saab's counsel asked him whether any adverse action was taken against him after he sent a letter to the operator complaining about certain safety issues. Tr. I 16. The operator's attorney objected to the question, on the ground that it had not been alleged that those events were directly connected to the layoff at issue in this case. Tr. I 16-17. Saab's attorney argued that "[I]t goes to credibility. . . . [I]f there were actions in the past taken against [Saab] in retaliation for making safety complaints, it's more credible that later on there was action taken in retaliation for [Saab] making safety complaints." Tr. I 17. The judge nonetheless sustained the objection, on the ground that Saab was not alleging that his April 4, 1997, layoff was in retaliation for the earlier safety complaints. Tr. I 17-18.

The judge ultimately concluded that Dumbarton successfully rebutted Saab's prima facie case, because he found that although the evidence showed that Saab had engaged in protected activity, his termination was not motivated by that activity in any part. 20 FMSHRC at 515. In concluding that the operator had successfully rebutted the prima facie case, the judge relied heavily on Buckley's testimony regarding the events of April 3 and 4, explicitly crediting it and finding it more persuasive than Saab's. *Id.* at 516. Because he made this credibility determination without hearing evidence of prior adverse actions taken against Saab — evidence which conceivably could affect that credibility determination — the judge erred.

Of course we do not know the specific evidence of past adverse action that Saab would have offered had the judge permitted the line of questioning Saab's counsel attempted to pursue. I therefore will not speculate as to whether these actions allegedly taken by the operator after Saab wrote his letter containing safety complaints would have demonstrated its animus towards Saab's protected activity to such an extent that the judge no longer would have believed Buckley's testimony that he decided to use a contractor to water the roads simply because of problems with his water trucks. Nonetheless, I am reluctant to affirm the judge's finding of no discrimination, based in large part on this testimony, when the judge did not take the opportunity to consider the evidence of Dumbarton's animus to Saab's previous safety complaints which he excluded and factor it into his decision as to whether to believe Buckley.

While this evidentiary issue was not as clearly stated in Saab's petition for review as it could have been, there is more than enough in that petition to find that the issue is implicit in, and related to, the issues that the petition plainly raises, so therefore the issue is properly before us. *See Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 (Sept. 1997) (construing

Secretary of Labor's petition to reach three other issues implicit in single issue that was expressly raised); *Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998) (reaching three issues not expressly raised by operator but sufficiently related to other issue that was only generally raised), *aff'd in pertinent part*, 170 F.3d 148 (2d Cir. 1999). I do not believe that we should hold individual miners to a higher standard than we hold the Secretary of Labor or large mine operators in fashioning their PDRs.

According to his petition, Saab seeks to have the judge's decision "overturned," asserting that it was not based on "an accurate set of facts." PDR at 2, 11. He argues that "it is only fair that [he] be granted the opportunity to have the decision reviewed by the Commission and decided based on conclusions that can reasonably be made from the correct set of facts." *Id.* at 11. Implicit in his request that the decision be based on a correct and accurate set of facts is Saab's contention that the judge's evidentiary ruling prevented development of a record of those facts. Consequently, I believe Saab sufficiently raised the evidentiary issue in his PDR for purposes of our review.

As for the merits of the issue, the question is one of whether the judge abused his discretion when he refused to permit Saab to offer evidence about the operator's prior adverse actions against him after an earlier safety-related complaint. *See General Elec. Co. v. Joiner*, 522 U.S. 136, 141-43 (1997) (confirming that the abuse of discretion standard is the appropriate standard of review of a district court's evidentiary rulings); *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1843-44, 1853-54, 1864, 1881-82 (Nov. 1995), *aff'd* 151 F.3d 1096 (D.C. Cir. 1998) (applying abuse of discretion standard in reviewing trial judge decisions involving the qualification and crediting of expert witnesses and the exclusion of trial testimony). With regard to the exclusion of testimony, it has been stated that a trial court abuses its discretion in so doing when its decision is based on, among other things, "an erroneous view of the law." *Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537, 1557 (9th Cir. 1996) (quoting *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 841 (9th Cir. 1995)).

A review of relevant case law quickly reveals that the judge erroneously applied the law of evidence in prohibiting Saab from testifying on Dumbarton's previous reactions to his safety complaints. Many of the federal appellate courts in recent years have overturned trial judge rulings that evidence of a defendant's prior discriminatory behavior is inadmissible where those actions, while not the central cause of action, were offered to prove the defendant's discriminatory motive in subsequently discriminating against a plaintiff. *See, e.g., Robinson v. Runyon*, 149 F.3d 507, 512-14 (6th Cir. 1998) (finding abuse of discretion in excluding evidence intended to show circumstantial case of discrimination because reviewing court was "firmly convinced that a mistake" was made). Courts have done so despite acknowledging that "a trial court's exclusion of evidence is entitled to substantial deference on review." *Hawkins v. Hennepin Technical Ctr.*, 900 F.2d 153, 155 (8th Cir.), *cert denied*, 498 U.S. 854 (1990) (citation omitted).

A leading case on the question of the admissibility of prior discriminatory acts is *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988), in which a black employee brought a race

discrimination claim after he was discharged from a car dealership. At trial, the jury ruled against him, and on appeal he argued, among other claims, that the trial court had improperly excluded evidence of other discriminatory acts of the dealership. *Id.* at 1102. The Eighth Circuit held that the judge had erred in excluding evidence of prior acts of discrimination against black customers. *Id.* at 1104. The court stated that “[i]t defies common sense to say . . . that evidence of an employer’s discriminatory treatment of black customers might not have some bearing on the question of the same employer’s motive in discharging a black employee.” *Id.* The court also ruled that the judge improperly excluded evidence that a Ford manager had made racist remarks. *Id.* While acknowledging that the plaintiff was not claiming relief for having been insulted, the court reasoned that he was trying to prove by a preponderance of the evidence that he was discharged because of his race, and testimony that his supervisors occasionally used racial insults was probative of his claim. *Id.*

The Eighth Circuit criticized the trial court for limiting the plaintiff to proving the dealership’s discriminatory intent solely from the facts of his own termination. According to the Court, evidence of the prior discriminatory acts could have provided evidence of discriminatory animus. *Id.* at 1105. The court emphasized that:

The effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer’s account of its own motives. . . . Circumstantial proof of discrimination typically includes unflattering testimony about the employer’s history and work practices — evidence which in other kinds of cases may well unfairly prejudice the jury against the defendant. In discrimination cases, however, such background evidence may be critical for the jury’s assessment of whether a given employer was more likely than not to have acted from an unlawful motive.

Id. at 1103.¹ These evidentiary rulings, along with other trial court errors, were the basis of the Court’s decision to remand the case for a new trial. *See also Robinson*, 149 F.3d at 513-14 (relying on *Estes* to find admissible evidence which made existence of employer’s discriminatory motive more probable, because even though by itself it could not prove motive, it was “a possible link”); *Abrams v. Lightolier Inc.*, 50 F.3d 1204, 1214 (3rd Cir. 1995) (“discriminatory comments by nondecisionmakers, or statements temporally remote from the decision at issue, may properly be used to build a circumstantial case of discrimination”) (citations omitted).

¹ Admissibility of such evidence is even more appropriate in Commission discrimination cases, because they are the subject of bench, not jury, trials. In reaching their decisions, trial judges, unlike juries, are expected to be able to exclude from their minds improper inferences from the evidence. *See Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981).

Equally instructive is the decision in *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417 (7th Cir. 1986), where an employer appealed a trial court verdict finding that it had discriminated against an employee by harassing him because of his race and then firing him in retaliation for complaining of the harassment. Rejecting the employer's appeal of the judge's ruling permitting evidence of harassment against other black workers besides the plaintiff, the Seventh Circuit recognized that,

[g]iven the difficulty of proving employment discrimination — the employer will deny it, and almost every worker has some deficiency on which the employer can plausibly blame the worker's troubles — a flat rule that evidence of other discriminatory acts by or attributable to the employer can never be admitted without violating [Federal] Rule [of Evidence] 403 would be unjustified.

Id. at 1423. The Court held that the evidence of harassment at issue was relevant in rebutting the employer's defense that it fired the plaintiff for cause. *Id.* The Court noted that the evidence increased the probability that the reasons given by the defendant (that the plaintiff's job performance was deficient) was "merely the pretext for the harsh discipline meted out to him by a management irritated by this complaints about racial harassment." *Id.* at 1424.

In light of these rulings and others, I believe it was clear error for the judge to prohibit Saab from testifying on Dumbarton's previous reactions to his safety complaints, particularly in light of the judge's acceptance of Dumbarton's claim that it laid off Saab for cause. See *Hawkins*, 900 F.3d at 155-56 ("Because an employer's past discriminatory policy and practice may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination, this evidence should normally be freely admitted at trial.") (citing *McDonnell Douglas v. Green*, 411 U.S. 792, 804-05 (1973)); *Mullen v. Princess Anne Volunteer Fire Co.*, 853 F.2d 1130, 1133 (4th Cir. 1988) (evidence of discrimination unrelated to alleged discriminatory action admissible because of value of evidence in showing employer's true state of mind). It has been recognized that where, as here, the complainant is relying heavily upon circumstantial evidence to carry his or her burden of proof of discrimination, the absence of even one piece of such highly relevant evidence may make the difference in the factfinder's mind as to the employer's true motivation in taking adverse action against the complainant. See *Robinson*, 149 F.3d at 515. Consequently, I would remand this case to the judge so that Saab can fully and fairly testify regarding his experiences with Dumbarton and its reaction to his previous safety complaints.



Marc Lincoln Marks, Commissioner

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replace them with a new batch weighing system. 21 FMSHRC 71; Tr. 84. PICOR, in turn, subcontracted with L & T to do the structural portion of the work. 21 FMSHRC 71. L & T, which was wholly owned by Edward and Catherine Crain, had a work force of 12 to 15 employees and was primarily involved in construction work at mine sites. *Id.*; Tr. 29, 77.

On the morning of August 6, 1997, L & T employees at silo number 2 at the Cordero Mine installed metal flooring on an elevated deck approximately 18½ feet above the floor in the north half of the silo. 21 FMSHRC at 71. After the flooring had been put in place, L & T foreman Glen Belt began installing a section of hand rail along the edge of the deck while the flooring was being welded. *Id.* at 71-72. The section of hand rail was approximately four feet high and five feet long, and weighed between 60 and 90 pounds. *Id.* at 72. Ironworker Shayne DeGaugh, who had been employed by L & T for 3 weeks and was assisting Belt, went to get bolts to attach the handrail to the deck. *Id.* at 72.

Belt set the handrail on a barricade at the top of the stairs leading up to the deck. *Id.* As Belt was crossing the barricade, the handrail slipped and fell to the floor below just as DeGaugh was returning to the deck with the bolts. *Id.* The falling handrail struck DeGaugh on the head, breaking his neck and permanently paralyzing him from the neck down. *Id.*

MSHA subsequently investigated the accident and issued a citation charging L & T with violating 30 C.F.R. § 77.203, which provides:

Where overhead repairs are being made at surface installations and equipment or material is taken into such overhead work areas, adequate protection shall be provided for all persons working or passing below the overhead work areas in which such equipment or material is being used.

The citation alleged that “[a]dequate protection was not provided in silo number 2 where people were working on an elevated walkway 18.5 feet above the concrete floor. A section of handrail . . . fell and struck a person walking underneath the elevated platform.” 21 FMSHRC at 72. The MSHA inspector who issued the citation determined that the violation was significant and substantial (“S&S”)¹ and resulted from high negligence and the operator’s unwarrantable failure² to comply with the regulation. *Id.* Less than 3 months earlier, on May 21, 1997, L & T had been cited for a violation of the same regulation. *Id.* at 72 n.3.

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

² The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

At the hearing, the only issue contested was the amount of the proposed penalty. *Id.* at 73. L & T and the Secretary stipulated to the violation and the events surrounding the violation. *Id.* at 72. In addition, L & T stipulated that the violation was significant and substantial S&S, caused by high negligence, and the result of its unwarrantable failure to comply with the regulation. *Id.*

With regard to the proposed penalty, the parties also stipulated at the hearing that L & T had acted in good faith in abating the violation. *Id.* at 73. L & T put on evidence to show that it had few prior violations, including two during the last 2 years (including the one at issue and another citation issued for a violation of the same regulation), and a total of six citations over 18 years (including three citations that were vacated). *Id.* L & T's primary defense to the proposed \$40,000 penalty was that it would adversely affect L & T's ability to continue in business. *Id.* In support of this position, L & T submitted financial statements, and Edward Crain, its president, testified concerning the financial burden that the proposed penalty would purportedly create. *See id.* at 73-74; Tr. 28.

The judge rejected L & T's defense that the proposed penalty would affect its ability to continue in business. 21 FMSHRC at 74. The judge concluded that the operator had not carried its burden of proof because it had presented unaudited financial statements. *Id.* Further, the judge found that even the statements L & T submitted did not establish that its ability to continue in business would be adversely affected if it had to pay the full \$40,000. *Id.* The judge found that the gravity of the violation and L & T's high negligence in committing a violation for which it had been cited several months earlier justified a \$40,000 penalty. *Id.* However, he found that the company's very good record of prior violations, its rapid abatement of the violation, and its small size mitigated the penalty. *Id.* Therefore, the judge concluded that a penalty of \$20,000 was appropriate. *Id.*

B. The EAJA Proceeding

On March 30, 1999, L & T filed an EAJA application for fees and expenses of \$14,809.82. The Secretary opposed the application because, inter alia, the proposed penalty was not substantially in excess of the judge's award and the proposed penalty was not unreasonable when compared to the judge's decision. Following the submission of pleadings, the judge concluded that L & T was an eligible party and addressed its entitlement to fees and expenses. 21 FMSHRC at 608.

In his decision, the judge stated that the burden was on L & T to establish that the Secretary's demand was substantially in excess of the penalty approved by the Commission. *Id.* After reviewing the underlying facts and the legislative history of the EAJA amendments, the judge concluded that L & T had failed to show that the proposed penalty was substantially in excess of the penalty finally assessed. *Id.* at 608-09. In addressing L & T's contention that a 50 percent reduction in the proposed penalty met the substantially-in-excess test, the judge stated that he rejected a mechanical, mathematical comparison approach. *Id.* at 609. Relying on floor

comments accompanying the passage of the amendments, however, the judge stated, “[c]learly, a greater discrepancy is required.” *Id.*

The judge further addressed whether the proposed penalty was reasonable. The judge noted that the Secretary had considered all six of the statutory penalty criteria under section 110(i) of the Mine Act. *Id.* at 610. The judge stated that the fact that he gave “greater weight” to some criteria than the Secretary did not indicate that the Secretary’s position was unreasonable. *Id.* In this regard, the judge noted the statutory obligation of the Commission to assess penalties *de novo*. *Id.* Finally, the judge found that there was no evidence that the Secretary proposed the \$40,000 penalty to pressure L & T into a quick settlement — one of the primary reasons given for amending the EAJA to protect small entities from the pressures of the federal government. *Id.* at 610 n.5 (citing the *Joint Managers Statement of Legislative History and Congressional Intent*, 142 Cong. Rec. S3242, S3244 (Mar. 29, 1996) (“*Joint Statement*”). The judge therefore denied L & T’s EAJA application. *Id.* at 610.

II.

Disposition

L & T contends that, contrary to the judge’s conclusion, the Secretary’s proposed penalty was excessive. PDR at 4.³ L & T asserts that the judge failed to consider all the facts and circumstances of the case and instead focused only on the gravity of the violation and the operator’s negligence. *Id.* at 5-6. L & T further argues the judge erred when he concluded that, based on the legislative history of the EAJA amendments, a 50 percent reduction in a proposed penalty was not excessive. *Id.* at 7. L & T also argues that courts have found that disparities of less than 50 percent were excessive in analogous circumstances. *Id.* at 8-9. L & T argues that the proposed penalty was excessive under the facts and circumstances of this proceeding. *Id.* at 9. *See also* L & T Reply Br. at 1-5. L & T asserts that the Secretary’s proposed penalty was unreasonable because she did not consider all the penalty criteria under section 110(i) and, even if she did consider all the criteria, she did not carry her burden of proving that the penalty was reasonable. PDR at 10-12. Finally, L & T argues that no special circumstances or any willfulness associated with the underlying violation made an EAJA award unjust. L & T Reply Br. at 8.

The Secretary responds that the judge properly found the proposed penalty was not excessive when compared to the final award. S. Br. at 7. Relying on floor statements that accompanied passage of the EAJA amendments, the Secretary argues that “excessive” must mean more than a 50 percent disparity. *Id.* at 7-9. The Secretary also argues that, based on numerous facts and circumstances of the case she sets forth in her brief, the proposed penalty was not unreasonable when compared to the judge’s decision. *Id.* at 10-14. The Secretary further contends that she took into account the criteria in section 110(i) of the Mine Act, 30 U.S.C.

³ L & T designated its petition for discretionary review as its opening brief.

§ 820(i), and properly followed her penalty assessment procedures and criteria set forth in 30 C.F.R. Part 100, in proposing the penalty. S. Br. at 14-18 & n.12. Moreover, the Secretary continues, because of the judge's statutory duty to review proposed penalties de novo under section 110(i), it should not be surprising that the judge arrived at a different penalty from that proposed by the Secretary. *Id.* at 19-22. Finally, the Secretary argues that the judge's conclusion that the proposed penalty was reasonable is supported by substantial evidence. *Id.* at 22.

The 1996 amendments to EAJA expanded the basis for recovering fees and expenses to include certain claims against private parties who did not prevail against the government. EAJA Amendments of 1996, Pub. L. No. 104-121, 110 Stat. 862. The pertinent portion of EAJA, as amended, provides:

If, in an adversary adjudication arising from an agency action to enforce a party's compliance with a statutory or regulatory requirement, the demand by the agency is *substantially in excess of the decision of the adjudicative officer and is unreasonable when compared with such decision*, under the facts and circumstances of the case, the adjudicative officer shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust.

