APRIL 2005

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

APRIL 2005

No cases were filed in which Review was granted during the month of April

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

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

April 18, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 2005-51-M
JAMES CARNEY CONSTRUCTION	:	

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

DIRECTION FOR REVIEW AND ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On January 28, 2005, Chief Administrative Law Judge Robert Lesnick issued to James Carney Construction ("Carney") an Order to Show Cause for failing to answer the Secretary of Labor's petition for assessment of penalty. On March 21, 2005, Chief Judge Lesnick issued an Order of Default dismissing this civil penalty proceeding for failure to respond to the show cause order.

On March 28, 2005, the Commission received a handwritten correspondence from Carney's owner, Jim Carney, which we construe to be a timely petition for discretionary review. In that petition, Jim Carney states that he did not receive the show cause order and that he opposes the citation on the merits. Letter at 1. The Secretary does not oppose the petition for review and states that the case should be remanded to the judge so that the parties can litigate whether there was a violation.

The judge's jurisdiction over this case terminated when he issued his decision on March 21, 2005. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Carney's correspondence to be a timely filed petition for review, which we grant. *See, e.g., Middle States Res., Inc.*, 10 FMSHRC 1130 (Sept. 1988).

In evaluating requests to reopen final orders, the Commission has found guidance in Rule 60(b) in the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of inadvertence or mistake. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Highlands Mining & Processing Co.*, 24 FMSHRC 685, 686 (July 2002). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Based on the present record, it is not clear whether Carney received the show cause order. In the interest of justice, we vacate the judge's March 21 order and remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Carney's failure to timely respond to the judge's show cause order, and for further proceedings as appropriate. *See RBS, Inc.*, 26 FMSHRC 751 (Sept. 2004).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Direction

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

April 20, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. SE 2005-182
v.	:	A.C. No. 01-01322-47081
JIM WALTER RESOURCES, INC.	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 3, 2005, the Commission received from Jim Walter Resources, Inc. ("JWR") a letter from the company's counsel that we construe as a motion to reopen a penalty assessment that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On January 4, 2005, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a proposed penalty assessment (A.C. No. 01-01322-47081) to JWR's No. 5 Mine in Tuscaloosa, Alabama. In its motion, JWR states that it received MSHA's proposed assessment on January 14, 2005, and that on February 7, 2005, it placed in the mail a contest of several of the orders and citations included in the proposed assessment. Mot. at 1. JWR asserts, however, that the contest was mistakenly sent to the Department of Labor's Division of Coal Mine Worker's Compensation rather than MSHA's Office of Assessments. *Id.* The contest was returned to JWR by February 14, 2005, but by that time, the proposed assessment had become a final Commission order. *Id.* The Secretary states that she does not oppose JWR's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

April 20, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2005-216-M
v.	:	A.C. No. 05-00438-47837
DICAPERL MINERALS CORPORATION	:	

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On March 8, 2005, the Commission received from Dicaperl Minerals Corporation ("Dicaperl") a motion made by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On September 3, 2004, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Citation No. 6300457 to Dicaperl's El Grande Plant in Antonito, Colorado. Dicaperl timely contested the citation, which is currently the subject of Docket No. WEST 2004-511-RM, on stay before Commission Administrative Law Judge Richard Manning. On January 12, 2005, MSHA issued to Dicaperl a proposed penalty assessment for Citation No. 6300457 (A.C. No. 05-00438-47837). In its motion, Dicaperl states that the proposed assessment was subsequently misplaced and was not forwarded to counsel in time for the proposed penalty to be timely contested. Mot. at 2. The Secretary states that she does not oppose Dicaperl's request for relief.

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

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

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

April 26, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. EAJ 2002-2
GEORGES COLLIERS, INCORPORATED	:	

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

DECISION

BY THE COMMISSION:

This case involves an application for an award of attorney's fees and other expenses by Georges Colliers, Inc. ("GCI"), pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, on the grounds that the Secretary of Labor's demands were substantially in excess of the decision of the judge and unreasonable when compared to that decision. The matter was previously before the Commission, which vacated and remanded the decision of the administrative law judge. *Georges Colliers, Inc.*, 26 FMSHRC 1 (Jan. 2004) ("*Georges Colliers I*"), *vacating and remanding* 24 FMSHRC 572 (June 2002) (ALJ) ("*ALJ I*"). On remand, the judge concluded that the penalties proposed by the Secretary were neither excessive nor unreasonable and that, therefore, GCI was not entitled to fees under the EAJA. *Georges Colliers, Inc.*, 26 FMSHRC 371, 376 (Apr. 2004) (ALJ) ("*ALJ II*"). GCI appealed the judge's determination, and the Commission issued a direction for review limited to the issues raised by the judge's remand decision.

I.

Factual and Procedural Background

A. The Mine Act Proceeding

GCI began operations in the early 1990's when it took over three coal mines of two financially troubled Oklahoma coal operators. 26 FMSHRC at 2. In 1998, Craig Jackson became GCI's president. *Id.* A more complete summary of the background facts is found in the judge's decision in the underlying Mine Act proceeding. *Georges Colliers, Inc.*, 23 FMSHRC 1346 (Dec. 2001) (ALJ).

The inspections giving rise to the Mine Act proceeding began in November 1998 and continued until July 2000. *See id.* at 1392-1416. Ultimately, the Mine Act proceeding involved more than 50 dockets that included 559 citations issued between 1998 and 2000.[1] 26 FMSHRC at 2. GCI stipulated with the Secretary to all issues raised by the citations and penalties except whether the amount of the proposed penalty assessments would affect GCI's ability to continue in business. *Id.* Subsequently, a hearing was held on this issue on April 10-12, 2001. *Id.*

After weighing all the penalty criteria and the evidence relating to the effect of the proposed penalties on GCI's ability to continue in business, the judge assessed penalties totaling $72,398, reduced from the Secretary's proposed penalties of $332,701. *Id.* at 1395, 1416. Neither GCI nor the Secretary appealed the judge's decision to the Commission.

B. The EAJA Proceeding ("*ALJ I*")

On January 25, 2001, GCI filed its Application for Fees and Expenses in the amount of $45,019.36, pursuant to 5 U.S.C. § 504(a)(4). 26 FMSHRC at 3; GCI EAJA Appl. at 10. In support of its application, GCI asserted that the Secretary's demands were excessive, as evidenced by the judge's 77% to 80% reductions in the Secretary's proposed penalties, and unreasonable when compared to the judge's decision.[2] The Secretary opposed the application,

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[1] Also included in the Mine Act proceeding were nine civil penalty assessments issued to three agents of GCI who were charged under section 110(c), 30 U.S.C. § 820(c), for knowingly violating various safety standards. 26 FMSHRC at 2. The violations and penalties associated with these individuals are no longer involved in the EAJA proceeding. *Id.* at 5 n.4.

[2] Section 504(a)(4) of EAJA 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*

stating that GCI did not submit financial information during the penalty assessment phase of the proceeding. Sec. Opp'n to Appl. at 1-2. The Secretary asserted that during subsequent settlement negotiations GCI requested either complete removal of penalties or imposition of nominal penalties, neither of which were permitted under the Mine Act. *Id.* at 2-3. The Secretary further argued that the applicants committed willful violations of the Mine Act and acted in bad faith. *Id.* at 5-8. Finally, the Secretary argued that penalties were not unreasonable when compared with the judge's decision and that demands by the Mine Safety and Health Administration ("MSHA") were not substantially in excess of the penalties assessed. *Id.* at 8-17.

The judge denied the EAJA application on June 14, 2002. 24 FMSHRC at 578. GCI filed a petition for discretionary review of the judge's decision and we granted that petition.

C. The Commission's Decision ("*Georges Colliers I*")

The Commission vacated the judge's decision and remanded the proceeding for further consideration. 26 FMSHRC at 16. The Commission concluded that the judge had applied the incorrect legal test of "substantial justification," rather than evaluating the Secretary's penalty proposals under section 504(a)(4) of EAJA, 5 U.S.C. § 504(a)(4), to determine whether they were excessive and unreasonable.[3] *Id.* at 8-9. On remand, the Commission instructed the judge to determine whether the Secretary's proposed penalties were "substantially in excess" of the penalties finally assessed in the Mine Act proceeding. *Id.* at 9-10. The Commission further instructed the judge to consider whether the government's demand was reasonable when compared with the judge's decision in the Mine Act proceeding. *Id.* at 10-11. Guided by its decision in *L & T Fabrication & Constr., Inc.*, 22 FMSHRC 509 (Apr. 2000), the Commission stated that, in examining the reasonableness of the Secretary's demand, a judge must ascertain whether she matched the penalties "to the actual facts and circumstances [of] the case." *Id.* at 11 (citation omitted). The Commission directed the judge on remand to consider whether the Secretary responded to GCI's submission of financial data indicating whether GCI's payment of the proposed penalties would have affected its ability to remain in business. *Id.* at 14. Finally,

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> *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).

[3] The Commission noted that this proceeding involved only the second claim presented to it under the 1996 amendments to EAJA, the first claim being one decided by the Commission in *L & T Fabrication & Constr., Inc.*, 22 FMSHRC 509 (Apr. 2000). 26 FMSHRC at 8.

the Commission instructed the judge, in the event that he determined the proposed penalties were excessive and unreasonable, to examine whether GCI committed willful violations or acted in bad faith, or whether special circumstances made an award unjust. *Id.* at 15.

D. The Judge's Decision on Remand ("*ALJ II*")

In his decision, the judge initially addressed whether, under the Commission's decision in *L & T Fabrication*, the proposed penalties were substantially in excess of the amounts ultimately imposed. 26 FMSHRC at 372. He noted that he ultimately reduced the proposed penalties by 78% but that "more than the reduction and the proposed assessments must be considered." *Id.* at 373. He further stated that he had to consider the context in which the penalty proposals arose and were litigated, noting that the Secretary reduced her proposed penalties by 50% following GCI's submission of documentary evidence concerning its financial status. *Id.* With regard to the settlement offer, the judge noted that he had refused to rely on "undocumented" settlement offers in his prior decision, but that on remand there was no question that the Secretary had made the offer, as evidenced by GCI counsel's letter rejecting the offer. *Id.* at 374 n.5. Considering the settlement offer, the judge concluded that the government's "demand" was reduced by 43%, which did not establish a substantial disparity between the demand and the final assessments. *Id.* at 373-74. The judge reiterated a finding from his prior decision that the Secretary did not propose onerous penalties in order to extract a speedy settlement. *Id.* at 374. The judge concluded that the proposed penalties were not substantially in excess of the assessed penalties. *Id.*

In addition to finding that the proposed assessments were not substantially in excess of the assessed penalties, the judge addressed whether the proposed penalties were reasonable. *Id.* The judge reviewed GCI's submission of financial data during the penalty proposal process and the Secretary's response to determine whether the Secretary acted reasonably in proposing a penalty reflective of "the actual facts and circumstances of the case." *Id.*, quoting *L & T Fabrication*, 22 FMSHRC at 514. Then, the judge examined the procedures in the Secretary's *Program Policy Manual* ("*PPM*"), which set out a process that provides an operator the opportunity to submit financial data to MSHA to determine whether proposed penalties should be reduced. 26 FMSHRC at 374. The judge noted that, by letter dated June 27, 2000, GCI submitted financial data and requested that MSHA review the company's financial status with regard to three citations and all other outstanding proposed assessments. *Id.* at 374-75. The judge found that the letter was timely with respect to only a few of the proposed assessments. *Id.* at 375. The judge further found that there was no evidence that MSHA's Assessment Office responded, as required by the *PPM*. *Id.* However, the judge concluded that the Secretary followed the "spirit" of the *PPM* by reviewing the data and proposing a 50% reduction in the proposed penalties in a settlement offer. *Id.*

In sum, the judge concluded that the Secretary's offer to settle represented a reasonable effort to match the penalties to the facts and circumstances and that the offer was a logical and efficient way for the Secretary to respond. *Id.* The judge noted that, while the Secretary's

reduction was not as great as the reduction he ordered, he had the benefit of sworn hearing testimony that was unavailable to the Secretary and that he had to consider other penalty criteria. *Id.* at 375-56. For these reasons, the judge concluded that the penalties the Secretary "effectively" proposed were reasonable. *Id.* at 376.

Finally, the judge addressed whether GCI should be denied an award because it committed willful violations or acted in bad faith. *Id.* at 376 n.7. The judge rejected the Secretary's position that the number of unwarrantable and significant and substantial (S&S) violations, in addition to its history of prior violations, was evidence of "willful . . . bad faith actions." *Id.* The judge further noted that GCI counsel's conduct did not make an award unjust because she used the hearing to make her case that GCI's financial condition warranted larger penalty reductions than the Secretary was prepared to offer. *Id.* The judge concluded that counsel's "conduct was not such as to bar an otherwise valid award." *Id.*

II.

Disposition

GCI initially argues that the proposed penalties of $332,701 were substantially in excess of the assessed penalties, totaling $72,398 – a reduction of 78%. GCI Br. at 4. GCI further argues that the Secretary's adherence to the proposed penalties, in light of GCI's financial hardship, was unreasonable. *Id.* at 3-6. GCI asserts that it was instructed to send financial documents to MSHA but that the agency never responded. *Id.* at 7-8. GCI asserts that it should not be barred from fees for committing willful violations because it was never charged under section 110(d) of the Mine Act, 30 U.S.C. § 820(d).[4] *Id.* at 11-12. GCI continues that it did not act in bad faith, either in its conduct giving rise to the violations or in its conduct during litigation. *Id.* at 13. Finally, it asserts that there are no special circumstances that would justify the denial of an award, noting particularly that it would have accepted a settlement offer reducing the proposed penalties by 50% had the Secretary made such an offer. *Id.* at 13-14.

The Secretary asserts that her demand in this proceeding was not excessive and that the judge correctly considered the Secretary's 50% settlement offer as her demand. S. Br. at 16-17. The Secretary argues that substantial evidence supports the judge's finding that the Secretary made a settlement offer of 50% of the proposed penalties. *Id.* at 20-25. The Secretary further argues that the penalty proposals were reasonable. *Id.* at 26-33. The Secretary asserts that the procedures in the *PPM* are not binding on her, and, even if they were, she was not required to reduce the proposed penalties based on the financial information submitted by GCI. *Id.* at 33-34. The Secretary also contends that GCI failed to comply with the procedures in the *PPM* and, alternatively, that GCI submitted financial data to MSHA through an informal procedure and that the Secretary responded to her consideration of that data with the settlement offer. *Id.* at 34-37.