5 U.S.C. § 504(a)(4) (emphasis added). The term "demand" is defined as "the express demand of the agency which led to the adversary adjudication." 5 U.S.C. § 504(b)(1)(F).

The legislative history of the 1996 EAJA amendments is meager. The committee report published following the passage of the amendments provides a one-paragraph explanation for the new category of EAJA claims:

This subtitle amends the EAJA to allow small entities to recover the fees and costs attributable to a demand by the agency which is excessive and unreasonable under the facts and circumstances of the case. The small entity would not be required to prevail in the underlying action; the final outcome must be, however, to require payment of an amount substantially less than what the agency sought to recover.

H.R. Rep. No. 104-500, at 2 (1996). Floor comments accompanying the passage of the EAJA amendments provide the following guidance in evaluating the government's demand:

This test should not be a simple mathematical comparison. The Committee intends for it to be applied in such a way that it

identifies and corrects situations where *the agency's demand is so far in excess of the true value of the case, as demonstrated by the final outcome*, that it appears the agency's assessment or enforcement action did not represent a *reasonable effort to match the penalty to the actual facts and circumstances of the case*.

Joint Statement at S3244 (emphasis added). Finally, as the judge noted (21 FMSHRC at 608), Commission EAJA Rule 105(b) provides that “[t]he burden of proof is on the applicant to establish that the Secretary’s demand was substantially in excess of the Commission’s decision; the Secretary may avoid an award by establishing that the demand was not unreasonable when compared to that decision.” 29 C.F.R. § 2704.105(b).

This case presents us with our first opportunity to interpret the 1996 EAJA amendments.⁴ We find that the amendments set forth a two-part test for determining whether fees should be awarded. The first prong is largely quantitative, focusing on whether, in the context of Mine Act cases, the Secretary has proposed a penalty that is “substantially in excess of” the penalty ultimately assessed by the Commission pursuant to section 110(i). Consistent with the intent of the drafters of the amendments, we view this test as more than merely “a simple mathematical comparison.” *Joint Statement* at S3244. Instead, whether an applicant meets the “substantially in excess” test will depend on the facts and circumstances of each case.⁵

While the first prong of the test is quantitative, the second prong is qualitative, and presents the issue of whether the Secretary has acted reasonably in proposing a particular penalty. Again, any determination of reasonableness will depend on the facts and circumstances of each case. For the Secretary to prevail, a penalty she proposes must “represent a reasonable effort to match the penalty to the actual facts and circumstances of the case.” *Id.* Finally, we note that the two prongs of the test set forth in the 1996 EAJA amendments are conjunctive (i.e., joined by the word “and”). Thus, for an applicant to prevail, both prongs of the test must be met.

Turning to the instant case, although the judge recognized that Congress did not intend the “substantially in excess” test to be “a simple mathematical comparison,” he nevertheless found that “[c]learly, a greater discrepancy [than 50%] is required” to meet this test. 21 FMSHRC at 609. “I do not find,” the judge wrote, “as a general proposition, that a fifty percent

⁴ At issue in all our prior EAJA cases has been whether the Secretary’s position was substantially justified. See *Black Diamond Constr., Inc.*, 21 FMSHRC 1188 (Nov. 1999); *James Ray, empl’d by Leo Journagan Constr. Co.*, 20 FMSHRC 1014 (Sept. 1998); *Contractor’s Sand and Gravel, Inc.*, 20 FMSHRC 960 (Sept. 1998), *rev’d*, 199 F.3d 1335 (D.C. Cir. 2000).

⁵ Contrary to L & T’s argument (L & T Reply Br. at 3-5), we conclude that “substantially,” when used in the phrase “substantially in excess,” means “[c]onsiderable in amount, value or the like; large.” See *Pierce v. Underwood*, 487 U.S. 552, 564-65 (1988) (citation omitted).

reduction demonstrates that the original penalty was [substantially in excess of the penalty he ultimately assessed].” *Id.* We find that the judge’s reasoning on this point represents application of a per se greater-than-fifty-percent rule, which we do not accept.⁶

We also note that in support of its position that the Secretary’s demand was substantially in excess of the Commission’s decision, L & T cites (PDR at 8-9) *U.S. v. 101.80 Acres of Land*, 716 F.2d 714 (9th Cir. 1983), a land condemnation case, which addresses whether an applicant was a “prevailing party” under EAJA. Land condemnation cases and the resolution of whether an applicant is a “prevailing party” under EAJA, however, are not determinative of whether a proposed penalty is substantially in excess of the final determination in a Mine Act proceeding.

We need not reach the merits of the judge’s determination on this prong of the test,⁷ however, because we find his conclusion that the Secretary’s penalty proposal was reasonable amply supported by substantial evidence.⁸ We begin by noting that MSHA’s Petition for Assessment of Penalty, filed in the underlying merits proceeding, included narrative findings for a special assessment under 30 C.F.R. § 100.5. MSHA stated that it had considered the inspector’s findings with regard to the violation, recited the penalty criteria in 30 C.F.R. § 100.3(a), and concluded by stating that, based on the penalty criteria and information available to it, the agency was proposing a civil penalty of \$40,000.⁹ Pet., Attach. at 5. In particular, MSHA noted the operator’s high negligence, a prior similar violation, and the severe injury sustained by DeGough when he was hit by the falling rail. Pet., Narrative Findings for Special Assessment. Clearly, the Secretary made “a reasonable effort [here] to match the penalty to the

⁶ Chairman Jordan and Commissioner Marks note that, although their colleagues reject, in dicta, the judge’s “fifty-percent rule,” they see no need to reach this issue, as this case is ultimately decided on an entirely separate ground, the reasonableness of the proposed penalty. *See infra* at 8.

⁷ Commissioner Verheggen believes that in the case *Unique Electric*, 20 FMSHRC 1119 (Oct. 1998), the Secretary’s proposed penalty of \$8,500 against an unincorporated sole proprietorship with no employees or assets was clearly substantially in excess of the \$400 penalty ultimately assessed in that case by the judge on remand. *See Unique Electric*, 21 FMSHRC 91, 97 (Jan. 1999) (ALJ).

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). “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)).

⁹ The highest penalty amount permitted was \$55,000. *See* 30 C.F.R. § 100.3 (Penalty Conversion Table).

actual facts and circumstances of the case.” *Joint Statement* at S3244.

As for L & T’s assertion that the proposed penalty would have adversely affected its ability to stay in business, we find supported by substantial evidence the judge’s conclusion that “the company has the capacity to absorb the penalty and still remain in business.”¹⁰ 21 FMSHRC at 74. We note, for example, that L & T “absorbed a loss of \$85,000.00 on a project in 1996 and still remained in business.” *Id.* We also agree with the judge as a matter of law that the reduction in the penalty after hearing “does not establish that the Secretary’s assessment was unreasonable,” but rather “only that the judge viewed it differently based on the hearing evidence.” 21 FMSHRC at 610. After all, section 110(i) delegates to the Commission sole “authority to assess all civil penalties provided in [the] Act,” 30 U.S.C. § 820(i), and in fulfilling this statutory mandate, our judges must assess penalties *de novo*, “based upon the statutory penalty criteria and the record evidence developed in the course of the adjudication.” *Wallace Bros., Inc.*, 18 FMSHRC 481, 484 (Apr. 1996). Thus, we do not find it at all unusual that the judge, in reducing the penalty proposed by the Secretary, determined to give greater weight to some of the other penalty criteria under section 110(i) — the company’s good history of prior violations, its small size, and its rapid abatement of the violation. 21 FMSHRC at 610; *see* 21 FMSHRC at 74.

In sum, the record supports the judge’s determination that the Secretary’s proposed penalty of \$40,000 was not unreasonable when compared with the \$20,000 penalty finally assessed.¹¹

¹⁰ We thus need not reach the judge’s holding that L & T failed to meet its burden of proof on this issue because it relied on unaudited financial statements. *See* 21 FMSHRC at 74. We also do not reach L & T’s argument that MSHA’s proposed penalty posed a financial hardship on Edward and Catherine Crain, made for the first time on review (PDR at 9), and thus not properly before us. 30 U.S.C. § 823(d)(2)(A)(iii) (“[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the [ALJ] had not been afforded an opportunity to pass”).

¹¹ The Secretary also argues the exclusion in EAJA for awards in situations in which “willful violations, bad faith actions and in special circumstances that would make such an award unjust” is applicable to the facts of this proceeding. S. Br. at 23 (citation omitted). In light of the disposition of this case, the Commission will not address this argument.

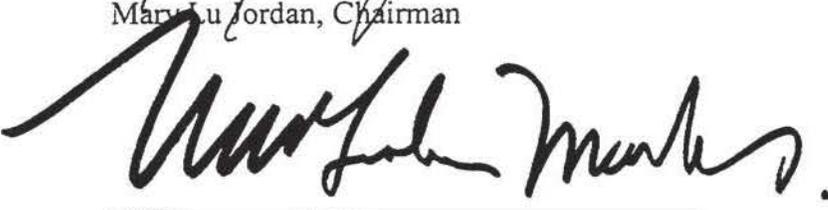
III.

Conclusion

For the foregoing reasons, we affirm the decision of the administrative law judge denying the EAJA application for fees and expenses filed by L & T.



Mary Lu Jordan, Chairman



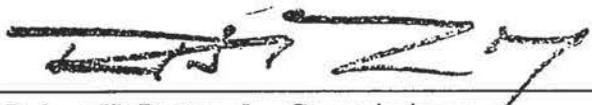
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 4, 2000

RAG EMERALD RESOURCES CORP., : CONTEST PROCEEDING
Contestant :
v. : Docket No. PENN 99-2-R
: Citation No. 7013288; 9/29/98
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Emerald No. 1 Mine
Respondent : Mine ID No. 36-05466
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 99-201
Petitioner : A. C. No. 36-05466-04136
v. :
:
RAG EMERALD RESOURCES CORP., :
Respondent : Emerald No. 1 Mine

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll Professional Corporation, Pittsburgh, Pennsylvania, on behalf of RAG Emerald Resources Corp.; Andrea J. Appel, Esq., Office of the Solicitor, U.S. Dept. of Labor, Philadelphia, Pennsylvania, on behalf of the Secretary of Labor.

Before: Judge Melick

These cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," to challenge Citation No. 7013288 and the civil penalty assessed for the violation charged therein. The general issue before me is whether RAG Emerald Resources Corp. (RAG) violated the cited standard as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation No. 7013288 was issued on September 29, 1998, pursuant to Section 104(a) of the Act. It alleges a violation of 30 C.F.R. § 75.360(b)(10) and charges as follows:

Certified persons were assigned to perform work in areas that did not have a pre-shift examination performed. The work was scheduled to the examiners prior to the mine being pre-shifted examined for the oncoming shift. These areas

generally involved people being assigned to perform work in return air courses, escapeway and bleeder entries.

The cited standard, 30 C.F.R. § 75.360(b)(10), provides as follows:

(b) The person conducting the pre-shift examination shall examine for hazardous conditions, test for methane and oxygen deficiency and determine if the air is moving in its proper direction at the following locations.

* * *

(10) Other areas where work or travel is scheduled prior to the beginning of the pre-shift examination.

The specific issue before me then is whether the areas that were the subject of the citation had to be pre-shift examined under 30 C.F.R. § 75.360(b)(10).

Stipulated Facts

The parties have reached multiple stipulations, the following of which are relevant to this issue:

The areas that are at issue in this proceeding, the work that was done and the dates on which it was performed are as follows:

August 27, 1998	218 left return	mopped float dust
August 27, 1998	H panel belt	set two posts
August 27, 1998	H panel belt	set two posts
September 2, 1998	218 right return	set post

The persons who performed the above-described work were certified mine examiners who conducted supplemental examinations before they began the work. Certified examiners are authorized to perform examinations under 30 C.F.R. § 75.360, § 75.361 and § 75.362.

Mine management did not have preshift examinations performed for such work.

Mine management was aware, prior to the start of the pre-shift examinations on the shifts in question, that the above-described work needed to be done. Such conditions had previously been reported during the weekly mine examinations conducted under 30 C.F.R. § 75.364.

Prior to the start of the specific shifts in question, Respondent's mine management expected this work to be performed during these shifts, provided that sufficient hourly personnel reported for work in the shifts.

Sufficiently hourly personnel to accomplish the specific work in question did report for work on the two shifts on August 27, 1998 and September 2, 1998.

On the dates and shifts at issue, management had pre-shift examinations performed of the active working sections and other areas of the mine where miners work or travel on a regular basis on each shift. Such examinations are done regularly every eight hours seven days a week.

If a hearing were held in this matter, Emerald would offer evidence that it did not perform pre-shift examinations of the areas in questions for two reasons:

(a) it did not believe it was required to do so; and

(b) it did not want to interrupt the regular schedule of pre-shift examinations because it believed that any disruption in the schedule might result in a pre-shift examiner overlooking an area of the mine that was regularly scheduled to be pre-shift examined and it would reduce the amount of the time for the regularly scheduled pre-shift examinations in areas where miners work or travel on a regular basis on a particular shift.

In agreeing to this stipulation, the Secretary agrees only that Emerald would offer evidence at hearing as it is described herein. The Secretary does not agree as to the validity of Emerald's rationale and the Secretary does not stipulate to the relevancy of this paragraph with regard to the existence of a violation as the Act is a strict liability statute.

The issue in this proceeding is whether the areas that were the subject of the Citation had to be pre-shift examined under 30 C.F.R. § 75.360.

Analysis

Under the standard at 30 C.F.R. § 75.360(a) a certified examiner must conduct a pre-shift examination within three hours before "the beginning of any shift and before anyone on the oncoming shift . . . enters any underground area of the mine . . ." Section 75.360(b)(10), cited herein, specifically requires that a pre-shift examination be performed in areas where work or travel during the oncoming shift is scheduled prior to the beginning of the pre-shift examination. It has been stipulated in this case that RAG knew before the commencement of the pre-shift examination for the shifts in question that the specific work identified in the stipulations needed to be performed and that RAG management expected this work to be performed during the shifts at issue. It has been further stipulated that rather than conduct a pre-shift examination in those areas in which work was expected to be performed during the oncoming shift RAG had the same

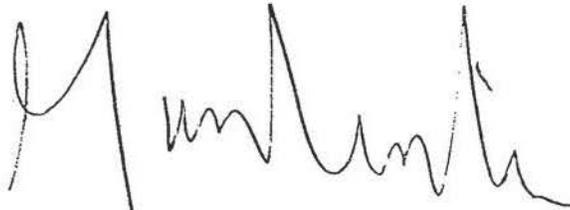
persons who performed the work, who were also certified mine examiners, conduct supplemental examinations before they commenced their work.

It is the well established law that if a regulation's meaning is plain on its face, the regulation cannot be construed to mean something different from that plain meaning. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Exportal LTDA v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990); *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984). I find from the clear and unambiguous language of the cited standard that indeed, a pre-shift examination must be performed in areas "where work or travel is scheduled prior to the beginning of the pre-shift examination." Accordingly, no further analysis is necessary and RAG's failure in this case to have performed a pre-shift examination in those areas constituted a violation as charged.

In light of the agreed stipulations I conclude that RAG is large in size, has a substantial history of violations, that the civil penalty in this case would have no effect on RAG's ability to remain in business, that RAG's negligence was low and that an injury or illness was unlikely and therefore the violation was of low gravity. There is no dispute that the violation was abated appropriately. Under the circumstances the Secretary's proposed civil penalty of \$55.00, is appropriate.

ORDER

Citation No. 7013288 is affirmed, Contest Proceeding Docket No. PENN 99-2-R is dismissed and RAG Emerald Resources Corp., is directed to pay a civil penalty of \$55.00 within 40 days of the date of this decision.

A handwritten signature in black ink, appearing to read 'Gary Melick', written in a cursive style.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., Room 6003

WASHINGTON, D. C. 20006-3867

Telephone No.: 202-653-5454

Telecopier No.: 202-653-5030

April 14, 2000

FLORIDA CANYON MINING,	:	CONTEST PROCEEDING
INCORPORATED,	:	
Contestant	:	
	:	Docket No. WEST 2000-24-M
v.	:	Order dated August 10, 1999
	:	
SECRETARY OF LABOR,	:	Florida Canyon Mine
MINE SAFETY AND HEALTH	:	Mine ID No. 26-01947
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Barbour

On October 12, 1999, the Commission received the operator's notice of contest of MSHA's notices to terminate an Agreement to Abate Violative Health Conditions (the Agreement) which was given the above-captioned docket number. The operator is contesting an August 10, 1999, letter from MSHA notifying the operator that MSHA was terminating the Agreement within 30 days and a September 10, 1999, letter from MSHA confirming that the operator must be in full compliance by October 10, 1999.

The Agreement between the operator and MSHA was entered into on October 17, 1997, and provided the time for abatement of certain citations would be extended so that the operator could address the problem of exposure of miners to dust at the mine. In particular, the Agreement set forth the abatement actions and schedules for the various areas affected by the citations and the manner in which the time for abatement would be extended.

On February 11, 2000, I issued an order denying the parties' request for stay and directing the parties to address the issue of jurisdiction. The parties have now filed their responses to the February 11 order. Both parties agree that the Commission has jurisdiction under section 105(d), (30 U.S.C. § 815(d)), which provides that an operator can contest the reasonableness of the length of the abatement period. However, the Secretary contends that jurisdiction no longer exists because MSHA has terminated all of the citations associated with the Agreement. The operator on the other hand asserts that jurisdiction exists because the Agreement itself is a modification of the citations and that the Commission retains jurisdiction over terminated citations. In addition, the operator argues that review of this matter furthers the purposes of the Act because the Agreement is an innovative approach to resolving a problem and is efficient in implementing protective measures.

Section 105(d) provides the Commission with the authority to hear operators' contests of the reasonableness of the time set for the abatement of citations. Here, the Agreement and the associated letters address the manner and time for abatement with respect to the citations. The Agreement and letters are not modifications of the citations. Jurisdiction exists, but it is limited to the issue of whether the abatement time was reasonable.

As the Secretary points out, the citations associated with the Agreement have been terminated. The Commission has held that termination of a citation is meant only to convey that a violative condition has been abated and to inform the operator that it will not be subject to a section 104(b) failure to abate withdrawal order involving that citation. (Wyoming Fuel Co., 14 FMSHRC 1282, 1289 (August 1992); See Also, Nacco Mining Co., 11 FMSHRC 1231, 1236 (July 1989); Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 378 (March 1993); Brauntex Materials Inc., 20 FMSHRC 778, 779 (July 1998)). Because the citations have been terminated, the Agreement and letters, which pertain to the abatement of the citations are no longer in effect since by definition termination means the citations have been abated. Moreover, there is no need to extend the abatement time because no other enforcement actions, such as 104(b) order, are going to flow from the abated citations. Therefore, the issue of reasonableness of the abatement time is moot, and the operator's contest must be dismissed.

In light of the foregoing, it is **ORDERED** that this case is **DISMISSED**.


David F. Barbour
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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Telephone No.: 202-653-5454

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April 14, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 99-307
Petitioner	:	A. C. No. 36-08719-03511
	:	
v.	:	
ROSEBUD MINING COMPANY,	:	Josephine # 3 Mine
Respondent	:	

DECISION

Appearances: John M. Strawn, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Joseph A. Yuhas, Esq., Northern Cambria, Pennsylvania, for Respondent.

Before: Judge Barbour

This civil penalty proceeding arises under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)) (Mine Act or Act). The Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), seeks the assessment of a civil penalty against Rosebud Mining Company (Rosebud) for an alleged violation of 30 C.F.R. § 75.523-2(c), a mandatory safety standard for underground coal mines that pertains to deenergizing devices (frequently referred to as "panic bars") on self-propelled electric face equipment. The standard is a subpart of 30 C.F.R. § 75.523. Section 75.523 states that the Secretary "may require . . . that electric face equipment be provided with devices that will permit the equipment to be deenergized quickly in the event of an emergency." The first subpart of section 75.523, 30 C.F.R. § 75.523-1, requires the time-sequenced installation of the devices on self-propelled electric face equipment. Section 75.523-2 specifies how the devices must perform and requires, among other things, that if panic bars are used, the "movement of not more than 2 inches of the . . . bar . . . resulting from the application of not more than 15 pounds of force upon contact with any portion of the equipment operator's body at any point along the length of the . . . bar shall cause deenergization of the trammig motors of the . . . equipment."

The Secretary alleges that on July 21, 1999, at Rosebud's Josephine No. 3 Mine, a MSHA inspector needed more than 15 pounds of force to cause a panic bar on a mobile bridge carrier (MBC) to deenergize a continuous mining machine. In addition, the Secretary charges that the condition was a significant and substantial contribution to a mine safety hazard (S&S), and she

proposes the assessment of a civil penalty of \$184 for the alleged violation. In response, the company argues that section 75.523-2(c) does not apply to the MBC or, in the alternative, that the proposed penalty is not based upon proper legal and factual findings.

The case was tried in Indiana, Pennsylvania. Following the trial the parties submitted helpful briefs.

THE STIPULATIONS

The parties stipulated as follows:

1. [T]he Josephine Number Three [M]ine is owned and operated by . . . Rosebud.
2. [T]he mine is subject to the jurisdiction of the . . . Act
3. [T]he Administrative Law Judge has jurisdiction over [the] proceedings.
4. [C]itation [No. 3698571] [and its modification were] . . . properly assessed and served by a representative of the Secretary . . . upon an agent of . . . [Rosebud]. . . [on and at] the dates and times and places stated therein, and may be admitted into evidence for the [purpose] of establishing their issuance and not for the truthfulness or relevancy of any statement asserted therein.
5. [T]he assessment of a [c]ivil [p]enalty in this proceeding will not affect [Rosebud's] ability to continue in business.
6. [T]he appropriateness of the penalty, if any, to the size of . . . [Rosebud's] business should be based on the fact that [Rosebud's] annual production tonnage [of coal] in 1998 was 1,424,142 tons. The month[ly] annual production tonnage [of coal] in the last two quarters of 1998 was 56,148 and [was] 61,462 in the first quarter of 1999. The mine employs 200 employees.
7. [Rosebud] demonstrated ordinary good faith in obtaining [compliance] after the issuance of the citation.
8. [T]he mine was assessed a total of 16 citations based on 28 inspection days in the 24 months immediately preceding the issuance of the citation.

9. The parties stipulate to the authenticity of their exhibits
(Tr. 13-14; see also Joint Exh. 1)

In addition, and based upon Stipulations 6 and 8, counsel for the Secretary characterized the size of Rosebud as “medium” and the company’s history of previous violations as “moderate” (Tr. 16).

THE CONTINUOUS MINING AND HAULAGE SYSTEM AND THE INVESTIGATION

An MBC is a component of a continuous mining and haulage system that extracts and moves coal from a face to a main conveyor belt line. A continuous miner is the component in the system that is closest to the face. The continuous miner cuts the coal. The coal is then conveyed to a bridge or to a series of bridges and ultimately to a main conveyor belt. The coal is dumped onto the belt and is carried out of the mine (Tr. 37).

An MBC is a bridge conveyor that carries the coal. However, unlike a regular bridge conveyor, an MBC can articulate so as to bend around corners. An MBC can be connected to the other bridge conveyors and to the continuous miner by a sliding dolly (Tr. 38-39). Also, an MBC can be trammed (moved) forward and backward (Tr. 38). The continuous miner and the MBC each have motors for tramping. No other parts of the system have tramping motors (Tr. 131). Because the continuous miner and the MBC can move independently of one another, both require the presence of miners at their controls (Id.). Therefore, when the system is operating, one miner is at the controls of the continuous miner and another is at the controls of the MBC.

At the Josephine No. 3 Mine, two deenergizing devices were installed on the subject MBC, one deenergized the MBC and one deenergized the continuous miner. Both devices were activated by depressing a single panic bar on the MBC (Tr. 30, 32-34). In addition, one deenergizing device was installed on the continuous miner. The device on the miner also was activated by depressing a single panic bar on the miner. When the bar on the miner was depressed, only the continuous miner was deenergized.

David Sherry was employed by Rosebud as an underground laborer. One of his duties was to operate the MBC. On July 21, 1999, he was at the controls of the MBC when it became necessary for him to leave the operator’s compartment in order to change a cable to the continuous mining machine (Tr. 26-29). Prior to leaving, Sherry depressed the panic bar on the MBC. The MBC deenergized. Sherry believed the continuous miner also deenergized (Tr. 30-31).

Sherry got out of the MBC, took a step or two, and knelt down within an arms length of the MBC. Sherry testified that he would not have left the MBC but for the fact that he believed the continuous miner was deenergized (Tr. 30, see also, Tr. 91).

As Sherry knelt, the continuous miner, which, in fact, was not deenergized, began to back up. The movement of the heavier continuous miner pushed the MBC backwards and sideways toward the rib. Sherry was caught between the MBC and the rib. He was crushed, suffering severe, traumatic injuries to his trunk and his abdomen (Tr. 29, 31). As a result, Sherry was out of work for three and one half months (Tr. 32).

The accident occurred around 10:30 a.m. MSHA was notified and MSHA Inspector Joseph O'Donnell was assigned to investigate the accident. O'Donnell went to the mine that afternoon. O'Donnell was accompanied by electrical inspector Bill Collinsworth. Once at the mine, O'Donnell spoke both with management personnel and with miners. The miners had been withdrawn from the mine following the accident, so the interviews took place on the surface (Tr. 53-54). After the interviews, O'Donnell and Collinsworth went underground where they inspected the continuous mining and haulage system (Tr. 54-55). They payed special attention to the MBC and its panic bar.

O'Donnell described the panic bar as "a long lever" — about four feet in length — "that the operator [of the MBC] can contact anywhere . . . and deenergize the tramming motors of the [MBC and the continuous miner]" (Tr. 57). The bar was designed to activate two different "on and off" devices, one in the form of a button and one in the form of a "flipper switch" (Tr. 57-58). O'Donnell stated that "when the prong of the bar strikes the button and the . . . switch . . . [the bar is] supposed to deenergize the tramming motors of the system" (Tr. 58).

O'Donnell and Collinsworth depressed the MBC's panic bar to determine if the "on and off" devices were working. When they did this the MBC was deenergized, but the continuous miner was not (Tr. 55-56). They applied more pressure to the bar, and the continuous miner then was deenergized (Tr. 61).

The inspectors checked the pounds of force necessary to apply to the bar to deenergize both pieces of equipment. The inspectors used a gauge-type device that they had calibrated according to its manufacturer's specifications shortly before going underground (Tr. 81). O'Donnell described how the gauge was used. "[Y]ou place it on the panic bar, force it in, when it shuts off [the equipment], [you] read how many pounds of pressure it took to deactivate the tramming motors of the unit" (Tr. 60).

The inspectors found that to deenergize the MBC they had to apply eight pounds of force and move the bar no more than two inches. However, to deenergize the continuous miner they had to apply more than 20 pounds of force (Tr. 61-63).

The inspectors also checked the panic bar on the continuous miner. They found that it operated properly (Tr. 82).

The inspectors further determined that although they could not move the continuous miner by tramming the MBC, the opposite was not true. The continuous miner was heavier and

more powerful than the MBC, and the movement of the continuous miner could cause the MBC also to move (Tr. 61-63).

The inspectors credited Sherry's belief that when he deenergized the MBC, he also deenergized the continuous miner. O'Donnell explained that Sherry was an experienced MBC operator and that he "had to believe that the tramping motors of the miner were also deenergized or he would have never ex[ited the MBC]" (Tr. 63).

Sherry told O'Donnell that after he depressed the panic bar he looked inby and saw no lights on the continuous miner, something that confirmed to him that he had deenergized the continuous miner (Tr. 64). As it turned out, however, the operator of the continuous miner was preparing to back out of the working face and to move the continuous miner to another area. Therefore, the operator shut off the continuous miner's lights so that he would not be "blinded." He wanted to see the areas surrounding and in back of the continuous miner and any miners who might be in the areas (Tr. 64).

The continuous miner operator stated that when he looked in back of the miner he saw lights that he believed to be the lights of the MBC. Three other miners were working within five feet of Sherry's location. O'Donnell speculated that the operator of the continuous miner mistook the lights of the miners' cap lamps for the lights of the MBC. This led the continuous miner operator to believe that the MBC was energized and that Sherry was in the MBC operator's compartment (Tr. 65-66).

The operator of the continuous miner began to back up the equipment. The movement of the miner "kicked the MBC against the rib" (Tr. 75, see also, Tr. 75-78). O'Donnell testified that had the panic bar on the MBC functioned as required, the continuous miner would not have been able to move and the accident would not have occurred (Tr. 67).

O'Donnell cited Rosebud for a violation of section 75.523-2. He based the violation on the fact that more than 15 pounds of pressure was required to deenergize the MBC (Tr. 67, see also, Tr. 81). O'Donnell noted that the standard applied to electric face equipment. He maintained that because the MBC and the continuous miner were physically and electrically connected they constituted one "single moving unit", and that the unit, which was headed by the continuous miner, was "electric face equipment" (Tr. 71). In O'Donnell's view, the continuous miner and the MBC were but "different component[s] of the system" (Tr. 80). He also noted that when the continuous miner was operated as a part of the continuous mining and haulage system, the miner could not act independently of the system (Tr. 80). In the inspector's mind, the "electric face equipment" referenced in the standard was "the entire mining system, the continuous haulage system," and the "equipment operator" referenced in the standard was both the operator of the continuous miner and the operator of the MBC (Tr. 94-95). O'Donnell put it, "there are two equipment operators in this system" (Tr. 94).

O'Donnell found that the violation resulted in lost work days and in restricted duty to

Sherry. He further found that it was S&S, and was caused by Rosebud's moderate negligence. (In fact, Rosebud agreed that if there was a violation, it was moderately negligent (Tr. 68, 69-70)). To abate the alleged violation, Rosebud dismantled the switch that deenergized the continuous miner, corrected a problem with the switch, lubricated the switch, and put the MBC back into service (Tr. 71).

MSHA's INTERPRETATION OF SECTION 75.523-2

In addition to O'Donnell's testimony regarding his investigation of the accident, the Secretary presented testimony concerning MSHA's interpretation of the standard. MSHA's policy was described by Robert Phillips, the coordinator of MSHA's electrical program (Tr. 102-103). (Phillips also participated in MSHA's investigation of the accident by going to the mine, by observing the conditions that surrounded the accident, and by meeting with management officials and with miners (Tr. 107-108)).

Phillips explained that the requirements for the installation of deenergizing devices are contained in section 75.523-1 and the requirements for the performance of the devices are contained in section 75.523-2. Like O'Donnell, Phillips emphasized that the subject continuous miner and MBC were parts of a unitary system. In Phillips view, this brought the system within the mandate of section 75.523-2 (Tr. 112). As a result, Phillips agreed with O'Donnell that Rosebud violated section 75.523-2.

Phillips identified a MSHA policy letter, dated July 12, 1989, which warned of the "hazardous condition [that] can occur when machines are mechanically connected to each other, but trammed independently and the emergency stop switch of the attached machine fails to deenergize the physically larger more powerful machine in the event of an emergency" (Gov. Exh. P-5). Phillips explained that in 1987, a fatal accident occurred when a MBC operator was killed. MSHA investigated the accident and found that it involved a continuous mining and haulage system and that the continuous miner in the system was sufficient in size, weight, and power to move the smaller, less powerful MBC (Tr. 114-115). The MBC involved in the accident did not have a device that could deenergize the continuous miner (Tr. 116). According to Phillips, the 1989 policy letter was issued to warn operators of the hazard (Tr. 114). The letter did not specifically state that the failure to have a device on the MBC that could deenergize a continuous miner constituted a violation of section 75.523 or of its subsections, rather it stated that if the smaller MBC did not have a switch, the MBC had to be removed from service because the MBC was in violation of section 75.1725 (see Tr. 123-124). (Section 75.1725 requires in part that "machinery or equipment in unsafe condition shall be removed from service immediately.") The letter instructed operators that "[a] means to eliminate the hazard is to mount an emergency stop switch on the MBC to deenergize the continuous mining machine" (Exh. P-5). The letter also stated that the "[f]ailure of the mine operator to install an emergency stop switch on the attached machine [i.e., the MBC] that will meet the requirements of . . . section 75.523-2, and simultaneously deenergize both . . . [the continuous miner and the MBC] when activated will result in enforcement action" (Gov. Exh. 5 at 2). The letter did not identify which section of the

regulations the Secretary would cite when he or she undertook the "enforcement action". The letter expired on March 31, 1991 (Gov. Exh. P-5).

MSHA's next policy statement on the problem took effect immediately after the expiration of the program policy letter (i.e., on April 1, 1991). Phillips identified this statement as a part of MSHA's Program Policy Manual (PPM) concerning the implementation of 30 C.F.R. § 75.1725 (Gov. Exh. P-6). The part identified by Phillips remains in effect and states:

When machines are mechanically connected to each other but trammed independently, and are sufficiently different in size, weight, and power an emergency stop switch shall be installed on the smaller machine to deenergize the larger machine. Without an emergency stop switch the equipment is not considered to be in a safe operating condition and must be removed from service (Gov. Exh. P-6).

According to Phillips, this part of the PPM pertains to those situations where a panic bar is not installed on a MBC (Tr. 125). If the MBC that injured Sherry lacked a device to deenergize the continuous miner it would have been cited under section 75.1725 rather than under section 75.523-2 (Tr. 125). However, because the MBC had a stop switch for the continuous miner and the switch did not perform as required by the performance standard for such a switch, the condition was cited under section 75.523-2(c) (Tr. 117-118).

Finally, although Phillips did not testify regarding the matter, in 1996 MSHA issued another policy statement on the hazards attending the operation of continuous mining and haulage systems (Public Information Bulletin No. P96-18, Operation of Continuous Haulage Systems (October 18, 1996)). As I will explain, the statement has a significant bearing on this case, and I have judicially noticed its contents.

THE VIOLATION

Citation No. 3698571 describes the alleged violation of section 75.523-2(c) as follows:

More than 15 pounds of force was needed along the actuating bar or lever of the . . . MBC . . . to deenergize the . . . [continuous] miner from the MBC operator[']s compartment. A . . . gauge . . . was used to measure the force needed to deenergize the miner. The equipment was involved in a serious accident that occurred at the mine. The measured force exceeded 20 pounds of force (Gov. Exh. P-2).

The principal issue is whether section 75.523-2 applied to the MBC? If so, there is no question but that a performance criterion of the standard was violated. Evidence offered by the

Secretary in this regard was clear and went essentially un rebutted. Sherry testified that on July 21, he activated the bar prior to leaving the MBC (Tr. 30). He further testified that although the MBC was deenergized as a result, the continuous miner was not (Tr. 32-33). The same day, and within a few hours of the accident, MSHA personnel inspected the MBC. O'Donnell described how he and Collinsworth tested the effectiveness of the bar with a recently calibrated, gauge-type device and found that more than 20 pounds of force was needed for the panic bar on the MBC to deenergize the continuous miner (Tr. 56, 60-61, 67, 81). There is nothing in the record to suggest that the panic bar functioned differently during the MSHA investigation than it did when Sherry depressed it prior to the investigation. Nor is there anything to suggest the gauge was improperly calibrated and unable to obtain an accurate measurement. Therefore, I find that when Sherry activated the bar, it did not deenergize the tramping motors on the continuous miner unless more than 20 pounds of pressure was applied and that the device failed to meet a performance requirement of section 75.523-2(c).

This leaves the question of the applicability of the standard. It is clear that the situation in which Sherry found himself was hazardous. As Sherry recognized, he was lucky he was not killed (Tr. 32). It is equally clear that MSHA has been cognizant of the hazard. MSHA publicly warned operators about such a hazard in its July 1989 policy letter (Gov. Exh. 5), and when the 1989 warning expired, MSHA renewed the warning in its PPM by stating that "an emergency stop switch shall be installed on the smaller" of mechanically connected machines that could be trammed independently (Gov. Exh. P-6). Further, and as I just stated, I take judicial notice that in 1996 it again alerted the mining community of the possible hazard (Public Information Bulletin No. P96-18 at 2), and in so doing described four fatal accidents, two of which appear to have been similar to the accident involving Sherry (Id.).