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[4] Section 110(d) provides for criminal sanctions for, inter alia, "[a]ny operator who willfully violates a mandatory health or safety standard." 30 U.S.C. § 820(d).

The Secretary concludes by contending that special circumstances make an award unjust and supports her position by pointing to the extensive number of citations and GCI's conduct during litigation of the case. *Id.* at 42-46. The Secretary argues that this proceeding is the type of case that Congress meant to exclude from an EAJA award. *Id.* at 42. The Secretary continues that, because GCI's conduct reflects an attitude that it could repeatedly violate safety and health standards with impunity because of its financial condition, the case embodies the special circumstances that preclude an EAJA award. *Id.* at 44.

In disposing of GCI's EAJA application, we begin by noting that there are three issues before the Commission: whether the Secretary's penalty proposals were substantially in excess of the decision of the administrative law judge; whether the proposed penalties were unreasonable when compared with the judge's decision; and whether special circumstances make an award unjust. *See George Colliers I*, 26 FMSHRC at 8-15; *ALJ II*, 26 FMSHRC at 372-76 & n.7. GCI must prevail on whether the proposed penalties were both excessive and unreasonable when compared to the judge's final decision. If GCI prevails on those two issues, it still must prevail on the issue of whether special circumstances would make an award of fees unjust.[5]

A. Special Circumstances Make an Award Unjust

In *Georges Colliers I*, the Commission noted that GCI committed 559 violations that repeatedly endangered the lives and safety of its miners, including 272 violations stipulated to be S&S, and that 39 violations were the result of its unwarrantable failure. 26 FMSHRC at 15. On remand, the judge stated, "[W]ere I required to rule, I would reject the Secretary's argument that the stipulated number of violations . . . evidence GCI's 'willful . . . bad faith actions.'" 26 FMSHRC at 376 (citations omitted). Thus, the judge reviewed the violations to determine whether GCI acted willfully or in bad faith; however, he did not consider GCI's pattern of violations in relation to the special circumstances exception. In examining GCI's conduct, we conclude that the judge considered GCI's history of violations too narrowly.

Section 504(a)(4) of EAJA states that a party who has been subjected to an excessive and unreasonable government demand is entitled to fees and expenses related to defending against the demand "unless the party has committed a willful violation of the law or otherwise acted in bad faith, or special circumstances make an award unjust." 5 U.S.C. § 504(a)(4). While the 1996 amendments were designed to prevent the government from issuing a high demand as a way of pressuring small entities to agree to quick settlements, Congress also wanted "to ensure that the government is not unduly deterred from advancing its case in good faith." 142 Cong. Rec. S3242, S3244 (1996) (statement of Senator Bond). One way in which Congress did this was to exclude an award when special circumstances are present. *Id.* These special

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[5] Nothing in the analytical framework of section 504(a)(4) dictates that these issues enumerated must be addressed sequentially as they appear in the statute. *See L & T Fabrication*, 22 FMSHRC at 515 (Commission disposed of an application on the basis that the Secretary's penalty proposal was not unreasonable without resolving whether the proposal was excessive).

circumstances "are intended to include both legal and factual considerations which may make it unjust to require the public to pay attorneys fees even in situations where the ultimate award is significantly less than the amount demanded."[6] *Id.* "Special circumstances could include instances where the party seeking fees engaged in a flagrant violation of the law, endangered the lives of others, or engaged in some other type of conduct that would make the award of fees unjust." *Id.*

The special circumstances exception in section 504(a)(4) has its genesis in 5 U.S.C. § 504(a)(1) and 28 U.S.C. § 2412(d)(1)(A). Section 504(a)(1) provides that, in an administrative adjudication, a party that prevails in an action brought by the agency shall be awarded fees and other expenses "unless . . . the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1). Section 2412(d)(1)(A) provides for an identical special circumstances exception to a fee award in proceedings in federal court when a party prevails over the government and the position of the government is not substantially justified. 28 U.S.C. § 2412(d)(1)(A). These sections, which predated the passage of the 1996 amendments to EAJA and apply only to prevailing parties, offer additional guidance to the meaning and application of the special circumstances exception in section 504(a)(4).

The House Report that accompanied EAJA, when it was enacted in 1980, stated the following with regard to the special circumstances exception to awards to prevailing parties in section 504(a)(1) and section 2412(d)(1)(A):

> Furthermore, the Government should not be held liable where "special circumstances would make an award unjust." This "safety valve" helps to insure that the Government is not deterred from advancing in good faith the novel but credible extensions and interpretations of the law that often underlie vigorous enforcement efforts. *It also gives the court discretion to deny awards where equitable considerations dictate an award should not be made.*

H.R. Rep. No. 96-1418, at 11 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4953, 4990 (emphasis added).

Several courts have addressed whether prevailing parties were precluded from recovering fees under the special circumstances provision in 28 U.S.C. § 2412(d)(1)(A). In *Oguachuba v. INS.*, 706 F.2d 93, 99 (2nd Cir. 1983), the court denied fees to an applicant who successfully challenged his incarceration by the Immigration and Naturalization Service ("INS"), stating, "In viewing applications for such awards in the context of general equitable principles, we are not required to limit our scrutiny to a single action or claim on which the applicant succeeded but

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[6] In his remarks, Senator Bond also stated: "Since there will not be a conference report on [EAJA], this statement and a companion statement in the House should serve as the best legislative history of the legislation as finally enacted." 142 Cong. Rec. S3242.

must view the application in light of all the circumstances." The court was particularly influenced by the fact that, although the applicant had successfully won his release from the INS through a habeas corpus action, he had repeatedly violated U.S. immigration laws prior to his incarceration. *Id.* The court concluded, "In classic equity terms, Oguachuba is without clean hands." *Id.*

In analyzing special circumstances under section 2412(d)(1)(A), another court has commented that the "theme of 'unclean hands' pervades the jurisprudence of 'special circumstances' under EAJA." *Air Transport Assoc. of Canada v. FAA*, 156 F.3d 1329, 1333 (D.C. Cir. 1998). *See also U.S. Dept. of Labor v. Rapid Robert's, Inc.*, 130 F.3d 345, 347-49 (8th Cir. 1998) (court denied attorney's fees to a prevailing party that committed statutory violations but was relieved of paying penalties because the agency's implementing regulations were invalidated); *Taylor v. U.S.*, 815 F.2d 249, 252-54 (3rd Cir. 1987) (court denied attorney's fees to a prevailing party who took advantage of government misconduct that he later successfully challenged and that became the basis for his EAJA claim).

Here, GCI committed 559 violations involving penalties that were at issue in the Mine Act proceeding. In addition, GCI had committed over 384 violations during the 2-year period prior to the proceeding that gave rise to the EAJA application. 23 FMSHRC at 1391. The judge concluded that this was "a large history" for a small operator. *Id.* at 1392. In the Mine Act proceeding, 272 of the 559 violations were stipulated to be S&S, and 39 of the violations were stipulated to be due to GCI's unwarrantable failure. In addition, there were nine citations in which supervisory agents of GCI were found to have knowingly engaged in violations of standards. *Id.* at 1356-86.

We conclude that GCI's record of violations brings this proceeding well within the special circumstances exception to section 504(a)(4). GCI's conduct reflects "flagrant violation[s]" of the Mine Act over an extended period that resulted in numerous violations that frequently "endangered the lives" of its miners, as evidenced by the S&S designations of a substantial number of citations. In short, GCI's conduct is the type of misconduct that Congress deemed sufficient to disqualify an applicant from an award.

Further, based on the traditional equitable principles that courts have applied to the special circumstances exception to deny fees to prevailing parties under 28 U.S.C. § 2412(d)(1)(A), denial of fees in this proceeding is further warranted because GCI, like the applicant in *Oguachuba v. INS*, 706 F.2d at 99, has "unclean hands." We note in particular GCI's extensive history of violations associated with this proceeding set forth above.

Finally, in weighing the equities in this proceeding, we can consider the nature and consequence of GCI's success in the underlying Mine Act proceeding. *See Rapid Robert's*, 130 F.3d at 349. In the merits proceeding, GCI's litigation strategy was to stipulate to the violations charged and to all the penalty criteria in section 110(i), 30 U.S.C. § 820(i), while preserving only its position to contest its ability to pay the proposed penalties and continue in business. 23

FMSHRC at 1351. Ultimately, upon considering the economic defense with the other penalty criteria, the judge reduced the proposed penalties by 78%. The court's comments on an applicant in similar circumstances in *Rapid Robert's* is instructive:

> Here, the district court relieved Rapid Robert's of over seven times the amount of penalties which actually resulted from the invalidated regulations. Rapid Robert's has reaped a windfall by escaping its duty to pay for clear violations of a valid statute. To add to that windfall by requiring the government to pay attorneys' fees and expenses would be patently unjust.

130 F.3d at 349. *Compare U.S. v. One 1997 Toyota Land Cruiser*, 248 F.3d 899, 906 (9th Cir. 2001) (under 28 U.S.C. § 2412(d)(1)(D), the judicial counterpart to section 504(a)(4), the court, in remanding for a determination of the existence of willful violations, bad faith, or special circumstances, noted that the fee applicant "has not been charged with any illegality, and she has asserted an 'innocent owner' defense"). But for its economic circumstances, GCI should justly have been held accountable for a much greater penalty, having made no allegations of its own innocence or the oppressive or abusive government conduct EAJA intended to address. We thus conclude that to grant GCI fees in the circumstances of this case would create a "windfall," as well, and that therefore we deny GCI's request for fees and costs.[7]

In *Georges Colliers I,* we established that in order to recover fees, an operator must show that the Secretary's demand was both excessive *and* unreasonable. We now address those two issues in order. While denial of GCI's EAJA application could rest solely on our determination of the special circumstances exception, the judge's decision on remand in *ALJ II*, in light of our decision in *Georges Colliers I*, merits our further consideration.

B. Whether the Proposed Assessments Were Excessive

On remand, the judge concluded that there was not a substantial disparity between the Secretary's demands and the final penalty assessments. 26 FMSHRC at 373-74. In reaching that conclusion, the judge relied on a settlement offer from the Secretary, which purportedly reduced the original assessments by 50%. *Id.* GCI appealed the judge's decision because it contends that the judge should not have relied on the 50% settlement offer. PDR at 2-6.

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[7] In light of our disposition that fees be denied because of special circumstances in the proceeding, we do not reach the issues of whether GCI acted in bad faith or engaged in willful violations.

In addressing whether the Secretary's demand was substantially[8] in excess of the penalty imposed in *Georges Colliers I*, the Commission noted that the test for evaluating the demand "should not be a simple mathematical comparison." 26 FMSHRC at 7, quoting *Joint Managers Statement of Legislative History and Congressional Intent*, 142 Cong. Rec. S3242, S3244 (Mar. 29, 1996) ("*Joint Statement*"). Further, consistent with this intent, the Commission has held that whether an applicant meets the "substantially in excess" test will depend on the facts and circumstances of each case. *L & T Fabrication*, 22 FMSHRC at 514. Finally, the Commission has considered it significant whether "the Secretary proposed an onerous penalty in order to extract a speedy settlement" because that was one of the agency practices that EAJA was designed to redress. 26 FMSHRC at 10.

In considering whether the Secretary's demand was substantially in excess of the decision of the judge, we must first identify the Secretary's "demand." In *Georges Colliers I*, the Commission rejected consideration of the Secretary's purported 50% settlement offer because, like the judge (24 FSMHRC at 576-77), the Commission was "understandably reluctant 'to delve into [the parties'] settlement discussions,' particularly given the lack of 'an undisputed, fully documented settlement proposal.'" 26 FMSHRC at 14 n.21.[9] In addition, the Commission further noted the statutory definition of "demand" at 5 U.S.C. § 504(b)(1)(F) (defining "demand" as the "express demand of the agency which led to the adversary adjudication"), and the lack of any written revised penalty proposals from the Secretary. 26 FMSHRC at 14 n.21

Notwithstanding the Commission's rejection of any consideration of settlement-related material in *Georges Colliers I*, the judge relied on the letter from GCI's counsel to the Secretary's counsel in which she refers to "the Secretary [sic] last offer to settle at the rate of fifty percent (50%)." PDR, Ex. A. The judge's consideration of this letter was in error. The Commission's prior disposition of consideration of settlement-related materials constitutes the law of the case. *See Douglas R. Rushford Trucking*, 24 FMSHRC 648, 652 (July 2002). In fact, the Secretary relied on the same letter from GCI's counsel with no docket numbers and a reference to a "ruling" from Judge Melick (rather than Judge Barbour, who presided over the Mine Act proceeding) that was before the Commission in *Georges Colliers I*.[10] *See* Sec. Opp'n

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[8] In *L & T Fabrication*, the Commission held that "substantially" when used in the phrase "substantially in excess," means "[c]onsiderable in amount, value or the like; large." 22 FMSHRC at 514 n.5 (citation omitted).

[9] The Commission's refusal to consider the purported settlement offer in *Georges Colliers I* was in connection with the reasonableness of the penalties. *Id.* at 14. However, the rationale for not considering the settlement offer in relation to the reasonableness of the offer applies with equal force to our consideration of whether the Secretary's demand was excessive.

[10] The Secretary's brief addresses the Commission's consideration of GCI's letter and whether it reflected a 50% offer as a substantial evidence question. S. Br. at 21-25. This is the sort of evidentiary review of settlement discussions that the Commission was trying to avoid in

to Appl. at 12, 15. There has been no legal or factual change in the proceeding that would warrant revisiting this issue. In short, in agreement with GCI, we conclude that the judge's consideration of the letter (26 FMSHRC at 373-374 & n.5) was in error. Any examination of the Secretary's "demand," in the circumstances of this case, should be limited to her proposed penalty assessments and those actually imposed by the judge.[11]

The instant proceeding presents an initial demand that was reduced by 78% by the judge's decision. In addition to this mathematical comparison of the Secretary's demand and the judge's decision, our analysis also includes an examination of the facts and circumstances surrounding the penalty proposals. The judge found and we agree that there is no evidence of inappropriate motivation on the part of the Secretary in proposing an initially high demand to extract a speedy settlement. 26 FMSHRC at 374. In this regard, we cannot conclude that the proposed penalties, totaling $332,701, were onerous. While the demand figure on its face is large, it represents the cumulative penalties for 559 violations accumulated over a period of 2 years.