Given its clear recognition of the hazard, one would think that MSHA would be equally clear about what it required operators to do to avoid the danger and about the authority for the requirement. Unfortunately, such is not the case. Although not explicitly stated, the 1989 program policy letter could have been read to imply that compliance with section 75.523-2 was required ("A means to eliminate [the] hazard is to mount an emergency stop switch on the MBC to deenergize the continuous min[er] . . . [and f]ailure to install an emergency stop switch . . . that will meet the requirements of . . . [section] 75.523-2 . . . will result in enforcement action" (Gov. Exh. P-5 at 1-2)). However, MSHA let the letter expire and the agency has not since made any explicit, let alone implied, pronouncements on the applicability of the subsection.

The PPM, which took effect upon expiration of the letter, states "[w]ithout an emergency stop switch the equipment is not considered to be in safe operating condition and must be removed from service" (Gov. Exh. P-6). The statement is made with respect to the agency's interpretation of section 75.1725. The PPM's discussion of section 75.523-2 makes no reference to the requirements of the section being applicable to MBC's when they are used as component parts of continuous mining and haulage system.

The fact is that nowhere in MSHA's extant public statements is notice given of MSHA's

intent to require through section 75.523 and its subparts that MBC's which are mechanically connected to self-propelled electric face equipment, i.e., to continuous miners, be equipped with panic bars to deenergize the continuous miners. On the contrary, although the agency's most recently published pronouncement on the subject advises that "MBC's should be equipped with panic bars or switches" and that "[t]he panic bar and/or emergency stop switch on the MBC should . . . be able to de-energize the continuous mining machine" (Public Information Bulletin No. P96-18 at 2), it describes the statement as a recommendation ("MSHA recommends . . . the following" (Id.)) rather than as a requirement. Moreover, it indicates the recommendation is made under the authority of section 75.1725(a) and the Act. It does not once reference section 75.523 or the section's subparts (Id. 3).

Given this lack of clarity and guidance by the agency, should Rosebud nonetheless have realized the MBC came within the requirements of section 75.523-2? I think not. The standard does not specifically refer to continuous mining and haulage systems and/or MBC's. Lacking a specific reference, the question, as with so many other standards, is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the requirements of the standard applied to the MBC (Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990)).

The standard states that it applies to "self-propelled electric face equipment", and the Secretary argues strenuously that the MBC and the continuous miner together constituted a single unit of "electric face equipment". However, while it is obvious the continuous miner was electric face equipment, in that it operated in the immediate vicinity of the face, it is not clear at all that the MBC, which was removed by distance from the face, also qualified as such equipment. Indeed, the Secretary's theory, if carried to its logical conclusion, would make every MBC in a continuous haulage system (and there could be several) "electric face equipment", no matter how far removed from the face they might be. The very use of the term "face" in the standard, gives the standard a specific locational reference, one that the Secretary's interpretation would blur if not altogether eliminate (see Tr. 94 (O'Donnell's description of electric face equipment as "the entire mining system"))).

Moreover, in its most recent public pronouncement on the need for deenergizing devices on MBC's, MSHA appears to take a position counter to that advocated in this case. The Program Information Bulletin treats MBC's and chain bridge conveyers as separate from the continuous miner that cuts the coal. It states, "Continuous haulage systems, known as mobile bridge conveyors, commonly consist of alternating series of piggyback mobile bridge carriers (MBC) and chain bridge conveyers" (Program Information Bulletin No. P96-18 at 1). There is no mention of continuous miners as part of the system. Rather, the agency strongly implies that it views the system and the continuous miner as separate entities in that the agency recommends "[a]ny panic bar and/or emergency stop switch in any MBC should de-energize the entire system" and it recommends that "[t]he panic bar and/or emergency stop switch on the MBC should also be able to de-energize the continuous min[er]" (Id., 1, 2).

Given the wording of the standard and the agency's lack of clear pronouncements, I do not believe that a reasonable operator familiar with the industry and the protective purposes of the standard should have known the cited MBC was required to have a panic bar that deenergized the continuous miner in accordance with the performance requirements of section 75.523-2. Accordingly, I conclude Rosebud did not violate the standard.

While it is readily apparent that MSHA has struggled with the issue of how best to confront the undoubted dangers posed by the operation of MBCs as parts of continuous mining and haulage systems, shoehorning situations like the one at issue into section 75.523-2 without first clearly advising operators of MSHA's regulatory interpretation does not meet the requirements of the law. The agency may want to rethink the issue and either make a straightforward statement of its policy or engage in rule making.

ORDER

For the foregoing reasons, Citation No. 3698571 is **VACATED** and this proceeding is **DISMISSED**.



David F. Barbour
Chief 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 18, 2000

DONALD L. RIBBLE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. LAKE 2000-25-DM
v.	:	NC MD 99-16
	:	
T & M DEVELOPMENT CO.,	:	T & M Development Pit
Respondent	:	Mine ID 20-02595

ORDER OF DISMISSAL

On December 20, 1999, the Complainant Donald Ribble filed a complaint with this Commission purporting to allege a violation of Section 105(c)(1) of the Federal Mine Safety and Health Act of 1977, the "Act."¹ In that Complaint Mr. Riddle alleges as follows:

I have a back injury there Company Doctor was treating me for pulled muscle or torn. I stopped going to Company Doctor because they would not ok therapy. So I have gone to my family Doctor. He oked therapy. On 8-11-99 I was checking a roller on the stacker about 18 ft. up I slipped and Lost Balance. I fall about 18 ft into a pile off sand feet first I report it to Gary Benting my boss. At the time it was just a sore knee. Then the next day my back & neck began to

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

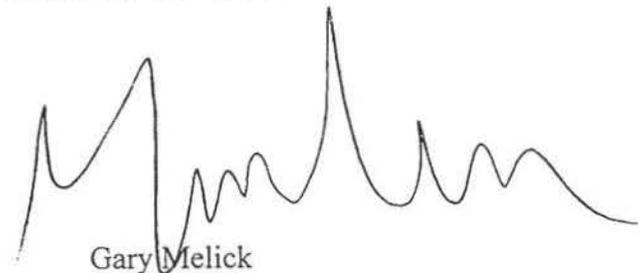
No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because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

hurt. On 8-12-99 I asked if I could go to the Company Doctor on my own. My boss Gary Benting said he needed a accident report from his boss Rick Hill. Asked everyday for the form so I could go to the Doctor. Never recieved it always had excuse. Rick didn't have it. So on the day of 8-17-99 when the day was over. Gary Benting fired me couldn't give me a reason. So I called main office in Belleville MI. Marlene VanPatten gave me permission to go to there Company Doctor. When I need therapy it was never ok with the Company. Company Doctor informed me I could go back on light duty. Marlene VanPatten informed me again I was fired. I still have Blue Cross Blue Shield with Thompson & McCully so that's paying medical bills. I don't know when that will quit. I have no means of income. They referred me Workman Comp. & refused to hire me back on light duty.

Since the Complaint did not allege facts constituting a violation of Section 105(c)(1) of the Act the Complainant, Donald Ribble was directed to show cause on or before April 14, 2000, why the case should not be dismissed. To date he has failed to respond. Accordingly this case is dismissed.

ORDER

Docket No. LAKE 2000-25-DM is hereby dismissed.



Gary Melick
Administrative Law Judge
703-756-6261

Distribution: (Certified Mail)

Mr. Donald L. Ribble, 4775 22nd Avenue, Hudsonville, MI 49426

Marlene J. VanPatten, Manager, Thompson-McCully Company, P.O. Box 787, Belleville, MI 48111

\mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

April 19, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 99-233
Petitioner	:	A. C. No. 15-16318-03656 M
v.	:	
	:	Mine No. 6
EARL BEGLEY, employed by	:	
MANALAPAN MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Fred Owens, Jr., Esq., Harlan, Kentucky for the Respondent.

Before: Judge Weisberger

Statement of the Case

This case is before me based upon a Petition for Assessment of Penalty filed by the Secretary of Labor seeking the imposition of a civil penalty against Earl Begley on the ground that Begley violated section 317(c) of the Federal Mine Safety and Health Act of 1977 ("the Act"). Subsequent to notice, a hearing on this matter was held in Big Stone Gap, Virginia.¹

I. Findings of Fact

A. Petitioner's Evidence

Robert D. Clay, an MSHA inspector, testified that sometime prior to March 22, 1999, his office had received an anonymous complaint from a miner that Earl Begley had been smoking underground at the Manalapan No. 6 Mine. On March 22, 1999, Clay, in the company of another

¹At the conclusion of the hearing the parties were ordered to file Briefs three weeks after receipt of the transcript. Subsequently, the parties requested numerous extensions, based on extenuating circumstances, and the requests were granted. On April 11, 2000 Respondent filed its Brief.

MSHA inspector, Lloyd Sizemore, inspected Manalapan's Mine No. 6. According to Clay, at approximately 8:10 a.m., he was dressed with protective gear, and was standing at the rear of Sizemore's jeep while the latter was putting on his protective gear. Clay testified that he saw Begley, whom he had known by sight, exiting the mine portal which was located 25 to 30 yards away. He stated that Begley was wearing a jacket, hard hat, boots, cap, and coveralls, and had both hands in his jacket pockets. According to Clay, when he (Clay) turned to look at Begley, the latter increased the pace of his walk, walking "very rapidly" (Tr.25). Clay attempted to get Begley's attention by saying "[H]ow's it going, Earl?" (Tr.25), and Begley continued to his vehicle. Clay proceeded to try intercept Begley, and arrived at Begley's truck at the same time as Begley. According to Clay, Begley did not leave his line of sight from the time the latter left the portal until he arrived at the truck.

Clay testified that he was within 3 feet of Begley, and that he observed that Begley used his left hand to open the driver's door of the truck Begley then leaned on the driver's seat. His right foot was placed in the truck, and his left foot was on the ground. According to Clay, he saw Begley put his right hand under a garment that was located in the middle of the driver's seat, and then place his left hand directly above the window crank inside the door on the driver's side, and lean against the front seat. According to Clay, when Begley's right hand came out of the truck, it contained a pack of cigarettes. Begley took the cigarette out of the pack with his left hand, and placed it in his mouth. He then put his left hand in the jacket pocket and removed a Bic lighter, and lit the cigarette.

According to Clay Begley had been in his line of vision from the portal to his (Begley's) vehicle, and that "[a]t no point in time do I ever recall Mr. Begley's left hand leaving my sight"(Tr.30). Clay said that he did not see Begley put anything in his left jacket pocket at any time.

According to Clay, he told Begley that he was going to ask him a question, and told him that he should think carefully before he answered it. Clay then asked him "where did you get the cigarette lighter", (Tr.32) and Begley informed him that he got it from the truck seat. Clay then informed Begley that he was going to issue a Citation, and Begley responded as follows: "[W]ell, you're not going to do me that way" (Tr.34).

Clay issued a citation alleging a violation of section 317(c) of the Act which provides as pertinent, that no person shall carry "smoking materials" or lighters underground.

Clay opined that the violation was significant and substantial because if a person were to take a cigarette lighter underground, its use could cause an explosion due to the presence of dust in suspension, which is part of the normal mining process. In this connection, he also indicated that using the lighter could cause a methane based explosion as the mine does liberate methane, and he had detected the presence of some methane in the past. Additionally, Clay opined that methane in coal seams below the working areas of the mine could rise through breaks in the floor of the working areas, and could accumulate in the working areas. He also indicated that during

the winter months due to changes in barometer readings, there is more methane activity, and due to decrease in temperatures, any float dust in the resultant dry air becomes drier, and more explosive. Clay also referred to an ignition that had occurred at another mine as a result of miners carrying a lighter which resulted in two fatalities. He also noted that inasmuch as Begley worked in all of the entries of the mine, all 12 miners working underground could have been endangered by any resultant fire or explosion.

Clay opined that since Begley had worked as a supervisor, it was inexcusable for him to have taken a lighter underground as he would have been responsible for conducting searches.

On cross examination, Clay indicated that in discussing the Citation with Begley and Doug Lunsford, the assistant superintendent at the mine, he did not "in any way" (Tr. 73) reenact "what had happened, [his] seeing the lighter and where Mr. Begley was ... [w]here [he was] when [he] saw the lighter" (Tr.73).

B. Respondent's Evidence

Earl Begley testified that on March 22, he was working as a repairman at the mine. He indicated that he had been working underground, but had to go outside in order to get a belt pin. According to Begley, when he emerged from the portal, he saw Clay and Sizemore with their backs to him. Begley then walked about 75 feet, and hollered to Clay and Sizemore "[h]ey, what's going on" (Tr.80). According to Begley, Clay and Sizemore had been putting on their equipment at their trucks, but did not say anything to him, and he continued another 20 to 30 feet to his truck. Begley testified that he did not run, and that the pathway was very slick, and contained big stones. He described the path or roadway as being impassable for all equipment except the bulldozer. According to Begley, when he got to his truck, he partially got in, reached under the seat, got his keys, and started the engine. Later on in his testimony, he indicated that he reached into the seat, got a cigarette and lighter, and lit a cigarette. According to Begley, Clay and Sizemore were approximately 25 to 35 feet away at the time. He then put the truck in gear, and started to move forward, and Clay stopped him, and told him that he was having a search and that if he moved the truck he would be violating the law. Begley said that Clay and Sizemore were standing in front of the truck. According to Begley, Clay asked him three times whether he was putting the lighter in his pocket or taking it out, and that he (Begley) replied as follows: "[W]hat in the world are you trying to do, Bob." (Tr.89) Begley testified that Clay then allowed him to proceed, and he went to the mine office to get some belt parts. He then returned with the truck, parked it, and went underground with Clay and Sizemore.

According to Begley, he, Sizemore, Clay, and Lunsford exited from the mine and went to the front of his truck. Accordingly to Begley, in essence, he placed Clay and Sizemore where he had observed them when he had gotten out of the truck earlier that morning. Begley stated that he asked Clay if this was the exact spot he was standing in when he (Begley) and got in and out of the truck, and Clay said yes. Begley testified that earlier in the day, when Clay and Sizemore were at that location, he was completely hidden by the truck. Begley denied having a cigarette

lighter with him that day, and indicated that earlier in the day, before he had left the underground section to get a belt part, he was searched by his foreman, Harold Gilbert, whom he indicated was his rival for the foreman's position. Gilbert searched his person as well as his hat, and lunch box.

Lunsford, who was the assistant superintendent at the mine on the date at issue, testified that after Clay and Sizemore inspected the men underground for smoking materials, he, Begley, Clay, and Sizemore went to the surface, and Clay pointed out where he had stood when Begley had entered his truck earlier. Lunsford estimated that point as being approximately 20 feet from the truck.

C. Petitioner's Rebuttal

On rebuttal, Lloyd Sizemore, an MSHA electrical inspector, testified that he did not stop Begley from driving his vehicle. He was asked if he participated in a reenactment of circumstances that morning, and he indicated that he did not, and that no one reenacted when had happened the morning.

II. Evaluation of the Evidence and Discussion

A. Violation of Section 317(c) *supra*

The issue presented for resolution is whether the Secretary has established, by a preponderance of the evidence, that Begley had carried a cigarette lighter underground the morning of March 22, 1999. Begley denied having a cigarette lighter with him underground, and stated that he had been searched throughly by his foreman, Harold Gilbert, whom he indicated, in essence, would not have been likely to have been motivated to exonerate him. Begley testified that when he emerged from the portal, Clay had his back to him. In addition, according to Begley's version of the events on March 22, Clay, was approximately 30 feet away from the truck when he (Begley) opened the door, and thus could not have been able to see his actions inside the truck. Accordingly to Begley and Lunsford, later on that morning Clay confirmed, in essence, that had not been in the immediate vicinity of the truck when Begley had opened the door and reached inside.

In reconciling the discrepancies between Begley's and Clay's versions, I accept Clay's version for the reasons that follow. I carefully observed Clay's demeanor and found him to be a most credible witness. Also, I place more weight upon Clay's version of Begley's actions at the truck at the due to the details found in Clay's testimony regarding Begley's actions, and the placement and movement of his upper and lower limbs. Also, I note that, most importantly, Begley did not either in his conversations with Clay on March 22, or in his testimony at the hearing, specifically deny that, after approaching the truck he took a cigarette lighter out of his jacket pocket. Further, based upon my observations of his demeanor, I accept Clay's version, that from the time Begley exited the mine until he withdrew the cigarette lighter from his left jacket

pocket, Clay had kept Begley in sight, and did not lose sight of Begley's left hand at any time. Begley did not adduce any improper motive or bias on Clay's part that would tend to establish that his testimony regarding his observations was motivated by something other than his intention to tell the truth regarding the execution of his official duties. I thus find that it is more likely than not that Begley had a cigarette lighter in his possession from the time that he left the portal until he lit a cigarette at his truck. There is no evidence in the record nor did Begley even allege that he had picked up the lighter subsequent to his exiting the underground area up to the time he exited the portal. Thus I find that it is more likely than not that he had the cigarette lighter in his possession when he was underground, and hence that he was in violation of Section 317(c) *supra*.