The Secretary further argues that the Commission should look at the proposed penalty assessments individually, rather than at the total assessed penalties. S. Br. at 17-18. Examining the proposed penalties in individual dockets presents a different, but more representative, picture than does examining the penalties *in toto*. As the Secretary indicates, more than half of the citations involve penalties at the lowest level – $55 – permitted by the regulations, 30 C.F.R. § 100.4. Our examination of the total penalties has been largely driven by the fact that GCI has not sought fees for challenging penalties for individual citations. *See* GCI EAJA Appl. at 5-6. This approach was borne out of the circumstances of the underlying Mine Act proceeding in

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Georges Colliers I. While the Secretary suggests that GCI's position that the letter should not be considered is based on "[s]nippets of legislative history" (S. Br. at 26) (citation omitted), the Commission's approach to this issue in *Georges Colliers I* was based on the statutory definition of "demand" in 5 U.S.C. § 504(b)(1)(F) and sound policy reasons for not delving into parties' settlement discussions. *See* 26 FMSHRC at 14 n.21.

[11] The Secretary reiterates an argument, which was considered and rejected in *Georges Colliers I*, that the Commission should compare the penalties proposed by the Secretary ($332,701) to the maximum amounts that the Secretary was authorized by regulation to impose ($31,045,000), rather than to the penalties actually imposed by the judge ($72,298). S. Br. at 18-20 & n.6. However, the Commission considered and rejected that issue in *Georges Colliers I*. "[T]he judge erred when he compared the proposed penalties to the maximum permissible penalty. The benchmark should have been the penalties that the judge finally imposed – a figure that was substantially lower than the dollar amount he used." 26 FMSHRC at 9, citing *L & T Fabrication*, 22 FMSHRC at 514-15. Indeed, the statute is clear on this point: "the demand by the agency is substantially in excess of the decision of the adjudicative officer." 5 U.S.C. § 504(a)(4).

which GCI raised a single global defense to all of the citations issued against it.[12] 23 FMSHRC at 1351. The Secretary responded to GCI's position by initially addressing, in the EAJA proceeding, "the total proposed penalty assessments." S. Br. (*Georges Colliers I*) at 18. Notwithstanding the Commission's prior focus on the total penalties, it is also appropriate to examine individual penalty amounts. Based on our review of the individual penalties proposed at the $55 level, we conclude, for this additional reason, that those penalties are not onerous and thus do not reflect an attempt by the Secretary to propose a high penalty in order to push GCI to settlement.[13]

In sum, based on the foregoing considerations, we conclude that the Secretary's penalty proposals, when compared to the judge's decision, were not excessive and that, for this reason, GCI's EAJA application should also be denied.

C. Whether the Proposed Assessments Were Reasonable

In *Georges Colliers I*, the Commission remanded to the judge the determination whether the proposed penalties were unreasonable. More particularly, the Commission instructed the judge to determine whether the Secretary sufficiently considered evidence of GCI's ability to continue in business in light of the proposed penalties. 26 FMSHRC at 14. On remand, the judge found that GCI had not fully complied with the procedures in MSHA's *PPM* in submitting financial data; nevertheless, the judge further found that the Secretary followed the spirit of the *PPM* by responding with a settlement offer to reduce the penalties by 50%. 26 FMSHRC at 375. On appeal, GCI objects to the judge's consideration of GCI's letter that purportedly rejected the Secretary's settlement offer to reduce the proposed penalties in the merits proceeding by 50%. PDR at 5-8.

The judge again relied on the same GCI letter that was discussed in relation to whether the Secretary's demand was excessive. That reliance is equally misplaced in this prong of his analysis. Indeed, the Commission in *Georges Colliers I* directly addressed consideration of the purported settlement offer in relation to the Secretary's response to GCI's submission of financial data under the *PPM*. *See* 26 FMSHRC at 14 n.21. The Commission stated: "'The EAJA defines 'demand' as a static concept and not one that metamorphoses over the course of settlement negotiations.' Accordingly, the lack of any written revised demand from MSHA dictates that the

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[12] The individual citations, proposed penalties, and penalties that were finally assessed by the judge after considering GCI's economic defense are fully set out in the Mine Act proceeding. 23 FMSHRC at 1398-1416.

[13] As we have noted above, our examination of individual penalties is made more complicated by a consolidated docket with multiple citations. Nevertheless, in *Georges Colliers I*, in analyzing whether the Secretary had made a reasonable effort to match the penalty to the facts and circumstances of the case, the Commission examined the process followed by the Secretary in each docket in her Petition for Assessment of Penalty. 26 FMSHRC at 11 & n.13.

judge only consider the proposed penalty assessments issued by MSHA." *Id.* As noted above, the Commission's prior disposition of this issue is the law of the case.[14]

Once consideration of the GCI letter is eliminated from analysis of the reasonableness of the Secretary's actions, it is not apparent that the Secretary responded in any other way to GCI's financial information. The lack of documentation to indicate that the Secretary, at least, considered the financial information is contrary to the spirit of the Secretary's rules and guidelines. In this regard, 30 C.F.R. § 100.3(h) provides that "[i]t is initially presumed that the operator's ability to continue in business will not be affected" by the penalty assessments. It is apparent, then, that the *PPM* provides the *only* procedure by which operators can submit this financial information to MSHA because the rules are otherwise silent as to the process for transmitting this information.[15]

In defense of her position, the Secretary argues that the *PPM* is not binding on her. We must note, however, that the Secretary's own regulations stipulate that an operator's ability to continue in business is presumed unless the operator submits evidence to the contrary. Upon such a submittal, the Secretary may, within her discretion, adjust the penalty. 30 C.F.R. § 100.3(h). When the Secretary establishes a procedure directing operators to submit financial information in support of a request for a mitigation of civil penalties, she should respond, even if the response is a rejection of the request.

Nothing required the Secretary to make an adjustment, and the operator's representation that it would be unable to pay even a token amount calls into question whether the Secretary would have been able to make any meaningful adjustment in the penalty without compromising her responsibility to ensure that appropriate penalties are imposed for profligate and serious violations of the Mine Act. Given the circumstances of this case, we understand the Secretary's reluctance to grant concessions to GCI. Nevertheless, the Secretary should have made a reasoned determination to that effect and communicated it to the operator. Indeed, one might view her failure to respond as an arbitrary and capricious disregard of a relevant penalty criterion under different circumstances.

By the time the parties went to trial in the Mine Act proceeding they had stipulated to all issues related to the violations and proposed penalties *except* whether GCI's payment of the

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[14] This is not to say that the Commission can never consider a settlement offer in determining the reasonableness of the Secretary's demand. Rather, on the record in this proceeding, including the lack of any definitive settlement offer from the Secretary that clearly pertains to the dockets before the Commission, consideration of the parties' settlement negotiations is clearly inappropriate.

[15] The Secretary asserts, and GCI does not disagree, that GCI timely submitted financial information in only five of the 55 dockets. S. Br. at 34-35. *See also ALJ II*, 26 FMSHRC at 374-75.

penalties would affect its ability to continue in business. Further, the judge's assessment of penalties in his decision focuses primarily, if not entirely, on this element of section 110(i), 30 U.S.C. § 820(i), in reducing the Secretary's proposed penalties in light of the parties' stipulations. 23 FMSHRC at 1398-1416. In these circumstances, the Secretary's failure to formally respond – either by a written settlement offer, revised penalties or by a letter rejecting mitigation of penalties – is at her peril in light of her potential EAJA liability. As the Commission noted in remanding this issue to the judge in *Georges Colliers I*,[16] the issue is to determine "whether [the Secretary] made 'a reasonable effort [here] to match the penalty to the actual facts and circumstances of the case.'" 26 FMSHRC at 14, quoting *L & T Fabrication*, 22 FMSHRC at 515-16.

In light of the Commission's decision in *Georges Colliers I*, the judge's clear error in considering GCI's letter, and the absence of any other evidence indicating that the Secretary responded to GCI's showing of financial hardship, we conclude that, while the Secretary's proposed penalty may not be deemed unreasonable in comparison with the judge's final decision, the Secretary did not act reasonably by failing to respond to the operator's request for an adjustment of the proposed penalties. However, given our prior disposition of the special circumstances exception and whether the penalties were excessive, our conclusions with regard to reasonableness do not change the outcome of this proceeding. We only intend our discussion to indicate what criteria we might apply were the circumstances different from those presented in this case, and because the reasonableness issue was remanded to the judge in *Georges Colliers I*.[17]

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[16] In *Georges Colliers I*, the Commission noted that the file in each docket indicated that the Secretary made a reasonable effort to match the penalty to the facts and circumstances of each citation when she initially issued her assessments. 26 FMSHRC at 11 & n.13. However, the central issue in this proceeding is the nature of the Secretary's response to GCI's submission of financial data that indicated GCI would be unable to continue in business if it paid the full amount of the penalty assessments. *Id.* at 11. Of course, it was not incumbent on the Secretary to lower the proposed penalties but rather to show that she had, at the least, considered the financial information in relation to the violations and the proposed penalties.

[17] While the Secretary erred by not providing a determinative response to GCI's economic hardship submission, nonetheless GCI's failure to timely follow the established procedure in most of these dockets constitutes a mitigating factor that would preclude a finding that the Secretary acted unreasonably in those cases.

III.

Conclusion

We affirm the judge's denial of the request for fees and expenses and dismiss the EAJA application for the reasons stated above.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 7, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 2004-211-M A.C. No. 41-01171-32192
v.	:	
WEIRICH BROTHERS, INC., Respondent	:	Boerner Pits & Plant

DECISION

Appearances: Thomas A. Paige, Esq., and Carlton C. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Terry Weirich, President, Weirich Brothers, Inc., Johnson City, Texas, *Pro Se*, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Weirich Brothers, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges five violations of the Secretary's mandatory health and safety standards and seeks a penalty of $2,575.00. A hearing was held in San Antonio, Texas.[1] For the reasons set forth below, I vacate one order, affirm an order/citation, modify three orders and assess a penalty of $700.00.

Background

Weirich Brothers, Inc., is a small, family-owned, sand and gravel company that operated three pits, known as the Boerner Pits and Plant, the Davis Pit and the Myer Pit, in the vicinity of Johnson City, Texas. In addition, to Terry Weirich, President, and his sister, Sandra Danz, Vice President, the company has no more than four employees at any one time. The Boerner Pits and Plant closed in May 2004.

[1] The record was kept open to admit the deposition of Jose G. Garza. (Tr. 103, 165.) Garza's deposition has been submitted as Petitioner's Exhibit 16 and is admitted as such.

This case arises out of semi-annual inspections of the Boerner Pits and Plant in July 2003 and February 2004. The Respondent has contested a combined 107(a) order/104(a) citation, 30 U.S.C. §§ 817(a) and 814(a), issued on July 14, 2003, and four 104(d)(2) orders, 30 U.S.C. § 814(d)(2), issued on February 3, 2004. The orders, and citation, will be discussed in the order of their issuance.

Findings of Fact and Conclusions of Law

Order/Citation No. 6233133

This order/citation alleges that a violation of section 56.14101(a)(1) of the Secretary's regulations, 30 C.F.R. § 56.14101(a)(1), occurred on July 14, 2003, because:

> The service brakes of the 980 CAT F.E.L. would not stop the loader on the typical grade in the plant area. The 980 CAT F.E.L. could smash or run over someone or something in the plant area with the defective brakes. Operator did not know how long the brakes had been defective[;] he does not run it every day. An oral 107(a) imminent danger order was issued to Joe Garcia [*sic*], foreman, at 1405 hours on this date.

(Pet. Ex. 1.) Section 56.14101(a)(1) provides, in pertinent part, that: "Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels. . . ."

Inspector Rick Knupp testified that as he was conducting his inspection on July 14,

> the piece of equipment that's mentioned here [in the order/citation] was coming by us, and Joe Garcia was the – or Joe Garza was accompanying me. And we went to stop the loader to do a safety check on it, he couldn't stop. The service brakes wouldn't work, and he ended up putting the bucket down to get the piece of equipment stopped there.

(Tr. 66.) He further related that during this time, "[t]here was at least one plant haul truck hauling materials, and then there was a couple of over-the-road trucks that were waiting to be loaded in the area there. And the truck drivers were standing around talking." (Tr. 67.) The inspector said that the loader was moving material and loading trucks and that when it loaded a truck, "he'd go up with his bucket, and his tires would go against the tires of the haul truck." (Tr. 70.)

Tim Hahne, the loader operator, testified that the loader "had brakes on it that morning. Then we start working, pushing the loader, working twice as hard with the trucks coming in and

out, then loading the pit trucks up. And, you know, it starts wearing down." (Tr. 99.) He said that the brakes had to be adjusted every once in awhile. (Tr. 97.) Terry Weirich testified that after receiving the order/citation, he adjusted the brakes on the loader. (Tr. 124.)

Imminent Danger

Section 107(a) of the Act states that:

> If, upon any inspection or investigation of a coal or other mine which is subject to the Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative . . . determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

Section 3(j) of the Act, 30 U.S.C. § 802(j), defines an "imminent danger" as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

In interpreting this definition, the Commission has stated that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989), *quoting Eastern Associated Coal Corp. v. Interior Bd. Of Mine Op. App.*, 491 F.2d 277, 278 (4th Cir. 1974) (emphasis omitted) (*R&P*). The Commission has elaborated that "[t]o support a finding of imminent danger, the inspector must find that the hazardous condition has a reasonable potential to cause death or serious injury within a short period of time." *Utah Power & Light Co.*, 13 FMSHRC 1617, 1622 (Oct. 1991).

An inspector's finding of an imminent danger must be supported "unless there is evidence that he has abused his discretion or authority." *R&P*, 11 FMSHRC at 2164, *quoting Old Ben Coal Corp. v. Interior Bd. Of Mine Op. App.*, 523 F.2d 25, 31 (7th Cir. 1975) (emphasis omitted). "An inspector abuses his discretion, making a decision that is not in accordance with law, if he orders the immediate withdrawal of miners in circumstances where there is not an imminent threat to safety." *Blue Bayou Sand and Gravel, Inc.*, 18 FMSHRC 853, 858-59 (June 1996).

In determining whether he has abused his discretion, an inspector "is granted wide discretion because he must act quickly to remove miners from a situation he believes is

hazardous." *Id.* at 859. In assessing an inspector's exercise of his discretion, the focus is on "whether the inspector made a reasonable investigation of the facts, under the circumstances, and whether the facts known to him, or reasonably available to him, supported the issuance of the imminent danger order." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1292 (Aug. 1992).

In this case, I find that the inspector did not abuse his discretion in issuing the imminent danger order. Operating a loader without brakes in area where trucks are moving and being loaded and truck drivers are standing outside of their trucks, not to mention any mine employees who might have been working in the area, certainly has a reasonable potential to cause death or serious injury within a short period of time. Accordingly, I affirm the imminent danger order.

104(a) citation

I further conclude that the Respondent violated section 56.14101(a)(1) as alleged. Although the inspector did not test the loader's brakes on the maximum grade that it travels, it is obvious that if the loader could not stop on level ground, it would not be able to pass such a test.

Significant and Substantial

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

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

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

Here the Respondent violated section 56.14101(a)(1) by operating a front-end loader without brakes. This violation contributed to a safety hazard to the employees and truck drivers in the area of the loader's operation, as well as the operator of the loader. There was a reasonable likelihood that one of the truck drivers or mine employees could have been struck by the loader, or that the loader could have struck a truck or other immoveable object resulting in injuries to the operator. Finally, there was a reasonable likelihood that any resulting injury would be reasonably serious or fatal.

For these reasons, I conclude that the violation was "significant and substantial."

Order No. 6236339

This order charges a violation of section 56.14112(b), 30 C.F.R. § 56.14112(b), on February 3, 2004, in that:

> The guard for the #2 screen v-belt and pulley drive was not in place. The foreman stated that he had performed repairs on the drive and had not replaced the guard. This exposes persons to an entanglement hazard. This mine has been issued three previous violations for this standard in the last seven months. Management engaged in aggravated conduct constituting more than ordinary negligence in that the foreman was running the plant and knew the guard was not in place. This violation is an unwarrantable failure to comply with a mandatory standard.

(Pet. Ex. 2.) Section 56.14112(b) requires that: "Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard."

Inspector Kevin Busby testified that when he pulled into the quarry and parked his car he observed that the #2 shaker screen was running and that there was no guard on the pulley and drive belts. (Tr. 14.) Jose Garza, the foreman, admitted that the screen was operating with an unguarded pulley, but claimed that he was testing it. (Garza Dep. at 36.) This claim does not fit within the exception to the rule.

In the first place, there is no claim that the testing could only be done with the guard removed. Garza said that he wanted to see if the belt would stay on after he fixed it. (Garza Dep. at 36.) This observation did not require the guard to remain off. In the second place, after he observed that the belt was holding, Garza left the belt unattended with the guard off. (Tr. 36.) Therefore, I find that the regulation was violated as alleged.

Unwarrantable Failure

This order was issued under section 104(d)(2) of the Act.[2] As the Commission has explained:

> Section 104(d) creates a "chain" of increasingly severe sanctions that serve as an incentive for operator compliance. *See Nacco Mining Co.*, 9 FMSHRC 1541, 1545-46 (Sept. 1987). Under Section 104(d)(1), if an inspector finds a violation of a mandatory standard during an inspection, and finds that the violation is S&S and that it is also caused by an unwarrantable failure, he issues a citation under section 104(d)(1). 30 U.S.C. § 814(d)(1). That citation is commonly referred to as a "section 104(d)(1) citation" or a "predicate citation." *See Greenwich Colleries, Div. Of Pa. Mines Corp.*, 12 FMSHRC 940, 945 (May 1990). If during the same inspection or any subsequent inspection within 90 days after issuance of the predicate citation, the inspector finds another violation caused by unwarrantable failure to comply with a standard, the inspector issues a withdrawal order under section 104(d)(1), sometimes referred to as a "predicate order." 30 U.S.C. § 814(d)(1); *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1622 n.7 (Aug. 1997). If an inspector "finds upon any subsequent inspection" a violation caused by unwarrantable failure, he issues a withdrawal order for that violation under section 104(d)(2). 30 U.S.C. § 814(d)(2). The issuance of withdrawal orders under section 104(d)(2) does not cease and an operator remains on probation "until such time as an inspection of such mine discloses no similar violations." *Id.; see Nacco*, 9 FMSHRC at 1545.

---

[2] Section 104(d)(2) provides that:

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

Cyprus Cumberland Resources Corp., 21 FMSHRC 722, 725 (July 1999) (footnote omitted). Thus, in order to establish that a violation comes within section 104(d)(2), the Secretary must prove three things: (1) a valid section 104(d)(1) predicate order; (2) a violation of a mandatory health or safety standard caused by an unwarrantable failure; and (3) the absence of an intervening clean inspection. *Id.*; *U.S. Steel Corp.*, 6 FMSHRC 1908, 1911 (Aug. 1984); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1600 (July 1984).

The predicate order for this order is listed in section 14 of the order form as Order No. 6233165, issued on August 27, 2003. (Pet. Ex. 2.) The predicate order, however, was not offered at the trial. Nor is it included in the Assessed Violation History Report, which purportedly lists all violations at the Boerner Pits & Plant between July 4, 1976, and January 20, 2005. (Pet. Ex. 14.) Indeed, there are no 104(d)(1) orders at all listed in the report. Therefore, there is no way to determine whether there is a valid predicate order. In addition, the Secretary did not offer any evidence of the absence of an intervening clean inspection.

Consequently, I find that the Secretary has failed to make out a *prima facie* case that this violation should be a section 104(d)(2) order and will modify it. In this regard, it cannot be modified to a section 104(d)(1) order because there is no evidence that this order was issued within 90 days of a 104(d)(1) citation. According to the violation history report, the most recent inspection prior to this one was on August 27, 2003, more than 90 days earlier. Furthermore, if a section 104(d)(1) order had been issued within 90 days of the instant order, the order would have been issued as a section 104(d)(1) order, not a section 104(d)(2) order. Nor can it be modified to a 104(d)(1) citation since the inspector determined the violation to be not "significant and substantial." Hence, I will modify it to a 104(a) citation, 30 U.S.C. § 814(a).

Order No. 6236340

This order also alleges a violation of section 56.14112(b) on February 3, 2004, because:

> The guard for the left side of the tail pulley of the truck load out belt conveyor was not in place. The foreman stated that he had taken the guard off to clean around the tail pulley and had not replaced it. This exposes the foreman who monitors the plant and accesses this area to an entanglement hazard. This mine has been issued three previous violations for this standard in the last seven months. Management engaged in aggravated conduct constituting more than ordinary negligence in that the foreman was running the plant and knew that he had not replaced the guard. This violation is an unwarrantable failure to comply with a mandatory standard.

(Pet. Ex. 3.)

Inspector Busby testified that while he was observing the previous violation, the foreman, Garza, "had driven up and parked his truck under the load-out belt and had walked over, and when I turned he was replacing that guard on the tail pulley." (Tr. 23.) He further testified that the belt does not run continuously, but is turned on by the truck driver after parking his truck under the belt, so material can be loaded into it. (Tr. 26-27.) On cross examination, when asked if the belt was running when Garza put the guard back on, he answered: "I believe it was." (Tr. 51.) Finally, the inspector and I had the following conversation:

> JUDGE HODGDON: Mr. Busby, going back to the load-out hopper, do you – did you observe Mr. Garza backing the truck up to the load-out hopper?
>
> THE WITNESS: Well, I – yes, sir, in a way. I turned and saw the truck backing up, and then he was exiting it. I don't – I can't say, for example, if – still rolling or if he had actually parked it, but he had exited and was walking in that area.
>
> JUDGE HODGDON: And what did he do? Where did he go?
>
> THE WITNESS: He came by the controls, and that's when I thought that he had activated that belt. And then he was putting the guard back on the tail pulley of the under-hopper belt when I turned completely and observed him.
>
> JUDGE HODGDON: So you're saying he activated the belt before he put the guard on?
>
> THE WITNESS: That's what I thought I saw, yes, sir.
>
> JUDGE HODGDON: Okay. When he put the guard on, was the belt operating?
>
> THE WITNESS: I believe so, sir.
>
> JUDGE HODGDON: Was it loading the truck?
>
> THE WITNESS: I didn't observe that.

(Tr. 59-60.)

Garza testified that:

> A rock got hung on the belt. I had to take [the guard] off to take the rock off. And my truck was loaded, and I went to take my load up, and when I get back to put the guard on, like I said, he's right on the money. He comes with the guard off. You know, by the time I park my truck, he already saw the guard.

(Garza Dep. at 43.) He further explained that the belt does not run constantly, that "[t]he only time I run it is when I turn it on with one of these switches. I turn it on, empty the hopper, turn it back off." (Dep. at 44.) He said that it was not running when the inspector saw it. (*Id.*)

Based on this evidence, I find that the regulation was not violated. The inspector was equivocal as to whether the belt was running or not. In his initial testimony, he did not mention the belt running at all. When questioned about it, he qualified his answers with "I believe" and "I thought." On the other hand, Garza's explanation that he loaded his truck, a rock got caught on the belt, he turned off the belt, removed the guard, removed the rock and then took his truck to dump it, is very plausible. He was not asked if he turned the belt on before replacing the guard, but since he knew the inspector was watching him, it does not make sense that he would do so. Furthermore, even if he did turn the belt on before replacing the guard, such a short time would have elapsed, with no one exposed to the hazard, that it would not be a violation. Accordingly, I will vacate this order.

Order No. 6236341

This order charges yet another violation of section 56.14112(b) because:

> The guard for the lower pulley of the drive for the jaw crusher was not in place exposing the pinch point. The foreman stated that he had removed the guard to replace the belt earlier in the day and had not replaced the section of guarding. This exposes the foreman who accesses this area to monitor feed to the crusher to an entanglement hazard. This mine has been issued three previous violations for this standard in the last seven months. Management engaged in aggravated conduct constituting more than ordinary negligence in that the foreman was running the plant and knew the section of guarding had not been replaced. This violation is an unwarrantable failure to comply with a mandatory standard.

(Pet. Ex. 4.)

The inspector testified that a portion of the guarding around the drive motor and pulley was missing, exposing the pinch points on the pulley and v-belt drive. (Tr. 40.) The pictures taken by the inspector confirm this. (Pet. Ex. 4.) Garza admitted that the piece of guarding was

missing. (Garza Dep. at 46-47.) Therefore, I conclude that the Respondent violated the regulation as alleged.

Unwarrantable Failure

This order was issued under section 104(d)(2). For the same reasons that I found that section 104(d)(2) did not apply to Order No. 6236339, *supra*, I find that the section does not apply to this violation and will modify it accordingly.

The order was amended on March 5, 2004, by deleting the "significant and substantial" designation. (Pet. Ex. 4.) Hence, for the same reasons as Order No. 6236339, the order can only be modified to a 104(a) citation.

Order No. 6236345

This order alleges a violation of section 56.14132(b)(1)(ii), 30 C.F.R. § 56.14132(b)(1)(ii), in that:

> The wheel mounted reverse movement bell alarm had been removed from the F700 Ford bobtail dump truck loading from the plant load out to stockpile. The truck also did not have a horn to warn persons of movement of the truck. Management engaged in aggravated conduct constituting more than ordinary negligence in that the foreman knew the bell alarm was not installed on the truck and he operated it in this condition. This violation is an unwarrantable failure to comply with a mandatory standard.

(Pet. Ex. 5.) Section 56.14132(b)(1)(ii) requires that: "When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have – . . . (ii) A wheel-mounted bell alarm which sounds at least once for each three feet of reverse movement."

The inspector testified that the truck was equipped with a wheel-mounted bell alarm, but that the bell had been removed from the wheel. (Tr. 34-36.) The Respondent admitted the violation. (Tr. 128.) Consequently, I find that the Respondent violated the regulation.

Unwarrantable Failure

This violation was also issued as a 104(d)(2) order. The inspector found the violation not to be "significant and substantial." Therefore, for the same reasons as for Order Nos. 6236339 and 6236341, *supra*, I will modify this order to a 104(a) citation.

Civil Penalty Assessment

The Secretary has proposed a penalty of $2,100.00 for the four remaining violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996).

With regard to the penalty criteria, I find that the Respondent is a small operator. Based on the Assessed Violation History Report, I find that the Company has a good history of previous violations. (Pet. Ex. 14.) Based on the order/citations, and the lack of evidence to the contrary, I find that the operator demonstrated good faith in abating the violations after being notified of them. I further find that the gravity of Order/Citation No. 6233133 was serious in that a fatal injury could have resulted from the operation of the loader without brakes. On the other hand, I find the gravity of the three remaining citations was not so serious since injuries were unlikely to result from them.

Turning to negligence, I find that the operator's negligence with regard to Citation (formerly Order) Nos. 6236339, 6236341 and 6236345 to be high. All of these violations were committed by the foreman, Jose Garza, who, as a foreman, is held to a heightened standard of care concerning safety matters. *S & H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995); *Youghiogheny*, 9 FMSHRC at 2011. In addition, the Secretary has established that the operator has a recent history of repeatedly committing guarding and back-up alarm violations. (Pet. Exs. 6, 7, 8 and 14.)

I also find that the Respondent's negligence was high with regard to Order/Citation No. 6233133. While Hahne was obviously highly negligent in continuing to operate the loader without brakes, that negligence is not necessarily imputable to the operator. Normally, the negligence of a "rank-and-file" miner cannot be imputed to the operator for civil penalty purposes. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) (*SOCCO*). However, the Commission has held that: "[W]here a rank-and-file employee has violated the Act, the *operator's* supervision, training and disciplining of its employees must be examined to determine if the *operator* has taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct." *SOCCO* at 1464.

In this case, I find that the operator had not taken reasonable steps in its supervision, training and disciplining to prevent the violative conduct. Garza testified that no one had ever been disciplined or fired for failing to follow safety rules. (Garza Dep. at 28.) In addition, in view of its continuing to receive citations for the same types of violations, one would expect the operator to exercise increased vigilance and to expect the same from his employees. Yet, there is no evidence of that in this case. The Respondent has apparently continued to operate as normal. Accordingly, I find that the operator's negligence with regard to this violation was high.

To show that paying the proposed penalty will adversely affect the company's ability to remain in business, the Respondent has submitted balance sheets and income statements for the years 2000 through 2003. (Resp. Exs. B, C, D and E.) In addition, Mr. Weirich testified that he expected a $30,000.00 loss for 2004. (Tr. 117.) All of the financial statements are accompanied by the following statement by the accountants:

> The owners have elected to omit substantially all of the disclosures ordinarily included in financial statements prepared on the income tax basis of accounting. If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's financial position and results of operations.