B. Significant and Substantial

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

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

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

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

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

As discussed above, the record establishes a violation under Section 317(c) of the Act. Further, based upon Clay's uncontradicted testimony I find that the violative condition i.e. having a cigarette lighter underground contributed to the hazard of a mine explosion. Regarding the third element set forth in *Mathies supra*, there is no evidence of any methane or coal dust present on the date Begley was cited. Also, with the exception of one location underground, all circulating air was sufficient. However, the evaluation of the reasonable likelihood of injury, i.e. the third element set forth in *Mathies supra* "... should be made assuming continued normal mining operations." (*U.S. Steel Mining Company*, 7 FMSHRC 1125, 1130 (August 1985)). According to the uncontradicted testimony of Clay the mine does liberate methane, and this potentially hazardous explosive condition is exacerbated by the fact that the floor at the mine in issue is cracked in some areas which would allow the liberation of methane contained in seams below the floor. Within this context I find that the third element of *Mathies, supra*, has been met. Also, accordingly to the uncontradicted testimony of Clay, in essence, should a methane explosion result from an individual lighting a cigarette lighter it is reasonably likely that a fatality could have resulted. For all these reasons I find that, within this context, it has been established that the violation was significant and substantial.

C. Unwarrantable Failure

Begley did not offer any circumstances to mitigate his negligence with regard to having in his possession a cigarette lighter underground. Hence, considering the fact that he worked as a supervisor, I find that the violation resulted for more than ordinary negligence and rose the level of aggravated conduct. As such, I conclude that the violation was as the result of Begley's unwarrantable failure (See, *Emery Mining Corp.*, 9 FMSHRC 1997 (1987)).

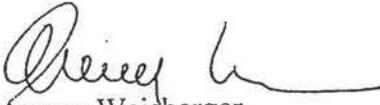
D. Penalty

Begley does not have any history of violations. However, inasmuch as the violation herein could have led to an explosion causing serious injuries I find that the gravity of the violation was relatively high. Further, as discussed above, I find that Begley's negligence reached the level of aggravated conduct and was more than ordinary negligence. In *Ambrosia Coal and Construction Co.* 19 FMSHRC 819, 824 (May 1997), the Commission explained that in evaluating the penalty to be assessed against an individual "the relevant inquiry with respect to the criterion regarding the affect on the operator's ability to continue in business, as applied to an individual, is whether the penalty affects 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." According to Begley he is no longer employed at Manalapan. He owns and operates a general store, which does not produce any cash income. He indicated that any cash that he receives from the store he uses to replenish stock. He receives \$1,065 a month from unemployment insurance. He pays \$523 month on the mortgage on his residence, and \$700 on the mortgage on his store. Begley indicated that also owns an establishment which manufactures and installs belt materials, but that he last earned money from this enterprise approximately four weeks prior to the hearing.

According to Begley, as of the date of the hearing he was current for all his bills except for his telephone bill, but his store checking account contained only \$300 in it. He indicated that he does not have any money to pay a penalty, and that if a penalty is assessed he would not be able to go underground, and that he cannot run a grocery store "that does not pay the bills and work in public jobs too." (Tr. 181). However, he testified that his three children are not dependent on him, that no one is dependent on him, that his wife does not live with him, and that she has filed for divorce. Significantly, he indicated he could come up with \$250 to pay the maximum penalty. Within the above context, I conclude that a \$250 penalty is appropriate considering the above factors, and considering his income and net worth as well as his ability to meet his financial obligations.

ORDER

It is **ORDERED** that Respondent pay a total civil penalty of \$250 within 30 days of this decision.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 20, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-272
Petitioner	:	A.C. No. 29-00097-03501 1JW
	:	
v.	:	Navajo Mine
	:	
JUSTIS SUPPLY & MACHINE SHOP,	:	
Respondent	:	

DECISION

Appearances: Ned D. Zamarripa, Conference and Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for Petitioner;
George R. Carlton, Jr., Esq, Godwin, White and Gruber, Dallas, Texas, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Justis Supply and Machine Shop (“Justis”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). A hearing was held in Albuquerque, New Mexico. The parties presented testimony and documentary evidence and filed post-hearing briefs.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Navajo Mine is a surface coal mine operated by BHP Minerals, Inc. (“BHP”) in San Juan County, New Mexico. Draglines are used at the Navajo Mine to remove the overburden above the coal. On January 5, 1999, MSHA Inspector Peter Paul Saint conducted an inspection of the Navajo Mine. As part of the inspection, he inspected the site where a new dragline was being assembled. This site, hereinafter the “dragline site,” was about one mile from the area where coal was being excavated. (Tr. 93). An earthen berm surrounded the dragline site and the site could be accessed directly from a road that was open to the public. (Tr. 66-67) Another entrance to the dragline site lead directly to the mine.

The dragline was being assembled by a company referred to by the parties as CDK. Employees of the Navajo Mine were not directly involved in the assembly of the dragline. CDK

contracted with Justis to do some cutting and welding on the dragline at the dragline site. Justis operates its business in Farmington, New Mexico, and its employees drove a welding truck owned by Justis from Farmington to the dragline site when working there. When Justis's employees first drove to the dragline site to start the welding project, they entered the mine gate and met with representatives of the mine operator before traveling down mine roads to the dragline site. After that first trip, however, Justis's employees always entered and exited the dragline site by traveling down roads that were open to the public. Thus, after the first day, Justis's employees did not travel through the Navajo Mine.

When Inspector Saint inspected the dragline site, he traveled on mine roads to get there. He issued three citations under section 104(a) of the Mine Act. Justis contested each citation and also maintains that MSHA did not have jurisdiction over the dragline site.

A. Jurisdiction

1. Arguments of the Parties

The Secretary contends that MSHA had jurisdiction to inspect the dragline site because this site was a mine, as the term "coal or other mine" is defined in section 3(h) of the Mine Act, 30 U.S.C. § 802(h). She argues that those employees who were engaged in the work of cutting and welding the dragline were "miners" as that term is defined in section 3(h). The Secretary maintains that the dragline site was selected by the operator of the Navajo Mine and "sectioned out" with a berm for the purpose of assembling the dragline. (S. Br. 15). Once assembled, the dragline was to be used to remove the overburden at the pit. She contends that the dragline site was on or adjacent to mine property about one mile from the area where coal extraction was taking place. The Secretary characterizes the dragline site as "a dedicated off-site facility of the mine operator where the assembly of the dragline was to be performed." *Id.* As such, she contends that the dragline site was a mine and that Justis was an "operator" performing services at the mine. The services were welding and cutting on the dragline. The Secretary states that these services were essential to the assembly of the dragline and the work "subjected" workers at the site to "hazards associated with this type of project." (*Id.* at 16).

Justis contends that the Secretary failed to show that the dragline site was a mine. The Secretary did not offer any proof that the site was owned or operated by BHP. It states that the only evidence the Secretary offered was Inspector Saint's "subjective belief that the [dragline site] was part of the Navajo Mine." (J. Br. 2). Justis maintains that because the dragline site was over a mile away from the actual mining operations and Justis's employees used public roads to get to and from the site, the site was not a mine. It also points to the fact that only CDK and Justis employees worked at the dragline site and that anyone could have driven into the site without passing through the mine. In addition, when Justis's employees first drove to the dragline site through the Navajo Mine, BHP's representatives told them that the site was exempt from MSHA regulations because it was not part of the mine. The record does not indicate who owned or leased the land at the dragline site.

2. Discussion

For the reasons explained below, I find that MSHA had jurisdiction to inspect the dragline site under the Mine Act. The starting point for an analysis of Mine Act jurisdiction is the definition of the term “coal or other mine,” in section 3(h)(1). A coal or other mine is defined, in pertinent part, as “(A) an area of land from which minerals are extracted ..., (B) private ways and roads appurtenant to such area, and (C) lands, ... structures, facilities, equipment, machines, tools, or other property ... on the surface or underground, used in, or to be used in ... the work of extracting minerals from their natural deposits, ... or used in ...the milling of such minerals...” 30 U.S.C. § 802(h)(1). The Senate Committee that drafted this definition stated its intention that “what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and ... that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.” S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978); *see also Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D. C. Cir. 1984).

The record does not disclose who owned or leased the land at the dragline site. Inspector Saint testified that BHP’s walkaround representative told him that the site was on BHP’s property. I cannot enter a finding based on that evidence because this BHP representative might have been misinformed. I can safely assume, however, that CDK was not a trespasser on the land. CDK was the principal employee at the site and exercised control over the site. Although the site could be accessed by roads that were open to the public, the site was private and it can be assumed that CDK could exclude individuals unknown to it from the area. The only activity at the site was the construction of the dragline. There is no evidence that CDK was performing any other activities at the dragline site or that it was performing services for other customers at the site. More importantly, the record makes clear that employees of Justis were only at the site to do welding and cutting on the dragline. Justis was not providing services for other customers at the dragline site.

Before Justis began work at the dragline site, CDK asked Justis’s employees to drive to the mine gate so that BHP’s contract security personnel could look over the trucks. These security guards also gave the Justis employees a training handbook. It was at this time that Justis’s employees were told that the dragline site was exempt from MSHA regulations.

I find that the dragline site fits within the definition of a “coal or other mine” in section 3(h). The dragline site was dedicated to the construction of a dragline to be used at the Navajo Mine. By necessity, the final assembly of a dragline must occur near a mine because it is such a large piece of equipment. It is not clear who owned the site, but it is clear that the site was under the control of CDK. The bermed-off site existed for the sole purpose of assembling the dragline.

The Commission has stated, “[t]he definition [of ‘coal or other mine’] is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines,

tools and other property used in the extraction of minerals from their natural deposits” *Harless, Inc.*, 16 FMSHRC 683, 687 (April 1994)(citation omitted). Although the dragline was not used in the extraction of minerals, it was being assembled to be used in the extraction process. Justis’s argument that the Secretary failed to show that the dragline was being assembled for use at the Navajo Mine is not well taken. CDK and Justis would not have been assembling and welding the dragline at this site if it was not going to be used at the Navajo Mine. Indeed, Inspector Saint testified that it was being used at the mine at the time of the hearing. (Tr. 19).

Justis was at the dragline site for a limited purpose. It did not have a shop or other facilities at the site or at the mine. It was present at the dragline site to perform cutting and welding on the dragline. The work it was performing was essential to the construction and assembly of the dragline.

If Justis was welding a piece of mining equipment at its shop in Farmington that was to be used at the Navajo Mine, such activities would not be subject to Mine Act jurisdiction. Likewise, I believe that if it operated a commercial welding shop in an area immediately adjacent to the Navajo Mine, it would not be subject to MSHA jurisdiction even if most of its welding work was for the mine. In this case, however, Justis was not operating a welding business at the dragline site. It was performing welding services on a dragline for CDK which, in turn, was assembling the dragline for use at the Navajo Mine. Justis was not open for public business at the dragline site.

Justis relies heavily on the fact that the dragline site was a mile away from the pit where coal extraction was taking place, its employees never entered the Navajo Mine after the first visit, and there was no showing that the dragline site was owned by the mine operator. Although these are factors to be considered, they do not resolve the issue. The Commission’s recent decision in *Jim Walter Resources, Inc.*, 22 FMSHRC 21 (January 2000) is instructive. In that case, Jim Walter Resources (“JWR”) operated a common supply shop for several of its mines and the shop was not located at any of the mines. The shop was used to warehouse materials and supplies used at its mines and preparation plants. The Commission held that this supply shop was subject to Mine Act jurisdiction “because a ‘mine’ includes ‘facilities’ and ‘equipment ... used in or to be used in’ JWR’s mining operations or coal preparation facilities.” (*Jim Walter* at 25). In a footnote, the Commission stated:

This case does not involve, and we therefore do not address, whether an off-site supply warehouse operated by a vendor, mining equipment manufacturer, or distributor would be covered by the Act, or even whether an off-site facility operated by a mining company or subsidiary that is open for “commercial” business would be covered.

Id. fn 7.

The present case is somewhat similar to the *Jim Walter* case except for the fact that it involves an independent contractor. The dragline site was immediately adjacent to the Navajo Mine. Indeed, anyone exiting the site via the mine road would immediately enter the area of the mine where extraction activities were taking place. In the context of a western open pit coal mine, a mile is a very short distance. The dragline site was a dedicated facility that was used by CDK and Justis solely for the assembly of the dragline. It was not open for any other business.

I find that Justis was an “operator” as defined by section 3(d) of the Mine Act because it was an “independent contractor performing services or construction at [a] mine.” The fact that Justis may not have had a written contract with BHP or CDK is not controlling because a common law contractual relationship is not required. *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 995-99 (10th Cir. 1996). In addition, the fact that Justis did not have the authority to control any mining-related operations does not defeat a finding that it was an independent contractor. *Id.* Justis was an operator because it performed services at a mine. *Id.* at 999-1000; *Otis Elevator Co. v. Secretary of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990).

If BHP employees were assembling the dragline at the dragline site, there is no doubt that the site would be deemed a mine and these activities would be subject to MSHA jurisdiction. The fact that these same activities were being performed by independent contractors at the dragline site should not change the result. Accordingly, I find that the dragline site was a mine and the activities occurring at the site and equipment used there were subject to MSHA jurisdiction.

B. Citations

1. Citation No. 7602366

Citation No. 7602366 alleges a violation of 30 C.F.R. § 77.410(a)(1), as follows:

Mobile equipment was not provided with a back-up alarm with an obstructed rear view that gives an audible alarm when the equipment is put in reverse. The Ford welding truck ... was not provided with a back-up alarm. The foreman stated that this was a new truck and had not had a chance to put the alarm on the truck. This truck is used at the contractor CDK site and person observed working and walking in the area of the truck. This condition would allow the truck to run into or over person working or walking around the truck.

Inspector Saint determined that the violation was of a significant and substantial nature (“S&S”) and was the result of Justis’s moderate negligence. Section 77.410(a)(1) provides, in part, that “[m]obile equipment such as ... trucks, except pickup trucks with an unobstructed rear view, shall be equipped with a warning device that gives an audible alarm when the equipment is put in reverse.” The Secretary proposes a penalty of \$66 for this alleged violation.

There is no dispute that the welding truck was not equipped with a back-up alarm. The truck was a Ford 350 with a gas powered welder mounted behind the cab. Oxygen and acetylene bottles were also mounted on the bed of the truck. Tool boxes were mounted along the sides of the bed. This equipment obstructed the rear view from the cab of the truck. (Tr. 25-27). The tool boxes along the sides of the bed made it difficult to see behind the truck using the side mirrors. *Id.*

The rear of this truck was used as a work bench and was equipped with a vise and rack. The truck was parked head-first about 40 feet from the dragline. CDK and Justis employees work in the area. It is highly likely that someone would back up the truck.

Justis argues that the welding truck is a “service vehicle” as that phrase is used in MSHA’s program policy manual (“PPM”) and is not required to be equipped with a back-up alarm. The paragraph of the PPM that discusses section 77.410 states as follows:

The warning device required by this section need not be provided for automobiles, jeeps, pickup trucks, and similar vehicles where the operator's view directly behind the vehicle is not obstructed. Service vehicles making visits to surface mines or surface work areas of underground mines are not required to be equipped with such warning devices.

(Ex. G-6). Justis argues that the welding truck is a service vehicle and that Inspector Saint admitted that fact. (Tr. 57).

The Secretary contends that Justis’s welding truck was not a “service vehicle” as that phrase is used in the PPM. She states that the truck was used not only to transport people and supplies to the dragline site, but was “engaged in work activities associated with the assembly of the dragline.” (S. Br. 17). The Secretary maintains that the exemption in the PPM applies to vehicles that make deliveries to a mine.

I find that the welding truck was not a “service vehicle making visits to” a surface mine. Although the PPM is not entirely clear, the language indicates that the exemption applies only to vehicles that “visit” a mine. Examples of such visiting vehicles would include Postal Service trucks, UPS trucks, soft drink delivery trucks, and other trucks delivering parts or supplies. Such vehicles are generally not inspected by MSHA when they make deliveries to mines. A truck used at a mine site by an independent contractor is subject to MSHA jurisdiction. In this instance, the welding truck was an integral part of the welding services that Justis provided. The truck was used as a mobile work station at the dragline site. Justis’s interpretation of the PPM would exempt a large percentage of trucks used by independent contractors at mines. Inspector Saint did not testify that the welding truck was a service vehicle making visits to the dragline site; he stated that it was a “service” truck because Justis was providing welding services at the dragline site. (Tr. 56, 76-78).

Based on the testimony and exhibits, I find that the Secretary established a violation. I also find that the Secretary established that the violation was S&S. An S&S violation is described in section 104(d)(1) of the Mine Act as a violation “of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard.” A violation is properly designated S&S “if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The Secretary established the violation and that the violation contributed to a discrete safety hazard. Inspector Saint testified that about 20 individuals worked at the dragline site. (Tr. 17). Two Justis employees were working at the site and both employees used the welding truck. The inspector stated that an injury was reasonably likely because people work at the back of the welding truck and there was a pronounced blind spot in that area from the cab of the truck. (Tr. 26, 28-29). The inspector believed that, given the noise and activity in the area, it was reasonably likely that someone would be seriously injured if the truck were to be put in reverse. (Tr. 30). He concluded that if the violative condition were allowed to continue, it would cause an accident of a serious nature. (Tr. 31). I credit Inspector Saint’s testimony in this regard.

I find that Justis’s negligence was low. It relied in good faith upon information provided by BHP’s security guards that it would not be subject to MSHA regulation. Justis did not normally perform work at mines and it did not have an MSHA identification number. It was unfamiliar with MSHA’s regulatory program. I enter this finding notwithstanding the fact that Justis was aware that the truck did not have a back-up alarm. A penalty of \$50 is appropriate for this violation.

2. Citation No. 7602367

Citation No. 7602367 alleges a violation of 30 C.F.R. § 77.402, as follows:

Hand-held power tools [were] not being maintained with controls that require constant hand or finger pressure to operate the tool, located at the CDK contractor work site. The Black and Decker 110-volt hand-held grinder was observed with a control that would

lock the equipment in the on state when in use. This condition would allow a person to be injured if the wheel would jam and break or turn the equipment around.

MSHA determined that the violation was not S&S and was the result of Justis's low negligence. Section 77.402 provides, in part, that "[h]and-held power tools shall be equipped with controls requiring constant hand or finger pressure to operate the tool" The Secretary proposes a penalty of \$55 for this alleged violation.