(Resp. Exs. B, C, D and E.) Furthermore, all of the financial statements are unaudited. (Tr. 157.)

It is apparent that the financial statements are not reliable information on which to determine whether the penalty will adversely affect Weirich's ability to remain in business. There is no way to know whether the information in them is complete, true and correct. The burden is on the operator to show that the penalty will adversely affect its ability to remain in business. *Sellersburg* at n.14. Unaudited financial statements are not sufficient to sustain that burden. *See Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 700 (Apr. 1994).

Nevertheless, the Secretary has submitted three settlement agreements from prior cases involving the Respondent in which the Secretary has reduced penalties because payment would adversely affect the company's ability to remain in business. (Pet. Exs. 11, 12 and 13.) Thus, it is clear that the Secretary has accepted that the payment of penalties will affect the operator's ability to remain in business. There is no evidence that business has gotten better since these agreements were made. Therefore, I find that payment of a penalty would adversely affect the Respondent's ability to remain in business and will take that into consideration in assessing penalties.

Taking all of these factors into consideration, I find that a penalty of $700.00 is appropriate, assessed as follows: (1) Order/Citation No. 6233133-$400.00; (2) Citation No. 6236339-$100.00; (3) Citation No. 6236341-$100.00; and (4) Citation No. 6236345-$100.00.

Order

In view of the above, Order No. 6236340 is **VACATED**; Order/Citation No. 6233133 is **AFFIRMED**; Order Nos. 6236339, 6236341 and 6236345 are **MODIFIED** to104(a) citations by deleting the "unwarrantable failure" designations and are **AFFIRMED** as modified. Weirich Brothers, Inc., is **ORDERED TO PAY** a civil penalty of **$700.00** within 30 days of the date of this order.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

Thomas A. Paige, Esq., Carlton C. Jackson, Esq., Office of the Solicitor,
U.S. Department of Labor, 525 South Griffin St., Suite 501, Dallas, TX 7502

Terry Weirich, President, Weirich Brothers Inc., P.O. Box 206, Johnson City, TX 78636

/hs

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY VENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001
April 7, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-268-M
Petitioner	:	A.C. No. 02-01221-05528
	:	
v.	:	Docket No. WEST 2003-269-M
	:	A.C. No. 02-01221-05529
CKC MATERIALS DIVISION,	:	
Respondent	:	Docket No. WEST 2003-270-M
	:	A.C. No. 02-01221-05530

DECISION APPROVING SETTLEMENT

Before: Judge Bulluck

These cases are before me upon petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"). Petitioner has filed a motion to approve settlement agreement and to dismiss these cases. A reduction in penalty from $10,384.00 to $6,000.00 is proposed. The citations, initial assessments and the proposed settlement amounts are as follows:

	Citation No.	Initial Assessment	Proposed Settlement
WEVA 2003-268-M	6283833	$ 55.00	$ 55.00
	6283836	55.00	55.00
	6283846	55.00	55.00
	6292219	55.00	55.00
	6292220	90.00	90.00
	6292221	90.00	55.00
	6292222	90.00	90.00
	6292223	55.00	55.00
	6292224	90.00	0.00
	6292225	90.00	55.00
	6292226	55.00	55.00
	6292228	55.00	55.00
	6292260	113.00	113.00
	6292261	90.00	90.00
	6292262	90.00	90.00
	6292263	55.00	55.00

	6292264	55.00	55.00
	6292265	55.00	55.00
	6292266	55.00	55.00
	SUBTOTAL:	$ 1,348.00	$ 1,153.00
WEVA 2003-269-M	6292267	$ 55.00	$ 0.00
	6292268	55.00	0.00
	6293869	55.00	55.00
	6293870	55.00	55.00
	6293871	55.00	55.00
	6293872	55.00	55.00
	6293873	55.00	55.00
	6293874	55.00	55.00
	6293875	55.00	55.00
	6293876	90.00	90.00
	6293877	90.00	55.00
	6293878	90.00	55.00
	6293879	55.00	0.00
	6293880	90.00	90.00
	6293881	55.00	55.00
	6293882	55.00	55.00
	6293884	55.00	55.00
	6293885	231.00	231.00
	6293886	55.00	55.00
	SUBTOTAL:	$ 1,361.00	$1,126.00
WEVA 2003-270-M	6293890	$ 231.00	$ 231.00
	6292997	224.00	224.00
	6292999	224.00	224.00
	6293001	655.00	162.00
	6293002	399.00	399.00
	6293003	161.00	161.00
	6293004	317.00	317.00
	6293005	224.00	224.00
	6293007	655.00	162.00
	6293008	655.00	162.00
	6293009	655.00	645.00
	6293010	655.00	162.00
	6293011	655.00	162.00
	6293012	655.00	162.00

6293013	655.00	162.00
6293014	655.00	162.00
SUBTOTAL:	$ 7,675.00	$3,721.00
TOTAL:	$10,384.00	$6,000.00

I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Citation Nos. 6292224, 6292267, 6292268 and 6293879 are **VACATED**, that the Secretary **MODIFY** Citation Nos. 6293877 and 6293878 to reduce the level of gravity to "unlikely," Citation Nos. 6292221, 6292225, 6292261, 6293877 and 6293878 to delete the "significant and substantial" designation, and that Respondent **PAY** a penalty of $6,000.00 within 30 days of this decision. On receipt of payment, these cases are **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge
(202) 434-9987

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington DC, 20001-2021
Telephone: (202) 434-9958
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April 15, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-397-M
Petitioner	:	A. C. No. 35-03260-28580
v.	:	
	:	Harvey W. Buche Building
HARVEY W. BUCHE ROAD BUILDING,	:	
INC.,	:	
Respondent.	:	

DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO VACATE CITATIONS
ORDER TO PAY

Before: Judge Lesnick

This case is before me pursuant to an order of the Commission dated December 23, 2004, remanding this matter for further consideration and determination as to whether the operator, Harvey W. Buche Road Building, Inc. ("Buche") is entitled to relief under Rule 60(b) of the Federal Rules of Civil Procedure.[1] In particular, Rule 60(b)(1) provides relief from a final judgment in cases where there has been a "mistake, inadvertence, surprise, or excusable neglect."

This matter arose because Buche failed to file a timely response to the Secretary of Labor's ("Secretary") petition for assessment of civil penalty and my subsequent Order to Show Cause. In its request to reopen, Buche asserts that after the show cause order was issued, it began negotiations with the Solicitor's Office and reached a settlement. However, Buche contends the agreement was inadvertently misplaced. As soon as the matter was brought to its attention, it forwarded the signed agreement to the Solicitor's Office. The Secretary has not filed a response to Buche's request, but she has filed a settlement motion.

Based upon the evidence presented before the Commission, the record before me, and the submission of the settlement motion by the Secretary - an seemingly indirect statement that she does not oppose the reopening of the assessment, I conclude that the penalty assessment should be reopened pursuant to Rule 60(b).

---

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

Accordingly, the penalty assessment is reopened, and this case shall proceed pursuant to the Mine Act and the Commission Procedural Rules, 29 C.F.R. § 2700.

Settlement Motion

The parties propose a reduction in penalty from $2,491.00 to $1,882.00. The parties also request that the negligence for Citation Nos. 6352339, 6352341, 6352342, and 6352355 be modified as outlined in the settlement motion. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i)of the Act. The settlement amounts are as follows:

Citation No.	Date	C.F.R.	Assessment	Settlement
6352339	03/04/04	46.8(a)(1)	$ 1,033.00	$ 805.00
6352341	03/04/04	56.14107(a)	286.00	199.00
6352342	03/04/04	56.14107(a)	286.00	199.00
6352355	03/05/04	56.14101(a)(2)	286.00	199.00
6352340	03/04/04	56.12013(b)	60.00	60.00
6352343	03/05/04	56.9300(a)	60.00	60.00
6352344	03/05/04	56.14107(a)	60.00	60.00
6352345	03/05/04	56.14107(a)	60.00	60.00
6352346	03/05/04	56.11002	60.00	60.00
6352348	03/05/04	56.4201(a)(2)	60.00	60.00
6352349	03/05/04	47.41(a)	60.00	60.00
6352350	03/05/04	47.31(a)	60.00	60.00
6352353	03/05/04	56.14101(a)(3)	60.00	Vacate
6352354	03/05/04	56.14103(b)	60.00	Vacate
Total:			**$ 2,491.00**	**$ 1,882.00**

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that the negligence for Citation Nos. 6352339, 6352341, 6352342, and 6352355 be **MODIFIED** as outlined in the settlement motion. It is also **ORDERED** that Citation Nos. 6352353 and 6352354 be **VACATED**.

It is further **ORDERED** that the operator pay a penalty of $1,882.00 within 30 days of this order.[2] Upon receipt of payment, this case is **DISMISSED**.

Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

Patricia Drummond, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212

Harvey W. Buche, Owner, Harvey W. Buche Road Building, Inc., 35111 S. Wilhoit Road, Molalla, OR 97038

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

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 22, 2005

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-23-D
on behalf of MARK GRAY,	:	BARB CD 2000-13
Complainant	:	
v.	:	
	:	
NORTH STAR MINING, INC.,	:	
and JIM BRUMMETT,	:	No. 5 Mine
Respondents	:	Mine ID 15-17437

ORDER LIFTING STAY
AND
DECISION APPROVING SETTLEMENT

The stay in the above-captioned case is hereby **LIFTED**.

This case is before me on remand by the Commission, and involves a discrimination complaint filed by the Secretary of Labor ("the Secretary") on behalf of Mark Gray, against North Star Mining, Incorporated ("North Star"), and Jim Brummett, under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c)(2).[1]

By decision issued on April 29, 2003, I found that Gray was not constructively discharged by North Star, and that Brummett did not unlawfully threaten Gray. Consequently, I dismissed the complaint against all Respondents, and disapproved a settlement agreement between the Secretary and Brummett.

As a result of its review, the Commission remanded the case for reconsideration of whether Brummett's statements to Gray were coercive and, therefore, discriminatory, by application of its test in *Moses v. Whitely Development Corp.*, 4 FMSHRC 1475 (Aug. 1982),

[1] The original complaint was also filed on behalf of Roscoe Ray Young; his complaint was dismissed on April 10, 2002. Mike Caudill was joined with North Star in the original complaint; the parties did not appeal my dismissal of the charges against Caudill and dropped him from the caption in their pleadings.

aff'd, 770 F.2d 168 (6th Cir. 1985).[2]

The parties have filed Joint Motions to Approve Settlement. I have reviewed the settlement agreements and conclude that they are appropriate under the criteria set forth in section 110(i) of the Act. Under the terms of the settlement agreement between the Secretary and Jim Brummett, Brummett has expressed remorse for his actions and has agreed to pay a civil penalty of $1,000.00. Respecting the settlement agreement between the Secretary and North Star, North Star has agreed to pay a civil penalty of $5,000.00 and back wages to Gray in the amount of $150.00.

The settlement is in the public interest. **WHEREFORE**, the Joint Motions to Approve Settlement are **GRANTED**, and it is **ORDERED** that Jim Brummett **PAY** a civil penalty of $1,000.00, and that North Star **PAY** a civil penalty of $5,000.00, within thirty (30) days of this decision. It is further **ORDERED** that North Star **PAY** $150.00 directly to Mark Gray, within 30 days of this decision. Upon receipt of payment, this case is **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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[2]On January 24, 2005, the Secretary filed a Petition for Reconsideration of the Commissions's January 12, 2005 decision; the Commission denied the petition.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 28, 2005

VERNON HOLDEN,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 2004-364-DM
	:	WE MD 2004-05
ROSS ISLAND SAND & GRAVEL CO.,	:	
Respondent	:	Avery Point Ramp
	:	Mine ID 35-00540

DECISION

Appearances: James E. Davis, Esq., Talbott, Simpson, Gibson & Davis, Yakima, Washington, for Complainant.
Richard C. Hunt, Esq., Barran and Liebman, Portland, Oregon, for Respondent.

Before: Judge Zielinski

This case is before me on a complaint of discrimination filed by Vernon Holden pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(c)(3).[1] Holden alleges that Ross Island Sand & Gravel Company, ("Ross Island") discriminated against him in retaliation for his complaints about safety by laying him off for one week in March 2003 and by failing to call him back to work from January 15 to April 5, 2004. A hearing was held in The Dalles, Oregon. Following the hearing, both parties moved to re-open the record to submit additional evidence. Those motions were granted, and the parties subsequently filed briefs.[2] For the reasons set forth below, I find that Respondent has failed to prove that he was discriminated against in violation of the Act.

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[1] Pursuant to section 105(c)(2) of the Act, a miner may file a complaint of discrimination to the Secretary of Labor, who must conduct an investigation and file a complaint with the Commission if she determines that the Act has been violated. Section 105(c)(3) provides that, if the Secretary determines that the Act has not been violated, the miner may file an action before the Commission on his own behalf. 30 U.S.C. § 815(c)(2) and (3).

[2] *See* Orders dated December 6, 2004, and January 31, 2005, allowing supplementation of the record with Complainant's exhibits 6 and 7, and Respondent's exhibits 22 and 23.

Findings of Fact

Through its wholly owned subsidiary, Pacific Northwest Aggregates, Incorporated ("Pacific"), Ross Island operates the Avery pit, a sand and gravel mine on the banks of the Columbia River in Avery, Washington. Sand and gravel are extracted from the site and transported by barge down-river to Ross Island facilities near Portland, Oregon. A small amount of material is sold to local consumers, which is referred to as "outside sales." The Avery pit is located on land owned by the Yakima Nation. Pacific's Handbook specifies that enrolled members of the Yakima Nation have preference in all aspects of employment, followed by enrolled members of other federally recognized tribes.[3] Ex. C-1 at 7.

The mining operation is seasonal. It typically begins in late March, after the U.S. Army Corps of Engineers completes annual maintenance on navigation locks. Barge traffic on the river must be curtailed during lock maintenance. In 2003, lock maintenance was scheduled from March 8 through March 22. Ex. R- 12. Pacific's employees were called back to work on March 3, before lock maintenance began, because Ross Island was in short supply of a particular product. On March 7, three of the eight men who worked at the Avery pit, including two haul truck drivers, were laid off. Tr. 398. A crew of five men was retained to perform major maintenance projects, taking down a radial stacker and extending a tunnel. Pacific encountered delays in that work, and did not resume full mining operations or call the truck drivers back to work, until March 31, 2003.

Material is extracted from various sites on the Avery pit property by use of front-end loaders, and is dumped into haul trucks. It is transported to a hopper and conveyor belt system, and loaded onto barges. Four barges are used in the operation. Three small barges have a capacity of 2,900 - 3,000 tons each, and can be loaded in approximately two hours. One large barge has a capacity double that of the smaller barges. The barges are loaded in pairs, and about 10 - 15 minutes is required to reposition the barges so that the second one can be loaded. Barge loading is a critical operation, and the loader operator and haul truck drivers attempt to keep a constant flow of trucks to the loading hopper so that the conveyor belts do not "go dry." Barges are loaded three days a week, on Mondays, Wednesdays and Fridays. Tuesdays and Thursdays are less busy "lay down days," when overburden is removed and the wash plant is operated. Tr. 410-14. Employees are encouraged to schedule matters that would prevent them from working, e.g., doctor's visits, on these days. Tr. 410-11.

Complainant, Vernon Holden, became employed at the Avery pit in March 2001, and performed a variety of jobs in 2001 and 2002. He operated equipment, including loaders, trucks, a backhoe, and a grader. He also operated the wash plant, and performed maintenance and other duties. Tr. 26-30; ex. C-3. By 2003, his primary assignment was driving one of the haul trucks.

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[3] Holden testified that he is over 25% Native American. Tr. 91. However, he is not an enrolled member of the Yakima Nation or any other federally recognized tribe. Tr. 115.

The standard work day at the Avery pit ends at 3:00 p.m. By longstanding practice, the men work through their 30 minute lunch period and leave a half hour early, at 2:30 p.m. The company handbook provides that workers are to have a ten-minute rest period in the morning and afternoon, but that the breaks will not be "scheduled since the nature of the work allows employees to take these rest periods on an intermittent basis." Ex. C-1 at 8. The nature of the operation also dictates that breaks not be scheduled. The barge loading system, with its extensive conveyor belts, for example, can not simply be shut down. Holden generally felt that he was unable to take rest periods, and had been concerned about the issue for some time. He brought up the subject of breaks at safety meetings three or four times from 2001 - 2003. Tr. 67; ex. R-14. On one occasion, an instructor associated with MSHA advised that equipment operators should stop and stretch their legs if they felt that they needed a break. Tr. 67.

Holden decided to press the break issue during safety meetings, shortly after he was called back to work in 2003. He thought that the meetings occurred on March 31 and during the first week in April. Tr. 60-61, 62, 67-68.[4] He described a safety meeting that would most likely have occurred on a Tuesday, when such meetings were normally held. Holden noted that there were no scheduled breaks, and proposed that on non-barge days, they get off work 20 minutes early if they had not taken their breaks. Tr. 129, 197, 201-03. His intention was to leave earlier to ease his commute, since he had moved to Toppenish, Washington, some 88 miles away from the pit. Tr. 60-61. Roland Jack Spencer, a fellow haul truck driver, also lived in Toppenish. He and Holden rode to and from work together. Tr. 61.

Holden testified that Richard Aldrich, Pacific's superintendent, reacted with hostility when he made his proposal regarding breaks, but that Aldrich told the miners that they should talk it over and he would do whatever they agreed to. Tr. 60-61. A few days later, there was another meeting. None of the other miners supported Holden, except for Spencer. Tr. 62, 67-68. Holden testified that that afternoon, he was told by Spencer that Aldrich had said that everyone would be working the following week, except for Holden, because Aldrich wanted to punish him for raising the break issue. Tr. 69. Spencer testified similarly, except that he stated that Aldrich did not say why Holden was being punished. Tr. 184. Holden was never told by Aldrich, or anyone associated with Pacific's management, that he had been laid off, and he made no effort to confirm the lay-off. Tr. 69-70. He and Spencer testified that Holden did not go to work the following week, but that Spencer did. Tr. 132, 185, 191, 430. Aldrich testified that Holden was not suspended for a week because he raised the break issue, and denied saying that he intended to punish Holden. Tr. 364.

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[4] His recollection of the timing of events appeared to have been based upon notations that he had made in a journal. Tr. 59; ex. C-5. He obtained the journal in mid-March of 2003, and made daily entries in it. One of the primary reasons that he got the journal was to record events pertinent to perceived discrimination. Tr. 423, 434-36. When he had forgotten the journal, he made notes on papers kept in his truck. Tr. 153-57. One of the first entries in the journal was made on March 20, and was to the effect that Holden was called back to work on March 31, 2003. Ex. C-5.

Holden testified that Aldrich attempted to call in another driver, Ernest Leslie, to replace him during the week's suspension. Tr. 70. Leslie testified that Aldrich called him in April, two days before his April 22 birthday, and asked him to come in to work. Tr. 208. He replied that he had no intention of returning to work until his entitlement to unemployment compensation ended at the end of April. Tr. 208. Leslie's testimony is rebutted by Pacific's payroll records, which show that he worked the entire month of April 2003, 198 hours from April 5 to May 3. Tr. 215; ex. R-15.

Holden returned to work on March 31, 2003, and worked the remainder of the season, except for an approximately 10-week period from June to mid-August, when Pacific's operations were curtailed for economic reasons. In mid-December, an MSHA inspection had raised an issue with respect to the absence of speed limit signs on the pit's roadways. Aldrich ordered signs designating various speed limits by overnight delivery, but received only "15 MPH" signs. Tr. 339. He decided to post the signs, even though trucks could safely travel at higher speeds on portions of some roadways. Holden and Spencer posted the signs.

The following day, on December 19, 2003, Aldrich contacted the drivers by radio and requested their views on whether higher speeds could safely be traveled. Tim Rambler replied that trucks could go faster than 15 mph on the haul road on the west end of the property. Tr. 78. Holden interpreted Aldrich's inquiry as a request to drive faster than the newly posted limit, and declined to respond to it. Instead, he replied by telling Aldrich that if he wanted him to drive faster he was going to have to tell him to, and stated that it was Aldrich's decision. Tr. 79. Aldrich then made the same inquiry to Spencer, who replied as Holden had. Tr. 81, 186. Holden and Spencer testified that Aldrich made a remark to the effect that the slow driving was "sabotaging loading of the barges." Tr. 81, 187. Aldrich denied making the comment. Tr. 341. A note purportedly made by Holden on December 19, relates that Holden asked Aldrich if he thought they were trying to sabotage loading of the barges, to which no response was made. Tr. 153; ex. C-3. Aldrich did not direct the drivers to exceed the posted limit. Tr. 137-38, 340-41.

That same day, December 19, Pacific shut down operations for the winter. Tr. 81-82. There was an ample inventory of material at Ross Island's facility, and no more barges were loaded. Tr. 341. Holden and most of the crew were laid off. Tr. 81. Holden gave conflicting accounts of his expectations regarding the anticipated winter shut-down. He first testified that Aldrich told him in December 2003 that a new barge loading system would be installed during the winter shut-down, and that truck drivers and operators would be needed. Tr. 82-83. However, he later testified that he found out in mid-January that men were installing the loading system, and that Aldrich had told him on December 19 that "nobody was going to be coming back until April." Tr. 94. He alleges that Pacific's failure to call him back to work in January 2004 was in retaliation for his December actions with respect to the speed limit signs.

Although he believed that he had been discriminated against as early as March or April of 2003, Holden did not take any action to assert a complaint of discrimination until approximately

November. At that time he spoke to an MSHA inspector, who was conducting an inspection of his truck, and told him that he wanted to talk to him. The inspector gave him his business card, and Holden later called him to relate his complaint of discrimination. Tr. 96. He was referred to MSHA's Vacaville, California, office, which mailed a discrimination complaint form to him. Holden testified that he filled out the form, signed it and mailed it back to MSHA about one week after receiving it. Tr 169. However, the date entered next to his signature on the complaint form is February 6, 2004, and the form was received by MSHA on February 23 or 25, 2004. Ex. R-14. Holden's complaint alleged that he had been discriminated against when he was laid off during the "first or second week of April 2003." Ex. R-14. It made no mention of the alleged January 2004 discrimination.

Subsequent to filing the MSHA complaint, Holden was called to return to work at the Avery pit. Phone messages were left at his home in late March, informing him that work would begin on April 5, 2004. Tr. 89-90. He decided not to return to work. At the time he made that decision he had not yet secured another job, and it is unclear whether he had applied for one.[5] Holden testified that he made his decision to file a discrimination complaint after learning in January 2004 that "everybody was working but me and Roland Spencer," when he had been told that no one would be coming back until April. Tr. 94-95. He concluded that he did not want to return to Ross Island because of the "hostile working environment" created by Aldrich, who he believed was a racist. Tr. 144.

By letter dated May 13, 2004, MSHA advised Holden that its investigation of his discrimination complaint had been completed and that it had concluded, on behalf of the Secretary, that no discrimination had occurred. Ex. R-14. Holden then filed his complaint of discrimination with the Commission, pursuant to section 105(c)(3) of the Act. The complaint was subsequently amended to include an allegation of discrimination during the period January 15 to April 5, 2004.

Conclusions of Law - Further Findings of Fact

Timeliness of Holden's Complaint of Discrimination

As noted above, Holden did not file a complaint of discrimination with MSHA until February 23 or 25, 2004, many months after the alleged March 2003 lay-off. That lay-off was the only discriminatory action alleged in the complaint. Respondent argues that both claims should be dismissed because the complaint was untimely, and the second allegation of discrimination was not included in the MSHA complaint. Section 105(c)(2) of the Act provides, in pertinent part:

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[5] Holden first testified that he had applied for a job by the time he was notified to return to work in April of 2004. Tr. 90. Later, he testified that he had not applied for another job at the time of the notification. Tr. 145.

> 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. (emphasis supplied.)

The Commission has held that the 60 - day time limit in section 105(c)(2) of the Act is not jurisdictional and that non-compliance may be excused on the basis of justifiable circumstances, including ignorance, mistake, inadvertence, and excusable neglect. *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1386-87 (Dec. 1999); *Perry v. Phelps Dodge Morenci*, 18 FMSHRC 1918, 1921-22 (Nov. 1996); *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21 (1984); *Herman v. IMCO Services*, 4 FMSHRC 2135 (1982). While the Commission has not ruled directly on the issue, it appears that a miner's reasonable fear of retaliation may be considered in determining whether there are justifiable circumstances for the late filing of a discrimination complaint.[6] *Cf. Olson v. FMSHRC*, 381 F.3d 1007, 1014 (10th Cir. 2004). Even if there is an adequate excuse for late filing, a serious delay causing legal prejudice to the respondent may require dismissal. *Perry*, 18 FMSHRC at 1922. The burden of proving justifiable circumstances is on the miner and the burden of demonstrating material legal prejudice is on the mine operator.[7] *See Olson*, 381 F.3d at 1009.

Timeliness – The March 2003 Lay-off

The first discriminatory action argued in Complainant's post-hearing brief is that he was laid off for a week in March 2003, either the week ending March 15, or the week ending March 29.[8] Under section 105(c)(2), Complainant's allegation of discrimination should have been filed with MSHA by May 9 or 23, 2003. The February 25, 2004, filing was over nine

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[6] While the Act provides comprehensive remedies for miners injured by discrimination, those remedies would not lessen the potentially substantial economic hardship that a miner might suffer while MSHA investigates a discrimination complaint and moves to secure temporary reinstatement of the miner. Combined with the uncertainty of a favorable outcome of a discrimination action, a miner considering whether to file a discrimination complaint might well reasonably defer such action because of a fear of reprisal. Allowing justifiable circumstances to be established by a reasonable fear of retaliation would be consistent with the intent of Congress that the Act's anti-discrimination provisions be broadly construed. *See Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 212 (Feb. 1994).

[7] Respondent does not contend that the delay in filing prejudiced its ability to defend.

[8] As noted in the discussion that follows, there is a great deal of inconsistency in Complainant's allegations regarding when he was discriminated against. That inconsistency has carried over into the post-hearing brief. At one point, it is argued that Complainant was improperly laid off from March 10 to 15, 2003. Compl. Br. At 10-11. Other discussions address improper punishment for the week beginning March 22. Compl. Br. At 2, 19, 20.

months beyond the statutory deadline. Complainant argues that justifiable circumstances for the untimely filing have been established by "his confusion regarding the proper procedures and his fear that he . . . would be terminated." Compl. Br. at 19.

Holden does not claim that he was unaware of his right under the Act to file a discrimination complaint. He testified that MSHA instructors had discussed a miner's right to file a discrimination complaint at training sessions, although he did not recall being aware of a time frame within which such claims had to be filed. Tr. 98, 168. Holden impressed me as an intelligent person, who understood his Mine Act and other rights, and was fully capable of pursuing remedies under the Act and other statutory provisions. He obtained a journal in March of 2003 for the express purpose of recording events pertinent to perceived discrimination, and made daily entries in it. Tr. 423, 434-36. At times when he had forgotten the diary, he made notes on papers kept in his truck. Tr. 153-57. He appeared to be familiar with terminology associated with other claims of discrimination that he may be pursuing. Tr. 144.

Holden testified that he delayed filing his discrimination complaint because he believed that, if he filed it while he was working, he would be fired. Tr. 92, 97-98. However, the record as a whole establishes that Holden was not intimidated, and that he continued to press issues that had alienated management. He discussed the issue of breaks in safety meetings conducted by MSHA instructors, and at other times over the course of his employment. Tr. 66-67, 140, 182, 190; ex. R-14. He was threatened by management several times. Tr. 97. He did not appear to have been intimidated by such threats. He described confrontations with management following his pressing of the break issue in March 2003, at which attempts were made to intimidate him and threats were made to fire him. Tr. 68, 85-87, 433. He was not intimidated by these actions, and continued to argue his position. Tr. 86-87, 433. Notes in Holden's diary indicate that he discussed safety issues with Aldrich in October 2003. Ex. C-5.

Based upon the foregoing, I find that Complainant has failed to carry his burden of proving justifiable circumstances for his delay in filing the complaint of discrimination with MSHA, regarding the March 2003 lay-off. I find that, at all pertinent times, Holden was fully aware of his right to file a discrimination complaint, and either knew or should have known of the 60-day time limit for filing. I also find that he has failed to prove that the delay in filing was the result of a genuine fear of retaliation.