The cited grinder was equipped with a trigger lock that allowed the grinder to remain running even when there was no pressure on the trigger. The grinder was inside a locked toolbox on the side of the welding truck. (Tr. 51). The grinder was not tagged-out or otherwise marked to indicate that it should not be used. (Tr. 36). The grinder was the personal property of one of Justis's employees. Inspector Saint testified that, in his experience, as long as equipment is on the property and is available for use, an employee will use it if he needs it whether it is owned by his employer or another individual. (Tr. 36-37). The inspector determined that the condition was not serious because Justis representatives told him that the grinder was more likely to be used at the shop than at the dragline site. I credit the inspector's testimony.

I find that the Secretary established a violation. The fact that the grinder was owned by an employee rather than Justis is not a defense to the violation because the grinder was available for use at the dragline site. Although the grinder was in one of the locked tool boxes on the welding truck, the key to the tool box was in the cab of the truck. (Tr. 73). Thus, it was available for use by the two Justis employees.

The violation was not serious. Justis was not negligent with respect to this violation. There is no showing that Justis was aware that the grinder was on the truck or, if it was aware, that it was equipped with a trigger lock. A penalty of \$10 is appropriate for this violation.

3. Citation No. 7602368

Citation No. 7602368 alleges a violation of 30 C.F.R. § 77.404(a), as follows:

Mobile and stationary equipment was not being maintained in safe operating condition. Located on the Ford truck ... at the CDK contractor site. A 3-ton chain hoist was observed without the safety latches on the hook to prevent cable from coming off the hooks.

MSHA determined that the violation was not S&S and was the result of Justis's moderate negligence. Section 77.404(a) provides, in part, that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition" The Secretary proposes a penalty of \$55 for this alleged violation.

Inspector Saint testified that the hook at the end of the chain for the hoist was not equipped with a safety latch. (Tr. 40). Such a latch is designed to prevent anything that is being hoisted from sliding out or slipping off the hook. He stated that hoists of this type are used to lift motors or pieces of metal. The inspector referred to the hoist as a “three ton hoist” and it was on the back of the welding truck. (Tr. 41-42, 53). Inspector Saint determined that the condition was not serious because Justis was not using the hoist at the time of his inspection.

There is no dispute that the hook was not equipped with a safety latch. Based on the testimony of Inspector Saint, I find that this condition violated the safety standard. The hoist was not maintained in safe operating condition. I agree that the violation was not serious because there was no showing that it would be used at the dragline site. I also find that Justis’s negligence was quite low. The hoist was laying on the bed of the truck, but there was no indication that it was going to be used. The cutting and welding described by the parties did not include any hoisting activities. A penalty of \$10 is appropriate for this violation.

II. APPROPRIATE CIVIL PENALTIES

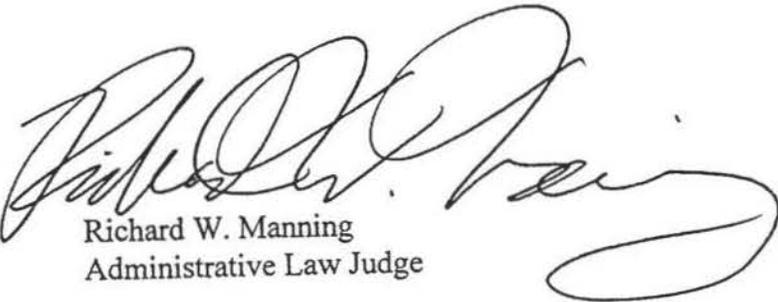
Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that Justis was not issued any citations during the two years prior to this inspection. Justis was a small operator that worked less than 10,000 man-hours annually and employed two people at the dragline site. The violations were rapidly abated in good faith. The penalties assessed in this decision will not have an adverse effect on Justis’s ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
7602366	77.410(a)(1)	\$50.00
7602367	77.402	10.00
7602368	77.404(a)	10.00

Accordingly, the citations contested in this proceeding are **AFFIRMED** as set forth above, and Justis Supply and Machine Shop is **ORDERED TO PAY** the Secretary of Labor the sum of \$70.00 within 40 days of the date of this decision. Upon payment of the penalty, this proceeding is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 25, 2000

BRYCE DOLAN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. CENT 97-24-DM
	:	MSHA Case No. SC MD 96-05
F& E ERECTION COMPANY,	:	
Respondent	:	Mine ID No. 41-00230-B96
	:	Bayer Alumina Plant

DECISION ON REMAND

Before: Judge Feldman

The captioned matter is before me based on a discrimination complaint filed on December 27, 1996, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 815(c)(3), by the complainant, Bryce Dolan, against the respondent, F&E Erection Company (F&E). The initial decision granted Dolan's discrimination complaint based on a finding that Dolan engaged in a work refusal protected by section 105(c) of the Mine Act. 20 FMSHRC 591 (June 1998) (ALJ).

On February 29, 2000, the Commission, although finding that "substantial evidence supports the judge's conclusion that F&E failed to address Dolan's concerns in a way that should have alleviated his fears," vacated the initial finding of discrimination and remanded this matter for further consideration concerning whether Dolan's protected work refusal constituted a constructive discharge. 22 FMSHRC 171, 177-78. Relying on *Simpson v. FMSHRC*, 842 F.2d 453, 461-63 (D.C. Cir. 1988), the Commission concluded "the key inquiry in a constructive discharge case is whether intolerable conditions existed such that a reasonable miner would have felt compelled to resign." *Id.* at 176. Thus, the Commission remanded this matter for me to determine whether Dolan's work refusal constituted a constructive discharge. For the reasons discussed below, I find that F&E's inadequate response to Dolan's reasonable, good faith safety complaints constituted a discriminatory constructive discharge.

In remanding this matter, the Commission noted that I stated at the hearing that I considered this a work refusal case, rather than a constructive discharge case, because F&E's actions were not calculated to induce Dolan's resignation. 22 FMSHRC at 177-78. I was referring to a retaliatory constructive discharge. A retaliatory constructive discharge occurs when an operator, who is prohibited by section 105(c) of the Act from directly firing a miner who has

engaged in protected activity, seeks to effectuate the miner's termination indirectly by creating intolerable working conditions.¹

Since termination of the miner must be accomplished indirectly, invariably a retaliatory constructive discharge involves working conditions that are unrelated to safety hazards because exposing the miner to hazardous conditions would give rise directly to section 105(c) protection. *Secretary of Labor o/b/o Bowling v. Mountain Top Trucking Company*, 21 FMSHRC 265, 275-81 (March 1999) *pet. for review docketed*, No. 99-4278 (6th Cir. Oct. 22, 1999) (truck drivers who quit after they had been called back to work after a discriminatory discharge were the victims of a retaliatory constructive discharge because they were subjected to forced idleness as well as to other forms of harassment). However, the anti-discrimination provisions of the Mine Act have been interpreted to prevent employers from accomplishing indirectly what is directly prohibited by law. *Id.* at 272, *citing Simpson* 842 F.2d at 461; *Secretary of Labor o/b/o Nantz v. Nally & Hamilton Enters., Inc.*, 16 FMSHRC 2208, 2210-13 (November 1994). The evidence does not reflect, and Dolan does not contend, that Dolan's working conditions were created by F&E in retaliation for Dolan's protected activity in order to encourage him to resign.

The facts in this case are set forth in the initial decision as well as in the Commission's remand decision. Briefly stated, Dolan was an iron worker employed by F&E, a construction company that performed work at an alumina smelter in Point Comfort, Texas operated by the Aluminum Company of America (Alcoa). From late 1994 until March 1996, to ensure a good weld on stiffeners, Dolan and five to six other crew members were removing paint from the angle irons of trusses in the R35 tank farm before affixing the stiffeners. Despite the fact that Jones & Neuse, Inc. (J&N), F&E's environmental and engineering consultant, had recommended "[r]emoval and containment of abated lead will be accomplished by using needle guns, roto penes and grinders attached to high efficiency vacuums," Dolan's crew removed the paint by burning it off with a cutting torch. 20 FMSHRC at 594. During this period Dolan's crew was not provided with any personal respiratory equipment or protective clothing.

In March 1996, Dolan learned that Alcoa employees performing similar work in the R35 tank farm were furnished with protective clothing and respirators, and, that the entire R35 tank farm was supposed to be treated as a lead abatement area. Dolan complained to several F&E officials, including general foreman Steve Whitehead, about the hazards of removing lead based paint without personal protective gear.

¹ A "retaliatory discharge" is "a discharge that is made in retaliation for the employee's conduct (such as reporting unlawful activity by the employer to the government)" *Black's Law Dictionary* 476 (7th ed. 1999).

In response to Dolan's complaint, F&E contracted with Health and Safety Management, Inc. (HSM) to perform air sample monitoring on crew members who, in the meantime, had been given Tyvek suits² and half-face respirators. Based on HSM's air sampling results, HSM recommended that the crew member using the cutting torch wear a full-face respirator, while the remaining crew could continue to wear half-face respirators. F&E implemented HSM's recommendation.

On or about March 25, 1996, Dolan complained that the entire crew should wear full-face respirators due to their proximity to the person using the cutting torch. Dolan also complained that the Tyvek suits were inadequate to prevent lead contamination because they were easily torn and because sparks from the cutting torch burned holes in the suits. In response, F&E provided a large quantity of Tyvek suits so that the crew could wear double layers and replace them when needed. In addition, F&E required the crew to vacuum their clothing with high efficiency vacuums before leaving the work area.

Dolan continued to complain about the inadequacy of the half-face respirators and Tyvek suits. On April 16, 1996, F&E held a meeting to address Dolan's concerns. At the meeting, Whitehead stated F&E would continue to use half-face respirators and Tyvek suits, and he offered to transfer any employee who wanted to perform non-lead based work. No employees accepted Whitehead's offer of reassignment. At the conclusion of the April 16, 1996, meeting, Dolan quit his job because he believed that the personal protective equipment provided by F&E was inadequate to prevent lead exposure to himself and his family.

As noted above, the Commission, in its remand decision, has determined that:

There is no doubt that Dolan's initial fears in March 1996, at a time when F&E had provided no personal protective gear to Dolan's crew, were reasonable. As the judge noted, F&E conceded as much at the hearing. 20 FMSHRC at 599-600. Nor is it disputed that Dolan made protected safety complaints to F&E based on his fears. The question is whether a reasonable miner in Dolan's position would have had his fears quelled by the measures taken by F&E in response to Dolan's initial complaint. We find that substantial evidence supports the judge's conclusion that F&E failed to address Dolan's concerns in a way that should have alleviated his fears.

22 FMSHRC at 179. The Commission, having concluded that Dolan's work refusal was protected, has directed that I determine, using an objective standard, whether the working conditions at the time of Dolan's April 16, 1996, resignation constituted a constructive discharge. On April 16, 1996, F&E already had responded to Dolan's complaints by (1) performing air sampling; (2) providing a full-face respirator to the cutting torch operator; (3) providing a half-face respirator to the remaining crew; (4) initially providing Tyvek suits; (5) subsequently

² Tyvek suits are thin, disposable coveralls made of spun olefin. 20 FMSHRC at 597.

providing greater quantities of Tyvek suits; (6) providing high efficiency vacuums; and (7) offering Dolan a temporary reassignment to non-lead abatement duties.

Despite F&E's responses to Dolan, as determined by the Commission, the evidence supports the conclusion that the protective measures taken were inadequate to alleviate Dolan's fears. *Id.* Robert Miller, an industrial hygienist who testified on behalf of Dolan, opined that respirators leak due to poor fit or perspiration. Miller also questioned whether half-face respirators provided adequate protection for non-torch cutting crew members. Dolan's testimony that Tyvek suits were ineffective because of they were not burn resistant, and because they tore, was supported by the testimony of crew members Kenneth Tam and Troy Stewart. In addition, vacuuming personnel before they left the work area did not prevent contamination to underlying clothing.

Burning lead paint is the fastest, cheapest, and, from a safety standpoint, the least desirable method of lead removal. 20 FMSHRC 602. Although OSHA does not strictly prohibit burning lead paint in inaccessible areas, OSHA has determined that burning as a principal method of removing lead-based paint is not acceptable. *Id.* Burning as a method of lead abatement is generally prohibited by Alcoa. *Id.* Finally, F&E's burning method was contrary to the advice of J&N, its environmental and engineering consultant, that lead paint should be removed by chipping and grinding. *Id.* at 594.

Although Dolan did not specifically complain about the burning method of lead abatement, Dolan's concerns were caused by F&E's practice of burning lead paint with a cutting torch rather chipping it with a needle gun and grinder. It was F&E's decision to burn, rather than chip, that provides the basis for Dolan's concerns regarding exposure to respirable fumes, as well as exposure to lead as a consequence of burn holes in Tyvek suits. F&E must bear the burden of departing from generally accepted methods of lead abatement.

In determining whether a constructive discharge has been shown despite remedial measures taken by an operator in response to a miner's complaints, it is helpful to examine the D.C. Circuit Court's decision and its progeny in *Gilbert v. FMSHRC* 866 F.2d 1433, 1439 (D.C. Cir. 1989); *John A. Gilbert v. Sandy Fork Mining Company, Inc.*, 12 FMSHRC 177 (February 1990) (*Gilbert I*); *John A. Gilbert v. Sandy Fork Mining Company, Inc.*, 12 FMSHRC 1203 (June 1990) (*Gilbert II*). Gilbert refused to perform work because of his concern regarding hazardous roof conditions. In *Gilbert*, the Commission concluded there "was no question . . . that mine management was aware of the roof problems . . . and was taking steps to address the problems." *Gilbert I*, 12 FMSHRC at 180. However, the Commission determined that Gilbert's safety concerns were not addressed in a manner sufficient to reasonably quell his fears. *Id.* at 181. In view of the fact that Gilbert "did not act precipitately and . . . he entertained a good faith, reasonable belief in a hazard, his departure from the mine constituted a discriminatory constructive discharge in violation of section 105(c)(1) of the Mine Act." *Gilbert II*, 12 FMSHRC at 1205. (emphasis added); *Gilbert I*, 12 FMSHRC 181-82.

Turning to the facts of this case, the Commission has determined Dolan had a good faith, reasonable belief that a hazard existed, and it is evident that Dolan did not act precipitately. Dolan initially raised safety related complaints in March 1996 and he waited a reasonable period for F&E to respond. Dolan did not resign until April 16, 1996, when it became clear that F&E would not alleviate his continuing concerns about his safety. Thus, consistent with *Gilbert*, the evidence reflects that Dolan's resignation on April 16, 1996, constituted a discriminatory constructive discharge.

In reaching the conclusion that Dolan was constructively discharged, I note that whether or not full and half-face respirators and Tyvek suits were ineffective goes beyond the scope of this proceeding. The determining factors in concluding Dolan was compelled to resign are the reasonableness of Dolan's continuing fears, and F&E's failure to adequately quell Dolan's fears, not the actual degree of hazard presented by F&E's lead abatement procedures. *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982); *Metric Constructors, Inc.* 6 FMSHRC 226, 230 (February 1984); *Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1534 (September 1983); *Gilbert v. FMSHRC*, *supra*; *Secretary of Labor o/b/o Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 997 (June 1983); *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (February 1988), *aff'd mem.*, 866 F.2d 431 (6th Cir. 1989). In fact, a miner refusing work under a good faith belief that a hazard exists is not required to prove that the working conditions were, in fact, hazardous. See *Secretary of Labor o/b/o Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 810-12 (April 1981).³ It is F&E's failure to remedy Dolan's reasonable, good faith safety concerns that provides the "aggravating circumstances" necessary to support a finding of a constructive discharge. *Clark v. Marsh*, 665 F.2d 1168, 1173 (D.C. Cir. 1981). Thus, as the Court concluded in *Simpson*, "[t]he resolution of [a discrimination] case . . . will turn on whether [the underlying] work refusal was protected 842 F.2d at 463.

In the final analysis, the Mine Act "is a remedial and safety statute, with its primary concern being the preservation of human life . . ." *Freeman Coal Mining Co. V. Interior Bd. Of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974) (citations omitted); *Peabody Coal Co.*, 7 FMSHRC 1357 (September 1985); *Jim Walter Resources*, 7 FMSHRC 1348 (September 1985), *aff'd sub nom. Brock v. Peabody Coal Co.*, 822 F.2d 1134 (D.C. Cir. 1987). Under the Mine Act, a miner who reasonably believes he is exposed to a continuing hazard is not required to continue working under such circumstances. If the operator fails to address the miner's good faith, reasonable safety concerns, the miner is left with an "intolerable" choice - - to continue to

³ The Commission has "rejected a requirement that miners who have refused to work must objectively prove that the hazard complained of existed . . . [and has] adopted a 'simple requirement that the miner's honest perception be a reasonable one under the circumstances.'" *Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1532 (September 1983) quoting *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1943-44 (November 1982), and *Robinette*, 3 FMSHRC at 812.

work indefinitely in the face of a perceived hazard, or to quit his job.⁴ It is the operator's failure to respond adequately to the perceived hazard that is the prohibited adverse action that compels the miner's resignation and provides the basis for a "discriminatory constructive discharge."⁵ *Gilbert II*, 12 FMSHRC at 1205; *Simpson*, 842 F.2d at 463.

Finally, the Commission also directed me to examine anew the impact of F&E's offer to reassign Dolan and other crew members to non-lead abatement jobs on the issue of constructive discharge. Whitehead testified that during the April 16, 1996, meeting he offered to transfer any employee who was not satisfied doing lead abatement work to another part of the plant. Whitehead could not explain why no one accepted his offer given the inherent dangers associated with excessive lead exposure. Dolan and Tam testified that it was not uncommon for F&E to transfer employees to non-lead work, particularly during periods immediately preceding blood test monitoring. However, employees were always returned to lead abatement tasks since most of the tanks, with the exception of newer units, contained lead based paint.