Timeliness – The January 2004 Lay-off

The amended complaint filed in this action alleges that Holden was discriminated against during the period January 15 to April 5, 2004, when he was not called back to work. He claims, in essence, that he was laid off during that period. The MSHA discrimination complaint was filed within 60 days of that allegedly discriminatory action. However, there was no mention of the claim in the MSHA complaint. Holden testified that he advised MSHA about the claim during a phone call that appears to have been made shortly after he filed the complaint. Tr. 171. He claims that he was told that he could describe the new claim during MSHA's investigation of

the original complaint.[9] Tr. 95-96, 170-71. He claims to have told an MSHA investigator of the claim in the course of an interview prompted by his original complaint. Tr. 171.

The Commission has held that discriminatory actions not specifically alleged in an MSHA complaint may be pursued in a later action before the Commission, if they were addressed in MSHA's investigation of the complaint. *Pontiki Coal Corp.*, 19 FMSHRC 1009, 1016-18 (June 1997). There is nothing in the limited MSHA records that were introduced into evidence at the hearing to confirm or rebut Holden's testimony that the claim was reported during the MSHA investigation. Ex. R-14. The letter advising Complainant of MSHA's determination that no discrimination had occurred, does not identify the claim or claims that were considered. Ex. R-14. In the absence of evidence to the contrary, I find that Holden's complaint of discrimination during the period January 15 to April 5, 2004, was brought to MSHA's attention in the course of its investigation and that it can be maintained in this action.

The Discrimination Claims

The determination that Complainant has not established justifiable circumstances for failing to timely file his complaint of discrimination requires dismissal of the claim as to the March 2003 lay-off. However, in the interests of judicial economy, it will be assumed, for purposes of argument, that justifiable circumstances were established, and both claims will be addressed on the merits.

A complainant alleging discrimination under the Act typically establishes a *prima facie* case by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no way 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 was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639,

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[9] Holden's explanation for failing to include the claim for the January lay-off in his written MSHA complaint is difficult to accept. He acknowledged signing the complaint form on February 6, 2004, well after he was aware of the essential elements of the claim. It seems highly unlikely that MSHA would advise a miner that a discrimination claim need not be reduced to writing, except, possibly, if it was related to a discrimination complaint that had already been filed. See the discussion above. If the phone call, in fact, did not occur until after the complaint had been filed, Holden's explanation fails.

642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

While the operator must bear the burden of persuasion on its affirmative defense, the ultimate burden of persuasion remains with the complainant. *Pasula*, 2 FMSHRC at 2800; *Schulte v. Lizza*, 6 FMSHRC 8, 16 (Jan. 1984).

The March 2003 claim

Holden failed to establish a *prima facie* case with respect to his allegation that he was laid off in March of 2003. While it appears that he engaged in protected activity, he failed to prove that he suffered adverse action.

The thrust of his argument is that he was suspended in retaliation for raising a safety complaint, i.e., that he and other workers were not getting rest breaks. He related advice that a trainer associated with MSHA had provided, to the effect that drivers should take a break if they felt that they needed one. In his written MSHA complaint, he described raising the issue that they should get breaks "as a safety precaution." Ex. R-14. Section 105(c)(1) of the Act prohibits discrimination against any miner who complains to an operator or its agent about "an alleged danger or safety or health violation." 30 U.S.C. § 815(c)(1).

However, as described in his and other witnesses' testimony at the hearing, his intention was not to get rest breaks, but to get off work 20 minutes earlier to ease his "almost 100 mile" commute. Tr. 129, 197, 201-03. Aldrich's recollection was that Holden was trying to have breaks scheduled, which, as noted in the handbook, is not permitted by the nature of the work. Tr. 351-52. As described at the hearing, the issue does not appear to have been raised as a matter of safety, or perceived as such by Aldrich. Nevertheless, Holden's actions did amount to a protest of what he perceived to be inadequate opportunities to take rest periods.[10] On the facts of this case, I find that Holden's actions constitute protected activity under the Act.

Holden's accounts of when he allegedly suffered adverse action have been highly inconsistent. His original complaint to MSHA alleged that he had been suspended for the "first or second week in April 2003" or the "last week [of March] or first week in April of 2003." Ex. R-14. The amended complaint in this action alleges that he raised the break issue at a safety meeting in March and was suspended during the "first or second week in April, 2003." Am. Compl. at 2.

Holden testified that he was laid off the first or second week in April. Tr. 68-69, 130. However, Respondent introduced time slips prepared by Holden showing that, with the exception

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[10] The parties introduced a considerable amount of evidence on the question of whether Holden took, or was able to take, the allotted rest breaks. I find it unnecessary to resolve that question, because I am satisfied that Holden raised the issue of breaks in a manner that qualifies as protected activity under the Act.

of a day or two, he worked from April 1 through 25. Ex. R-20. After Respondent introduced those records, Holden was re-called, and testified that he believed that he had been laid off from April 28 to May 2, and that the safety meeting must have been the Friday before the 28th.[11] Tr. 420-21, 428-29. Because of this significant change to the adverse action allegation, Respondent supplemented the record, post-hearing, introducing additional time slips submitted by Complainant showing that he worked from April 27 to May 10, except for two or three days that he was off participating in a basketball tournament. Ex. R-22, R-23.

Faced with his own time slips showing that he was not laid off for a week during the April to early May period, Complainant now argues in his post-hearing brief that he was laid off in March, although it is unclear when. At pages 10 - 11 of the brief, it is argued that Complainant was improperly laid off from March 10 to 15, 2003. However, discussions at pages 2, 19 and 20, address improper punishment for the week beginning March 22. While Pacific's records confirm that he did not work during those weeks, it is clear that he was not laid off for retaliatory reasons at those times.

One of the few consistencies in Holden's claim is that he was laid off following a week during which he and Spencer worked, at the conclusion of which Spencer advised him of Aldrich's statement that everyone but Holden would be back the following week. Tr. 68-70, 133, 428-30, ex. R-14. Another consistency is that Spencer continued to work, and worked during the week that Holden was laid off. Tr. 132, 185, 191, 430.

It is undisputed that Holden did not work from March 8 through March 30. Ex. R-6, R-17. Spencer, likewise, did not work during that period. Ex. R-6, R-18. Consequently, the alleged retaliatory lay-off could not have occurred during the week beginning on March 22, because neither Holden nor Spencer had worked the previous week, and Spencer did not work that week. In addition, there are no entries in Holden's journal relating to the alleged discriminatory events for that time frame. Ex. C-5. It is inconceivable that events of such importance would not have been contemporaneously recorded in the journal which he obtained

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[11] Holden's allegations, regarding meetings at which the break issue was discussed, show a similar lack of consistency. His MSHA complaint describes a safety meeting that occurred during the last week of March or the first week in April, at which he raised the break issue and was called a troublemaker. Ex. R-14. The complaint also describes a meeting that occurred "the next day," in the lunch room, that lasted over an hour. Ex. R-14. Only Holden, Aldrich and one other person were involved in that meeting, at which Aldrich threatened to fire Holden. At the hearing, Holden testified that he raised the break issue at an informal meeting on March 31. Tr. 61-61. He then described a meeting with the whole crew that occurred two days later, during the first week in April, at which he was called a troublemaker. Tr. 62, 67-68. He later described an hour-long meeting in the lunch room, with Aldrich and one other person, that occurred "after [he was] off the week in April." Tr. 85. When re-called to the stand, he discussed a meeting in the lunch room, at which Aldrich threatened to fire him, that occurred after a safety meeting on March 4, before he was laid off. Tr. 433-35.

for the purpose of recording information pertinent to perceived discrimination.

The week of March 10 through 15, is a more plausible possibility for the alleged retaliatory lay-off; however, only slightly so. Spencer and Holden had worked the previous week, despite Holden's initial testimony to the contrary.[12] There also had been a safety meeting the previous Tuesday, March 4, conducted by Aldrich. Tr. 350-53; ex R-19. Holden apparently did not procure his journal until mid-March, which could at least partially explain the absence of entries for that period.[13] However, Pacific's records clearly establish that Spencer did not work during the week of March 10. Ex. R-6, R-18. It is also undisputed that maintenance on the river locks started that week, which dictated that virtually all mining activity had to be curtailed.

Complainant supplemented the record, post-hearing, with records from the Washington State Employment Security Department, purporting to show that Holden received unemployment compensation benefits for the week ending March 15, but that Spencer did not. He argues that those records establish that Spencer worked that week, and that Holden did not. However, the unemployment records do not explain why Spencer did not receive benefits. He may have failed to apply for them, or he may have been working somewhere other than at Pacific. What is clear, is that he did not work at Pacific that week. Ex. R-6, R-18. Consequently, the alleged retaliatory lay-off, as Holden and Spencer described it, could not have occurred during the week of March 10.

I find that Complainant has failed to establish that he suffered adverse action.[14] He and Spencer were laid off starting the week of March 10 solely because of the curtailment of mining operations, necessitated by the closure of navigation locks on the river.

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[12] Holden testified that he did not work or attend a safety meeting at the beginning of March. Tr. 59-60, 131, 151. However, Respondent introduced into evidence time slips submitted by Complainant, himself, showing that he worked a total of 48 hours from March 3 through 7, 2003. Ex. R- 17.

[13] Of course, the placement of the entry in the notes section at the end of April remains puzzling.

[14] Complainant apparently claims to have suffered other adverse action, i.e., the denial of rest breaks during his entire period of employment with Pacific, beginning in 2001. Compl. Br. at 1-2, 20-21. However, he makes no plausible argument that he was denied breaks from 2001 to 2003, in retaliation for engaging in activity protected under the Act, i.e., his raising and pressing the issue as a safety concern in March of 2003. Complainant cannot assert his claim to wrongfully denied wages under Washington State law in this proceeding. Nor can he litigate here the allegation included in his amended complaint, that he was discriminated against because of his status as an American Indian.

Discrimination from January 15 to April 5, 2004

Complainant claims that Aldrich's questioning of the truck drivers about whether it would be safe to drive faster than 15 mph was "an effort to coerce the drivers into violating the posted speed limit." Compl. Br. at 14. He further contends that his and Spencer's resistence to the inquiry, and their continued adherence to the 15 mph speed limit, led to adverse consequences, i.e., that Rambler "ended up taking Complainant's (and Spencer's) truck driving job commencing in January 2004."[15] *Id.*

This claim has deficiencies similar to those of the first claim on the issues of protected activity and adverse action. There had been no speed limit signs in the area in question, and drivers had traveled faster than 15 mph because the haul road was well-maintained and it was safe to do so. Tr. 193, 267, 313. Even Spencer stated that he safely drove faster than 15 mph before the signs were posted, and that 25 mph would have been a safe speed.[16] Tr. 187-89, 193. Aldrich had the signs posted because an MSHA inspector had suggested it and they were the only ones available, which he and Rambler characterized as a misunderstanding. Tr. 313-14, 399-400. The inspector had advised that the speed limit could be adjusted, and Aldrich reasonably sought the drivers' input on whether a speed higher than 15 mph would be appropriate.[17] Tr. 377-78. He most likely was not satisfied that trucks were traveling at 15 mph on a haul road that could safely be driven at the faster speeds that the trucks had traveled prior to installation of the signs. As Dave Clark, the loader operator and lead man for the crew, stated, the signs slowed loading of the barges. Tr. 262. While Aldrich's inquiries may reasonably have been interpreted as a preference that the trucks be driven faster than 15 mph, he did not direct that the trucks operate faster than the posted limit. Tr. 137-38, 340-41. Nor did he attempt to pressure the drivers into operating the trucks at a speed that would have been inappropriate for the conditions. I also find that Aldrich did not make a remark to the effect that Holden and Spencer were "sabotaging" loading of the barges. A note that Holden claims to have made that day, apparently a day that he had forgotten his journal, describes only Holden's use of the word "sabotage" in an inquiry to

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[15] Aside from the conceptual difficulty of one individual taking the jobs of two drivers, Spencer did not share this view. He testified that the work being done over the winter shut-down was not the type of work he would normally do, and that he suffered no adverse consequences because of his responses to Aldrich's inquires. Tr. 187, 189.

[16] The 15 mph signs on the haul road were later replaced with 25 mph signs. Tr. 191-92, 339; ex. R-3.

[17] The Secretary's regulations provide that "Operating speeds shall be consistent with conditions of roadways, tracks, grades, clearance, visibility, and traffic, and the type of equipment used." 30 C.F.R. § 56.9101.

which Aldrich did not respond.[18] Ex. C-3.

It is difficult to characterize Holden's actions as protected activity. His refusal to respond to Aldrich's inquiry, as well as his insistence on driving no faster than the newly posted speed limit, were not motivated by safety concerns. At no time did Holden assert that driving 20 or 25 mph on the haul road would have been unsafe. From the testimony of Spencer and others, it is apparent that haul truck drivers, including Holden, drove at the higher speed before the signs were posted, and that it was not unsafe to do so. Holden's chief concern appears to have been his personal responsibility in the event of a collision or accident. Tr. 79. While driving at a slower speed will almost always be safer, on this record, I find that Holden's actions did not constitute protected activity.

I also find that Complainant did not suffer adverse action as a result of any activity that he engaged in with respect to the speed limit issue. He had been specifically advised that major maintenance projects were going to be performed over the winter shut-down. Tr. 82-83. He and Spencer were production haul truck drivers, and there was no such work during the shut-down. Spencer testified that the work was not the type of work that he would normally have done, and that nothing happened to him as a result of his replies to Aldrich's inquiries. Tr. 187, 189. Aldrich selected the members of the work crew based upon the type of work that needed to be done. Tr. 359-60, 401-03. Some of the work, e.g., excavation, was performed by a contractor. Tr. 359. There was very little need for trucks. Tr. 264, 268-70. Rambler was part of the work detail and had experience as a haul truck driver. Tr. 309-10. He had provided relief to haul truck drivers so that they could take breaks, and he operated a truck, when needed, during the project. Tr. 204, 270-71, 311. Rambler was also an enrolled member of the Apache tribe, and was entitled to hiring preference at Pacific's Avery pit site. Tr. 309; ex. R-1. Charpentier, who had been originally hired as a maintenance worker, also worked on the project from time to time. Tr. 359.