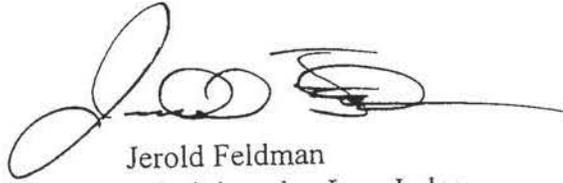
As noted in the initial decision, the intent of the Mine Act is to minimize the exposure of all miners to hazards not just those miners that speak out about hazards. 20 FMSHRC at 605. Thus, offering to reassign a complaining miner while others continue to be exposed to the subject hazard is not an appropriate mitigating factor. Moreover, given the nature of F&E's contract activities concerning maintenance of steel tanks containing lead paint, I credit the testimony of Dolan and Tam that any reassignment would have been temporary in nature. As the Commission noted in its remand, a miner's refusal of a temporary reassignment as a solution to his complaints concerning the continuing existence of hazardous conditions is inextricably connected to the underlying complaints and constitutes protected activity. 22 FMSHRC at 180 *citing Nantz*, 16 FMSHRC at 2214. Accordingly, F&E's offer of reassignment does not alter the fact that its inadequate response to Dolan's legitimate concerns provided the aggravating factors necessary to support a constructive discharge.

⁴ Unlike the Mine Act, most other anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964, do not exclusively concern safety and health. Consequently, there is a general reluctance to predicate a constructive discharge on the fact of discrimination, absent aggravating circumstances, because public policy requires discrimination victims to mitigate damages by remaining on the job while attacking unlawful discrimination within the context of existing employment relationships. *Clark v. Marsh*, 665 F.2d at 1173. Thus, under most anti-discrimination statutes, absent aggravating circumstances, discrimination alone is "an insufficient predicate for a finding of a constructive discharge." *Id.* For example, a failure to receive equal pay for equal work, and a denial of a promotion because of an employee's ethnicity, do not provide a basis for a constructive discharge under Title VII. *Id.* (citations omitted). However, section 105(c) does not require a miner, whose work refusal is entitled to statutory protection because he reasonably believes that he is exposed to hazardous conditions, to remain on the job for the purpose of mitigating damages.

⁵ Obviously, minor or technical violations of the Mine Act, or conditions that are not potentially dangerous to health and safety, ordinarily will not support a finding of a constructive discharge. *Simpson*, 842 F.2d at 463.

ORDER

In view of the above, Bryce Dolan's April 16, 1996, work refusal and resignation were protected by the provisions of section 105(c) of the Mine Act and constituted a constructive discharge. Consequently, the grant of Dolan's discrimination complaint and the August 5, 1998, *Supplemental Decision on Relief*, 20 FMSHRC 847 (August 1998) (ALJ) **ARE REINSTATED.**⁶



Jerold Feldman
Administrative Law Judge

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⁶ The Commission previously has directed for review *sua sponte* the mitigation of damages issue that is relevant for determining the proper period for relief.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

April 28, 2000

CONTRACTORS SAND AND GRAVEL, INC.,	:	EQUAL ACCESS TO JUSTICE
	:	PROCEEDING
Applicant,	:	
	:	
v.	:	Docket No. EAJ 96-3
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION ON REMAND

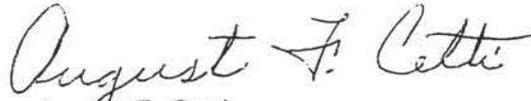
Before: Judge Cetti

On January 7, 2000, the United States Court of Appeals for the District of Columbia Circuit issued a decision in the above Equal Access to Justice Award case ("EAJA"). The Court held that the Secretary's position in the underlying proceeding was not substantially justified. The Court ordered the award of fees and expenses that were granted by the administrative law judge be restored, and remanded the case to the Commission for a determination of the amount of the award to Contractors for pursuing review before the Court.

On March 28, 2000, the Commission issued an order reinstating the judge's EAJA award. The Commission also remanded the case to the judge for a determination of fees and expenses incurred in defending the judge's decision before the Commission and those incurred in the court's review of the Commission's decision.

Pursuant to the remand, the judge ordered the parties to confer and to attempt to reach an agreement upon the amount of the fees and expenses to which the Applicant was entitled. Counsels have conferred as ordered, and counsel for the Secretary reports the parties have agreed that a total amount of \$99,935.51 in fees and expenses will be paid by the Respondent to the Applicant.

WHEREFORE, the Secretary of Labor is **ORDERED TO PAY** Contractors Sand and Gravel a total award of \$99,935.51 within 30 days of the date of this decision. Upon receipt of full payment, this proceeding is dismissed.



August F. Cetti
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 4, 2000

SECRETARY OF LABOR	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-96-D
ON BEHALF OF ROYAL SARGENT,	:	DENV CD 99-03
Complainant	:	
v.	:	
	:	
THE COTEAU PROPERTIES CO.,	:	Freedom Mine
Respondent	:	Mine ID 32-00595

ORDER DENYING MOTION TO DISMISS
PREHEARING ORDER

This case is before me on an amended complaint filed by the Secretary of Labor on behalf of Royal Sargent, alleging that Respondent, The Coteau Properties Co, had discriminated against him in violation of section 105(c)(1) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(c)(1). Sargent alleged that, on August 3, 1998, he had been suspended for five days because he brought safety issues to Respondent's attention. He also claims that on August 10, 1998, he was subjected to an involuntary job transfer and restrictions on job availability, and was placed on probationary status. Sargent filed his initial written complaint of discrimination with the Mine Safety and Health Administration ("MSHA") on November 20, 1998, 49 days beyond the statutorily prescribed 60 day period.¹ On December 21, 1999, a complaint alleging discrimination was filed with the Commission.

Respondent filed an Answer and a motion to dismiss the complaint asserting that Sargent did not timely file his complaint with the Secretary.² The Secretary opposed the motion, claiming that there were justifiable circumstances to excuse the late filing. On February 28, 2000, the undersigned Administrative Law Judge found that Complainant had failed to submit evidence that could establish justifiable circumstances for the late filing and issued an Order to

¹ 30 U.S.C. § 815(c)(2).

² Respondent also argued that the Secretary lacked authority to reopen her investigation and file the eventual complaint. In response to the motion, the Secretary provided factual information that undercut the premise of that argument. By failing to address the Secretary's response, as directed in the Order to Show Cause, Respondent has abandoned this argument.

Show Cause Why the Complaint Should Not be Dismissed. Complainant filed a response to the Order, submitting affidavits from himself, his brother and an MSHA official. Respondent submitted a reply. For the reasons set forth below, I find that Complainant has submitted competent evidence demonstrating the existence of genuine issues with respect to facts material to whether there were justifiable circumstances for his late filing and deny Respondent's motion to dismiss.

The Motion to Dismiss

The Order to Show Cause noted that Respondent's motion to dismiss would be treated as a motion for summary decision pursuant to Commission Rule 2700.67. Section (b) of the Rule provides that the motion can be granted only if the entire record shows:

- (1) That there is no genuine issue as to any material fact; and
- (2) That the moving party is entitled to summary decision as a matter of law.

Rule 2700.67(c) further provides that: "Supporting and opposing affidavits shall be made on personal knowledge and shall show affirmatively that the affiant is competent to testify to the matters stated."

The Order to Show Cause addressed the deficiencies in Complainant's opposition to the motion, specifically, that the affidavit relied on was not based upon personal knowledge and did not show that the affiant was competent to testify to the matters stated. As a result, it was concluded that there was no reliable evidence that Complainant "misunderstood or was misled as to his rights or obligations under the Act." Order, at p. 5.

The affidavits submitted in response to the Show Cause Order, in contrast, present direct evidence based upon personal knowledge that Complainant misunderstood his rights and obligations under the Act and was affirmatively deterred by Respondent from exercising those rights in a timely fashion. These facts, if ultimately established, would constitute justifiable circumstances for the untimely filing of his discrimination complaint with MSHA.

Respondent continues to argue that Complainant was, or at least should have been, aware of his rights and has submitted competent evidence that the rights of miners under the Act had been included as part of new miner training at the time Complainant was hired in 1985 and that notice of such rights was posted on a bulletin board in an area that Complainant frequented. However, the facts relied upon by Respondent do not conclusively establish that Complainant was fully aware of his rights under the Act. While Complainant has not directly refuted those contentions, he denies any recollection of new miner training on the topic of rights under the Act and, at least indirectly, the contents of the poster. There is no evidence that Complainant had read the poster, which had been on the bulletin board for many years. In any event, the poster does not clearly convey the concept that a discrimination complaint must be filed within 60 days of the adverse action. The poster read, in pertinent part:

If you believe you have been punished for using your safety and health rights, you or your representative *should* file a complaint with MSHA. The complaint *should be filed in writing, within 60 days.* (Emphasis supplied)

The use of the permissive term “should” is not likely to inform an average miner that filing a complaint with MSHA within 60 days is mandatory and may be critical to his ability to pursue such a claim. There is no warning of the potentially serious consequences of failing to file a complaint within 60 days of an adverse action. The posted language also is unclear as to when the 60 day period begins to run. There is no statement identifying the beginning of the time period in the sentence that contains the “60 days” language.³ Reference to the preceding sentence would suggest that it runs from the time the miner forms a belief that he has been punished for exercising his rights.

Complainant’s denial of present recollection of training that he may have received when he was hired in 1985 is plausible. His claims that he was not aware of the 60 day filing requirement and was proceeding cautiously because of concerns about reprisals by Respondent are also plausible. His affidavit, and the other affidavits submitted in response to the Show Cause Order, establish genuine issues as to the precise extent of his knowledge and understanding, on and after August 3, 1998, of the filing requirement and the reasonableness of his actions based thereon.

Complainant further asserts in his affidavit that he was told by Respondent’s area manager that he could not talk about the adverse action with anyone or he could lose his job. Respondent disputes this assertion. If Complainant’s assertion is accurate, it would lend support to his statements regarding fear of retaliation and how such concerns prompted him to proceed cautiously in pursuit of his discrimination claim. It might also raise an estoppel issue with respect to Respondent’s assertion of the untimely filing defense. Genuine issues exist with respect to such statements made by Respondent’s agents and the reasonableness of Complainant’s interpretation of them.

As noted above, the affidavits submitted by Complainant in response to the Show Cause Order present competent evidence creating genuine issues as to several facts material to the justifiable circumstances determination. Accordingly, Respondent’s motion to dismiss the complaint is denied.

³ Compare that language with the corresponding statutory language: “Any miner * * * who believes that he has been * * * discriminated against * * * **may, within 60 days after such violation occurs,** file a complaint with the Secretary alleging such discrimination. . . .” 30 U.S.C. § 815(c)(2) (emphasis supplied).

Prehearing Order

In accordance with section 105(c) of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. § 815(c) and 29 C.F.R. § 2700.1, *et seq.*, this matter will be called for a hearing on the merits at a time and place to be designated in a subsequent notice.

In preparation for the hearing, the parties are directed to: (a) confer on the possibility of settlement and endeavor to stipulate to relevant matters not in dispute; (b) endeavor to stipulate the issues of fact and law remaining for hearing; (c) discuss exhibits, and, at the request of a party, produce exhibits for inspection and copying; (d) endeavor to stipulate to the admissibility of exhibits, and specify the grounds for any objections to any exhibit the admissibility of which is not stipulated to; and, (e) discuss the testimony expected of each witness (unless privileged). The parties are also invited to discuss proposals to expedite the submission of evidence or shorten the proceedings, e.g., the submission of witnesses' direct testimony in writing.

The parties shall notify the undersigned Administrative Law Judge of the results of their efforts on or before **May 17, 2000**. The communication may be in writing or by conference call. The notification shall include each party's: best estimate of the hearing time required to present its case and the number of witnesses it expects to call; a hearing location preference; and, at least two agreed hearing dates, preferably within the following 30-60 days. Complainant's counsel shall assure that the notification is timely made.

Discovery requests and responses thereto, pursuant to Rule 2700.58, shall not be filed with the Commission. Deposition transcripts shall not be filed, but shall be retained and safeguarded by the party noting the deposition. Pertinent requests and responses shall be set forth verbatim in any motion to compel or for other relief regarding discovery matters.

If the matter has not been settled, each party shall file with the undersigned Administrative Law Judge on or before **May 31, 2000, a written prehearing report** setting forth: (a) a statement of the party's case, identifying each contested issue; (b) any stipulations entered into; (c) a list of witnesses expected to be called by that party and a synopsis of each witness' expected testimony (unless privileged); (d) a list of exhibits⁴; (e) a statement of the grounds of any objection to an adverse party's exhibits; and, (f) a memorandum of law on any significant or novel legal issue expected to be raised in the proceeding.

⁴ Complainant's exhibits shall be prefixed with the letter "C" and Respondent's exhibits shall be prefixed with the letter "R". Exhibits shall be numbered consecutively.

Failure to comply with any part of this prehearing order may result in sanctions against the defaulting party.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

303-844-3577/FAX 303-844-5268

April 5, 2000

COX TRANSPORTATION CORP./COX	:	CONTEST PROCEEDINGS
ROCK PRODUCTS, INC.,	:	
Contestant	:	Docket No. WEST 99-155-RM
	:	Citation No. 7911843; 2/5/99
	:	
	:	Docket No. WEST 99-156-RM
v.	:	Citation No. 7911745; 2/5/99
	:	
	:	Docket No. WEST 99-157-RM
	:	Citation No. 7911846; 2/5/99
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 99-158-RM
MINE SAFETY AND HEALTH	:	Citation No. 7911783; 2/8/99
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 99-159-RM
	:	Order No. 7911784; 2/8/99
	:	
	:	Cox Rock Portable #3
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-369-M
Petitioner	:	A.C. No. 42-02201-05501 G3S
	:	
v.	:	Docket No. WEST 99-370-M
	:	A.C. No. 42-02201-05502 G3S
	:	
COX TRANSPORTATION CORP./COX	:	
ROCK PRODUCTS, INC.,	:	Docket No. WEST 99-371-M
Respondent	:	A.C. No. 42-02201-05503 G3S
	:	
	:	Cox Rock Portable #3

**ORDER DENYING COX TRANSPORT CORPORATION'S
MOTION TO DISMISS AND FOR SUMMARY DECISION**

Cox Transport Corporation ("Cox Transport") filed a motion to dismiss and for summary decision on the basis that the Department of Labor's Mine Safety and Health Administration lacked jurisdiction over the area where an employee of Cox Transport was fatally injured. The Secretary opposes the motion and asserts that MSHA had jurisdiction.

The driver of a bottom-dumping truck was fatally injured when his clothing became entangled in the clamshell dump at the bottom of the truck. He was on his way to an aggregate mine to receive his first load of material for the day when the accident occurred. He was found under the truck on an unpaved road outside the mine's gateposts. The road was not closed to the public. The site of the accident was about 300 feet from the mine's scale house. The driver was employed by Cox Transport and he was assigned to pick up material from the mine and deliver it to a road construction site. This was his first trip of the day and he had not entered the active areas of the mine.

Cox Transport maintains that there is no basis for MSHA jurisdiction in these cases. It argues that:

[t]he truck was well outside the entrance to the mine, parked in a public area where no mining activities occurred, and this was an area distinct from any mining activity. In short, the area where the truck was located at the time of the accident is not part of the "parcel" of land on which the pit, crusher, and scale house were located.

(CT Surreply 2). Cox Transport's analysis fails to take into consideration the broad reach of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 802 and 803. The starting point for an analysis of Mine Act jurisdiction is the definition of the term "coal or other mine," in section 3(h)(1). A coal or other mine is defined, in pertinent part, as "(A) an area of land from which minerals are extracted ..., (B) private ways and roads appurtenant to such area, and (C) lands, ... structures, facilities, equipment, machines, tools, or other property ... on the surface or underground, used in, or to be used in ... the work of extracting minerals from their natural deposits, ... or used in ...the milling of such minerals..." 30 U.S.C. § 802(h)(1). The Senate Committee that drafted this definition stated its intention that "what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and ... that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978); *see also* *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D. C. Cir. 1984).

Cox Transport argues that because the road where the accident occurred was open to the public and the truck had not yet entered the mine that day, MSHA lacked jurisdiction. Cox Transport notified Utah-OSHA not MSHA of the fatal accident.

Jurisdictional issues under the Mine Act are often factually complex. The Commission and various federal circuit courts have wrestled with these issues. The circuit court decisions cited by the parties base their holdings on the precise facts presented and these decisions are not

entirely consistent. A slight change in the facts may change the results in a jurisdictional case. The Secretary takes what is often called a “nooks and crannies” approach when interpreting OSHA jurisdiction. OSHA fills in the nooks and crannies that other safety statutes do not cover. Whether MSHA has jurisdiction under the specific facts at issue here will be one of the key issues in these cases.

I find that there are too many open factual issues for me to rule that MSHA did not have jurisdiction over the accident. For example, although it appears that the road was open to the public, it is not clear whether the road was on land owned by the mine operator. Ownership may be an important issue of fact. It is also not clear whether this road also leads to non-mining related properties or whether it is primarily used to gain access to the mine. It appears from the photographs submitted by the Secretary that the “gateposts” referred to by Cox Transport may be nothing more than two posts set into the ground on either side of a road. Cox Transport puts great significance on the fact that the accident occurred outside these gateposts, but is not clear how these gateposts relate to the road in question and whether they have any real significance. Cox Transport’s argument that the area where the accident occurred was “not part of the ‘parcel’ of land on which the pit, crusher, and scale house were located” is unclear. Mine Act jurisdiction has never been analyzed by reviewing land, parcel by parcel, to determine which individual parcels fit within the definition in section 3(h). A facility is considered as a whole when determining whether it is a mine.

I find that Cox Transport has not established the two prerequisites to granting summary decision set forth in Commission Rule 67(b): that there are no genuine issues of material fact and that Cox Transport is entitled to summary decision as a matter of law. As stated above, there are a number of genuine issues of material fact. In addition, even if I accept all of the facts presented by Cox Transport, I cannot hold that Cox Transport is entitled to summary decision as a matter of law because the record is not complete. For the same reason, I cannot grant Cox Transport a judgment on the pleadings under *Fed. R. Civ. P. 12(c)*.

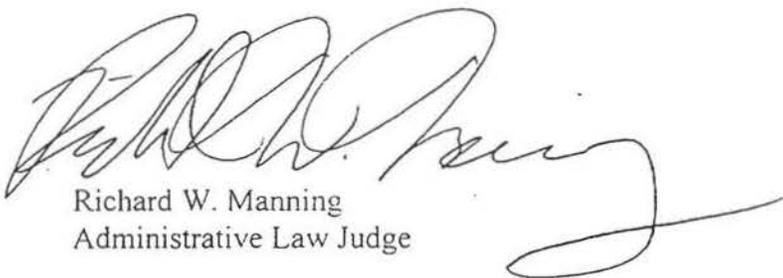
In denying the motion, I do not hold that the Secretary has jurisdiction over the accident site. I only determine that I need additional facts to resolve the jurisdictional issues presented in these cases with the result that summary disposition is not appropriate. Accordingly, Cox Transport’s motion to dismiss and for summary decision is **DENIED**.

Cox Transport also separately challenges the validity of Citation No. 7911846, which alleges that Cox Transport failed to notify MSHA of the accident. As stated above, Cox Transport notified Utah-OSHA and it contends that such notification was all that was required. Cox Transport maintains that MSHA did not claim jurisdiction until six days after the accident, after Utah-OSHA released the accident scene. Cox Transport asks that the citation be vacated because it was not trying to hide the accident from MSHA and Utah-OSHA had an obligation to notify MSHA if it did not have jurisdiction.

Although Cox Transport characterizes this challenge as separate from its jurisdictional

challenge, it is really intimately tied to the jurisdictional challenge. If, after the hearing, I find that MSHA did not have jurisdiction, then this citation will be vacated. If, on the other hand, I find that MSHA did have jurisdiction, whether the citation should be vacated will depend on many factors that are not in the record at this time. The OSHA/MSHA Interagency agreement does not necessarily resolve the issue. For example, in some states the state OSHA agency has concurrent jurisdiction over mines and the OSHA/MSHA agreement may not apply to Utah-OSHA in any event. Cox Transport has not established that it is entitled to summary decision under Commission Rule 67(b) or a judgment on the pleadings under *Fed. R. Civ. P.* 12(c).

In denying the motion, I do not hold that the Citation No. 7911846 is valid. I only determine that I need additional facts to resolve the issues presented with the result that summary disposition is not appropriate. Accordingly, Cox Transport's motion to vacate Citation No. 7911846 is **DENIED**. The hearing will commence at 9 a.m. on May 30, 2000, in Salt Lake City, Utah, as previously scheduled.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 6, 2000

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 99-196
Petitioner : A.C. No. 42-02113-03539

v. : Willow Creek Mine

PLATEAU MINING CORPORATION, :
Respondent :

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Petitioner :

v. :

JOHN A. PESARSICK, employed by : Docket No. WEST 99-422
Plateau Mining Corp., : A.C. No. 42-02113-03546 A
Respondent :

JOHN D. TRACKEMAS, employed by : Docket No. WEST 99-423
Plateau Mining Corp., : A.C. No. 42-02113-03547 A
Respondent :

KELLY BURNHAM, employed by : Docket No. WEST 99-446
Plateau Mining Corp., : A.C. No. 42-02113-03545 A
Respondent :

**ORDER GRANTING THE SECRETARY OF LABOR'S
MOTION FOR PARTIAL SUMMARY DECISION**

These proceedings involve one citation issued by the Secretary of Labor under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C § 814(d)(1) alleging a violation of 30 C.F.R. § 75.363(b).¹ The parties entered into stipulations and asked that I determine whether Plateau Mining Corporation ("Plateau") violated the safety standard based on

¹ Docket No. WEST 99-196 also involved two section 104(a) citations, but by order dated January 10, 2000, I approved the parties' proposed settlement of those citations.

the stipulated facts. The parties state that whether a violation occurred is basically a legal issue because the facts surrounding the alleged violation are not disputed. I agree that the issue presented by the parties can be resolved based on the stipulations, the pleadings, and the arguments of the parties. For the reasons set forth below, I find that the Secretary established a violation. This order does not resolve these cases because I do not make any findings or conclusions with respect to the civil penalty criteria, the unwarrantable failure allegation, or the allegation that the individual respondents knowingly authorized, ordered, or carried out the violation.

I. CITATION, SAFETY STANDARD, AND STIPULATED FACTS

Citation No. 7625090, issued September 1, 1998, states, in pertinent part:

The On-Shift Mine Examiner for the D-1 Long Wall 001-0 MMU, Willow Creek Mine, Kelly Burnham, Long Wall Foreman, on 8/26/1998, during required On-Shift Examin[ations], did not list all hazardous conditions incurred. A methane/Coal Dust, and/or Hydrocarbon ignition occurred at approximately 19:30 hours on the D-1 Long Wall 001-0 face. The ignition is a hazardous condition. Hazardous condition[s], or combination of hazards existed to cause an ignition. At the end of each shift hazardous conditions shall include nature and location, and corrective action taken. The ignition lasted approximately 45-60 seconds, and extinguished by Shear's Fire Suppression system, and 10 pound Fire Extinguisher. The mine operator did not immediately contact MSHA

Section 75.363 provides, in part, as follows:

Hazardous conditions; posting, correcting and recording.

(a) Any hazardous conditions found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected....

(b) A record shall be made of any hazardous condition found. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by

the completion of the shift on which the hazardous condition is found and shall include the nature and location of the hazardous condition and the corrective action taken. This record shall not be required for shifts when no hazardous conditions are found or for hazardous conditions found during the preshift or weekly examinations inasmuch as these examinations have separate recordkeeping requirements.

Subsections (c) and (d) set out detailed record keeping requirements including who must make the record and who must countersign the record. The parties entered into the following stipulations, in pertinent part:

2. The parties are submitting these stipulations with the intention of filing cross motions for summary decision of whether a violation existed with respect to Citation No. 7625090. ... If it is found that a violation existed, the issues of the appropriate penalty for the operator and whether Messrs. Pesarsick, Trackemas, and Burnham committed knowing violations of the cited standard, would remain.

3. [T]he Secretary alleges that the operator failed to record in the on-shift book an ignition which occurred at approximately 19:30 hours on the D-1 Longwall 001-0 fact on August 26, 1998.

* * * *

5. The ignition lasted approximately 45-60 seconds and was extinguished by the longwall machine's fire suppression system and a 10-pound fire extinguisher operated by one of the operator's employees.

6. Kelly Burnham, at all relevant times, was the longwall foreman at the Willow Creek Mine and was responsible for the operation of the longwall production unit. Mr. Burnham was the individual who made the entry in the on-shift report for the longwall section on the afternoon shift on August 26, 1998. Mr. Burnham did not make an entry in the on-shift report concerning the ignition, nor did anyone else.

7. The ignition occurred during the afternoon shift on August 26, 1998. That shift worked from about 2:00 p.m. until midnight. Burnham was not in the vicinity of the ignition when it occurred.

8. Mr. Burnham was not present on the longwall face when the ignition referenced in the citation occurred. He was in the bleeder entries at the time. When he returned to the face, the longwall crew reported to him that an ignition of some sort had occurred, but Mr. Burnham did not observe the ignition.

9. Jack Trackemas was the mine manager at the Willow Creek Mine.

10. Mr. Trackemas first learned of the ignition late in the evening of August 26, 1998, but prior to the end of the afternoon shift, through a telephone call from Mr. Pesarsick.

11. John Pesarsick, at all relevant times, was the shift supervisor at the Willow Creek Mine.

12. Mr. Pesarsick was on the surface in the Conspec Room when the longwall headgate shearer operator reported that an ignition had occurred around the tailgate of the longwall.

13. Mr. Trackemas, Mr. Pesarsick, and Mr. Burnham are "certified persons" as that term is used in 30 C.F.R. § 75.363(b). They agree that any decision in these matters upon summary decision as to the fact of violation with respect to Citation No. 7625090 would apply to them in Docket Nos. WEST 99-422, 99-423, and 99-446. They do not agree that, if a violation is found to have existed, that they knowingly authorized, ordered, or carried out any violation found to have occurred.

14. In conclusion, the parties submit that the issue of whether a violation occurred is a legal issue; specifically, whether "found" as used in the cited standard (30 C.F.R. § 75.363(b)) encompasses circumstances where a hazardous condition becomes known to a certified person by a report or whether "found" is limited to circumstances where the hazardous condition is personally observed or discovered by the certified individual.

II. SUMMARY OF THE PARTIES' ARGUMENTS

The Secretary contends that three certified persons at the mine found a hazardous condition that had not been reported in the preshift or weekly examination books and they failed to report it in the required record book, hereinafter, the "on-shift book." The hazardous condition was the ignition in the longwall that occurred at about 19:30 on August 26, 1998.

The Secretary maintains that the language of the safety standard makes clear that the certified person does not have to personally observe the hazardous condition in order for the requirements of the safety standard to apply. The Secretary argues that if a miner tells a certified person about a hazardous condition at a mine, the certified person must record the hazard in the on-shift book, if he agrees with the miner that the condition presented a hazard. She contends that, in this case, all three certified persons became aware of the hazardous condition before the end of the shift and that a violation occurred because the condition was never recorded in the on-shift book. The Secretary notes that there is no indication in this case that Plateau failed to record the condition because it did not consider the condition to be hazardous. Rather, the operator did not record the hazardous condition because no certified person personally observed the condition.

The Secretary also contends that the preamble to the regulation supports her interpretation that the word “found” in the safety standard does not require personal observation by the certified person. She argues that the interpretation urged by Plateau is directly contrary to the intent of the standard which is to prevent injuries by requiring the posting and recording of hazardous conditions to ensure that it is corrected.

Plateau maintains that the language of the standard only requires the reporting of incidents that are “found” by the designated mine officials. That is, unless one of the certified persons set forth in subsection (a) of the standard finds the hazardous condition, the condition is not required to be recorded in the on-shift book. It argues that its interpretation is supported by the posting requirement because the certified person must be at the site of the hazardous condition to either post the hazard or to take steps to have the condition immediately corrected. Plateau also points to the preamble to the regulation to support its argument. Plateau contends that the Secretary’s interpretation of 75.363 must be rejected because it is at variance with the plain language of the standard.

III. DISCUSSION WITH CONCLUSIONS OF LAW

The issue in this case revolves around the meaning of the word “found” in subsections (a) and (b) of the safety standard. It appears that this is an issue of first impression. The regulation states that any hazardous condition “found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons” must be posted and a record of the condition and corrective action must be made in the on-shift book. For purposes of this order, I will use the term “certified persons” when referring to this list of persons. The standard does not say who must first discover the hazardous condition. In most cases, if a miner first discovers a hazardous condition, he would likely report it to a certified person, who would then go examine the condition. If, in that situation, the certified person determines that the condition is hazardous, I believe that the standard requires that the condition be recorded. The mere fact that someone other than a certified person first discovered the condition would be irrelevant. Because of the nature of the hazardous condition in this case, a certified person did

not personally observe the condition. I believe that this fact should not defeat the purpose of the standard.

I agree with Plateau that the word “found” as used in subsection (a) of the standard is ambiguous, especially because it is followed by the titles of very specific individuals to whom the term is to be applied. Thus, I do not agree with the Secretary that the regulation is clear on its face. The word “found” is fraught with difficulty because it can be used in so many different ways. The term “find” has an adjudicatory meaning, it can mean “to happen upon,” or it can mean to “learn” or “discover.” The term is too ambiguous to have a clear meaning in the context of the safety standard.

If the terms of a safety standard are ambiguous, the Commission must defer to the Secretary’s reasonable interpretation of the regulation, unless it is plainly erroneous or inconsistent with the regulation. *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *Island Creek Coal Co.*, 20 FMSHRC 14, 18 (January 1998). The legislative history of the Mine Act provides that “the Secretary’s interpretations of the law and regulations shall be given weight both by the Commission and the courts.” S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 637 (1978). I conclude that the Secretary’s interpretation is reasonable and is consistent with the objectives of the Mine Act.

The fact that none of Plateau’s certified persons observed the ignition because they were not in the longwall face at the time does not mitigate the need to record the incident in the on-shift book. They were informed of the ignition before the end of the shift and Mr. Burnham made at least one entry in the on-shift book that day, but he did not record the ignition. The on-shift book, along with the records for the pre-shift and weekly examinations, provides important information to mine operators. This information can be used to improve the safety and health of miners. These books can also be used by MSHA to monitor conditions at a mine. Whether a hazard is recorded in the on-shift book should not depend upon the location of an operator’s certified persons at the time of the incident.

Plateau relies on the posting requirement in subsection (a) to support its argument. It contends that if the certified person is not present when the hazardous condition is found he cannot post the area to prevent entry or immediately correct the condition so the hazard no longer exists. This argument is not well taken. As stated above, in most instances once the hazardous condition is reported to the certified person, he can go to the area and take whatever remedial measures are necessary. In the instant case, the issue as to whether the hazardous condition required posting is not before me. In any event, a certified person could have traveled to the longwall face and made that determination.

Each party relies on the regulatory history of the standard to support its position. When the standard was first proposed, the first sentence of subsection (a) read, in pertinent part: “Any

hazardous conditions found by, or reported to, the mine foreman” (59 *Fed. Reg.* 26396, May 19, 1994)(emphasis added). Plateau contends that the deletion of the highlighted language evidences the Secretary’s clear intent that if a hazardous condition is reported to a certified person rather than observed by the certified person, it need not be recorded in the on-shift book.

I find that the preamble provides an explanation for this change. Several comments that were filed with MSHA suggested that the “or reported to” language in the proposal could be interpreted to mean that the certified person would be required to record and post the condition even if he did not believe that a hazard was present. The preamble states:

Under the proposal, hazardous conditions reported to [certified persons] would have required posting. Commenters suggested that requiring [the posting of] hazardous conditions “reported to” these individuals would eliminate the judgment of the persons responsible for making decisions about whether or not a hazardous condition exists. One commenter suggested that the requirement, as proposed, could undermine the integrity of the certified person.

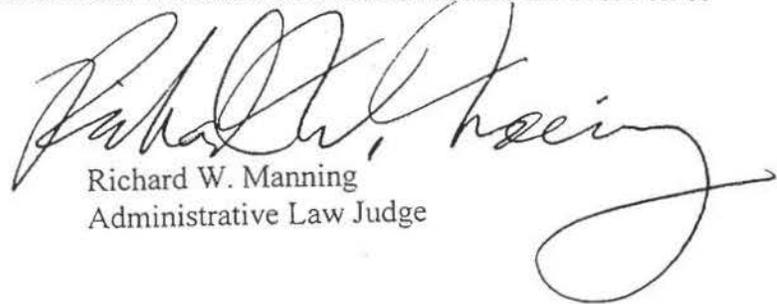
(61 *Fed. Reg.* 9802, March 11, 1996). The proposal was revised to delete the “or reported to” language based on these comments. The preamble goes on to state: “MSHA would expect that when a hazardous condition is reported to these certified persons, that the measures necessary to evaluate the situation and, if necessary, comply with the provisions of this section would be taken.” *Id.*

I conclude that the preamble supports the Secretary’s interpretation of the standard. The “as reported to” language was removed to make clear that it is the certified person who decides whether a hazardous condition exists, not individual miners. I reject Plateau’s argument that this language was removed because MSHA “did not want to require the recording of hazardous incidents that are ‘reported to’” certified persons. (P. Motion 8). Plateau also relies upon the language in the preamble that states that “MSHA would expect” certified persons to evaluate a condition reported to them so they can determine if the requirements of the standard “would be taken.” It maintains that the “would expect” language shows that MSHA merely entertained a “hope” that mine operators would post and record hazardous conditions reported to a certified person. *Id.* I hold that the use of the word “expect” does not detract from the Secretary’s interpretation of the standard. The preamble makes clear that she requires conditions that are reported to a certified person to be recorded and posted or corrected if the certified person determines that a hazardous condition was present.

I find, based on the stipulations and pleadings, that there is no genuine issue as to any material fact and that the Secretary is entitled to partial summary decision on the issue presented to me. The issue presented is whether Plateau violated section 75 75.363(b) as alleged in Citation No. 762090 and my finding in this regard applies to the individual respondents.²

IV. ORDER

Based on above, the Secretary's motion for partial summary decision is **GRANTED** and Plateau's motion for summary decision with respect to Citation No. 762090 is **DENIED**. The parties shall confer for the purpose of attempting to resolve the remaining issues. If a settlement cannot be reached, the parties shall discuss proposals for resolving the remaining issues. In either event, counsel for the Secretary shall initiate a conference call to discuss the cases on or before **April 21, 2000**.



Richard W. Manning
Administrative Law Judge

² In its response to the Secretary's motion for partial summary decision, Plateau states:

Respondents did not stipulate that the ignition was specifically a "hazardous condition" as contemplated by the standard. It occurred and was immediately extinguished. A question exists as to whether an already corrected condition constitutes a "hazardous condition" for the purpose of the standard.

(P. Response 3, n. 2). If it is Plateau's position that it did not violate the safety standard even if a certified person found the cited ignition, as the term "found" is interpreted by Plateau in this case, then the stipulations and cross-motions for summary decision serve no purpose. If Plateau believes that the ignition did not create a hazardous condition, then whether a certified person was present at the time of the ignition is irrelevant. Although Plateau did not specifically stipulate that the ignition presented a hazardous condition, it did stipulate that the stipulations and cross-motions were filed so that the judge could determine "whether a violation existed with respect to Citation No. 7625090." (Stip. 2). It further stipulated that "[i]f it is found that a violation existed, the issues of the appropriate penalty for the operator and whether Messrs. Pesarsick, Trackemas, and Burnham committed knowing violations of the cited standard, would remain." *Id.* Finally, the parties stipulated that "the issue of whether a violation occurred is a legal issue" involving an interpretation of the word "found." (Stip. 14). There is no indication that, if I grant the Secretary's motion for summary decision, Respondents could then challenge the citation in subsequent proceedings on the basis that no hazardous condition existed. Such an interpretation is at odds with the terms of the stipulations that I decide whether there was a violation based on the stipulated facts and cross-motions.

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