I find that Holden would not have been scheduled to work on the construction project during the winter shut-down, whether or not he engaged in protected activity, with respect to the speed limit or any other safety issue. Aldrich's selection of men to work on the maintenance projects was based entirely upon *bona fide* business considerations.[19] Complainant has not established that he suffered adverse action as a result of his claimed protected activity with

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[18] There are only two entries in Holden's journal relating to speed for the week of December 15, 2003. The first, at the top of the page, reads "Tim [not Aldrich] tried to get me + Jack to drive faster after MSHA [?]. . . ." The second, in the space allocated to Wednesday, December 17, reads: "Tim driving over speed limit." Ex. C-5.

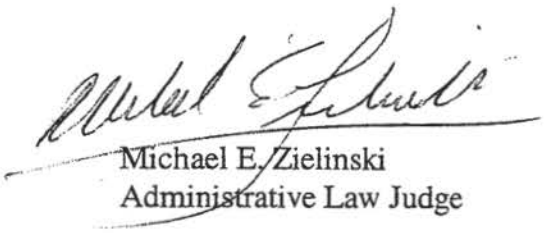
[19] There was a considerable amount of evidence introduced by both parties on Holden's skills, attitude and general value as an employee and co-worker. That evidence has not been discussed, because Respondent made clear that Holden's work schedule was not established based upon any perceived shortcomings he might have had as an employee.

respect to the speed limit issue.

ORDER

For the reasons stated above, I find that Complainant has failed to carry his burden of establishing that justifiable circumstances existed for failing to timely file his complaint of discrimination with MSHA, with respect to the alleged March 2003 lay-off. In addition, I find that Complainant has failed to establish a *prima facie* case of discrimination as to either his March 2003, or January 15 to April 5, 2004, claim. Alternatively, I find that Ross Island has established that its determinations not to call Complainant to work during March 8 to 31, 2003, and January 15 to April 5, 2004, were the result of *bona fide* business reasons, and that it would have made the same decisions, regardless of any protected activity that Complainant might have engaged in.[20]

Ross Island did not discriminate against Complainant in violation of the Act. Accordingly, the Discrimination Complaint, as amended, is hereby **DISMISSED**.



Michael E. Zielinski
Administrative Law Judge

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/mh

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[20] Had Complainant established a *prima facie* case, Respondent would have established its affirmative defense to the claims. *See Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983); *Haro v. Magma Copper Co*, 4 FMSHRC 1935, 1938 (Nov. 1982).

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

April 29, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2004-164
Petitioner	:	A.C. No. 15-17234-21221
v.	:	
	:	Docket No. KENT 2004-215
LONE MOUNTAIN PROCESSING, INC.,	:	A.C. No. 15-17234-23900
Respondent.	:	
	:	Huff Creek No. 1

DECISION

Appearances: Neil Morholt, Esq., and MaryBeth Bernui, Esq., U.S. Department of Labor, Nashville, Tennessee, Elmer Keen[1], William Johnson[2], and Danny Deel[3], for the Petitioner;
Noelle M. Holladay, Esq., and Marco M. Rajkovich, Jr., Esq., Wyatt, Tarrant & Combs, Lexington, Kentucky, for the Respondent.

Before: Judge Weisberger

STATEMENT OF THE CASE

These cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (Secretary) alleging violations by Lone Mountain Processing , Inc. (Lone Mountain) of various mandatory safety standards set forth in Title 31 of the Code of Federal Regulations. The cases were heard in Johnson City, Tennessee, on January 19, 2005. Subsequent to the hearing the parties filed post hearing briefs .

I. Docket No. KENT 2004-164

A. Citation No. 7536380

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[1] Mr. Keen represented Petitioner in Citation No. 7586387

[2] Mr. Johnson represented Petitioner in Citation No. 7536389.

[3]Mr. Deel represented the Petitioner in Citation No. 7536390.

The Inspector's Testimony

Lone Mountain operates the underground coal mine at issue. On November 24, 2003, MSHA inspector Robert D. Clay, a certified electrician and electrical inspector, inspected various circuit breakers located on a panel in the 003 unit. The breakers are designed to energize and de-energize mining equipment. He examined an energized 225 amp, 480 volt breaker, but was unable to determine which specific piece of equipment received power from this breaker. Clay traced the cable that had been plugged into the receptacle of the circuit breaker and observed that it ran to a roof bolter.[4]

The parties stipulated that this circuit breaker was labeled "in numerals No. 6". (Tr. 14). A label, approximately 3 inches by 4 inches, had been placed directly above the circuit breaker. According to Clay, a miner who did not work on a regular basis on the section would not have any way of knowing what specific equipment was served by this circuit breaker. Accordingly, if such a person would be instructed to de-energize the breaker and disconnect a cable, he might inadvertently de-energize the wrong breaker. As a result when the miner would attempt to remove the disconnecting device he would receive serious burns and electrical shock which could be fatal.

Clay opined that breakers are required to be identified as to the piece of equipment that they serve. He concluded that since the breaker at issue was not marked in this fashion, it had not been properly identified. He issued Citation No. 7536380 alleging a violation of 30 C.F.R. § 75.904 which provides, as pertinent, that "[c]ircuit breakers shall be marked for identification."

The Applicability of U.S. Steel Mining Co. 30 C.F.R. § 75.601

In support of its position that a breaker must be identified as to the equipment it services, the Secretary relies on *Secretary of Labor v. U.S. Steel Mining Co.*, 10 FMSHRC 1138, 1141 (Sept. 1988). *U.S. Steel*, supra, involved an alleged a violation of 30 C.F.R. § 75.601, which requires disconnecting devices used to disconnect power from trailing cables to be plainly marked and identified. In *U.S. Steel*, supra, the operator was cited for having marked the receptacle on a panel to identify the specific circuit breaker that controlled the receptacle but did not mark the receptacle with the name of the piece of equipment that it served. The Commission held that the Secretary's position requiring that cable plugs and receptacles to be labeled identically was reasonable .

The Secretary, in its brief, after discussing *U.S. Steel*, supra, argues that under "controlling case law" the "only reasonable interpretation" of Section 904, supra, is that the circuit breaker, plug, and receptacle be labeled in a similar manner.

I find that this reliance is misplaced, as the issue presented in *U.S. Steel*, supra, is inapposite to the issue presented herein. In *U.S. Steel*, supra, the regulatory standard before the Commission,

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[4]The plug (Cathead) on this cable was labeled "roof bolter". (Tr. 14)

Section 75.601, supra, contains language that is not similar to Section 904, supra, at issue herein. The operative phrase in Section 601, supra, provides as follows: "disconnecting devices used to disconnect power from trailing cables shall be plainly marked and identified." (Emphasis added.) In contrast, Section 904, supra, requires that circuit breakers shall be marked for identification. Thus, it does not follow that the Commission's holding in *U.S. Steel*, supra, must be extended to Section 904, supra. In this connection, it is significant to note that the Commission, in *U.S. Steel*, supra, at 1142, explicitly stated that the case before it required it to construe only Section 601, supra, "... and we reserve construction of other standards addressing other concerns to cases raising such issues."

Further, the specific issue presented before the Commission in *U.S. Steel*, supra, was whether the term "disconnecting device" in Section 601, supra, encompasses both the plug of a trailing cable and the receptacle. As such, the resolution of that issue is not germaine to the case at bar, which involves an interpretation of the scope of the requirement in Section 904, supra, that circuit breakers be marked for identification.

Further Discussion

Section 904, supra, sets forth in clear plain language that circuit breakers "shall be marked for identification". (Emphasis added.) Webster's Encyclopedic Unabridged Dictionary (1994 Ed.) (Webster's) defines marked as "* * * 3. having a mark or marks ... ." A "mark" is defined in Webster's as * * * 5. "an affixed or impressed device, symbol, inscription, etc., serving to give information, identify ... ." "To mark" is defined in Webster's as follows: "v.t. ... 28. to put a distinguishing feature of . . . 30. to furnish with figures, signs, tags, etc." Webster's defines "identification" as "1. the act of identifying." Webster's defines "identify" as "1. to recognize or establish as being a particular person or thing ... ."

Thus the plain meaning of the words in Section 904, supra, requires, merely, that the circuit breaker must be identified in some fashion. The evidence is clear and the parties have so stipulated, that the circuit breaker cited was labeled as No. 6. The corresponding receptacle was also labeled No. 6. Thus, the record establishes that the breaker at issue, labeled No. 6, was clearly marked in a fashion sufficient for identification.[5] There is not any requirement in the plain unambiguous wording of Section 904, supra, that the breaker be identified as to the specific piece of equipment it is serving.[6] To so find would have the effect of amending the regulation by setting forth an

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[5] It is significant to note the uncontradicted and unimpeached testimony of Respondent's witnesses, Sheffield and Webb, that Lone Mountain has been using the numerical method of identifying circuit breakers since the mine opened in 1993, and has never been cited before for this method of marking.

[6] I take cognizance of Program Policy Letter No. P0V-V-2(PPL) (effective June 17, 2003), which sets forth as follows: "Circuit breakers shall be marked to clearly identify the circuit or machine receiving power through the circuit breaker ... . In order to comply with the provisions of Sections 75.601, 75.903, 75.904, an example is to label the loading machine cable plug, receptacle, and the circuit breaker through which the loading machine is receiving power as 'loader'". (Government Exhibit 1)

additional requirement. Such a step would require notice and comment.

For all the above reasons, I conclude that the Secretary has not established that Lone Mountain violated Section 904, supra, and accordingly, Citation No. 7536380 should be dismissed.

II. Docket No. KENT 2004-215

A. Citation No. 7536387

According to Clay, on November 24, 2003, he observed that a pilot circuit wire was not connected at the belt starting box enclosure for the No. 2 belt drive motor. Clay concluded that because the pilot wire had not been connected, there was not a complete monitoring circuit for the motor starter enclosure. Clay issued a citation alleging a violation of 30 C.F.R. § 75.902 which provides, as pertinent, that "grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit to open when either the ground or pilot check wire is broken ... ."

Lone Mountain argues that the Secretary did not establish that it (Lone Mountain) violated Section 75.902, supra, in that the Secretary failed to prove that the belt drive did not include a fail-safe ground check circuit, or that a pilot wire was not connected to monitor the system. In this connection, Lone Mountain relies on testimony of Sheffield that a pilot wire was connected which monitored the entire belt drive system. In essence, according to Sheffield, the belt drive system consisted of four motors powered by two cables that ran from the power center to the belt starter box. He said that each of the cables had a ground wire and a pilot wire and only one of these needed to be connected to monitor the belt drive system. However, his explanation that only one pilot wire, is sufficient to protect the entire belt drive system, including all four motors is confusing and not clear. In this connection, Sheffield's testimony is as follows:

> Q. Let's talking about P 1. (Sic) [the pilot indicator in exhibit R3].
>
> A. P 1. was continuous through the circuit to the belt motors, the way it was supposed to be.
>
> Q. So, was it connected as required under law?
>
> A. Yes. (Tr. 138)

* * *

The Secretary aruges that this interpretation of Section 904, supra, should be given deference. However, because the plain meaning of Section 904, supra, is clear and unambiguous, there is not any mandatory requirement to give deference to the Secretary's interpretation as set forth in the PPL. (See, *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.* 467 US 837, 843 (1984).

A. No. What was cited, if I could explain: This shows one pilot wire being used. This supply cable – these cables are identical and they both go back to the power center. You don't use this monitor wire; you only use one. And back at the power center it stays – this receptacle uses a pilot interlock jumper in the plug. Do not connect the pilot wire in the trailing cable jumper to the two pilot ends and the plugs. So, we only use one of the pilot wires. The cables are identical, so you only use the pilot wire in this case. (Tr. 140-141)

* * *

A. Okay. And then on these motors, I won't draw the phases, but each motor has a cable going to it.

Q. Out of the starting box?

A. Out of the starting box. Each one of them has a ground on all four motors. Do you want me to put all four of them on there? (Tr. 151)

* * *

Q. Tell me why that satisfies the regulation that we're talking about. Why is that a pilot monitor system?

A. Because it is monitoring continuously ...

Q. And how is it monitoring continuously?

A. ... and in this system it [the pilot wire inside cable "A" depicted in Exhibit R-5] is internally connected in the plug, it comes into the starter, which it actually ties into the pilot wire, and you can tie it into one of these cables or you can tie it into all four cables. As far as the law goes, it really doesn't matter. Internally, every one of these 4-aught cables has a monitor wire. You can come down and tie it into the one in this cable, bring it down here, tie it to ground in this motor.

Q. Tie it to the ground in this motor?

A. Or to the frame in this motor, not to the ground. Tie it in a different location, which connects the whole one piece of equipment which has multiple motors.

Q. Will that complete the circuit, then, for this pilot monitoring?

A. Yes. (Tr. 152 - 153)

* * *

Q. Okay. Now, without going through all of this, this pilot wire in this "B-system cable", let's say, is that pilot wire connected, or was that pilot wire in this particular situation connected this cathead, ...

A. No.

Q. ... the plug?

A. No sir.

Q. And why not?

A. Because in this system you only use the pilot wire in this cable.

Q. Which is System A?

A. Syst -- Cable A.

Q. Yes.

A. And it interlocks through the cathead of Cable B. (Tr. 155 - 156)

* * *

Q. That's okay. That's okay. I want the simplest way to explain it whatsoever. Is there an interconnection?

A. Yes, there is an interconnection in the power center itself.

Q. In the power center.

A. Yeah. The pilot wire comes through.

Q. Yes sir.

A. These are closed.

Q. The pilot wire is System A.

A. And pilot wire in Cable A, ...

Q. Yes.

A. ... or System A, comes over, goes back into the receptacle that feeds Cable B.

Q. Yes sir.

A. It actually interlocks through two internal prongs, comes back into the power center, which makes up the ground-check circuit. (Tr. 156 - 157)

* * *

Q. In other words, the Cable B, the power, the three power leads to Cable B, do they come into this starting box? How do they get to these motors? . . .

A. You've got two contactors. Two motors are run by this power cable.

Q. Which power cable?

A. These two motors are run by Power Cable B. (Tr. 159)

* * *

THE COURT: Are you now saying that coming out of the starter box there were two cables from the A System going to two other motors?

A. That's basically how it works, yes. Feeding from A and from B. (Tr. 160)

* * *

Q. Okay, Mr. Sheffield, I guess first of all, the whole idea, let me ask you, is to provide a pilot monitoring for what here?

A. The belt drive.

Q. The belt drive

A. Yes.

Q. And the belt drive is composed of how many motors?

A. Four motors.

Q. So, are we trying to monitor the motors, then, the pilot to the motors?

What are we trying to monitor?

A. We're monitor this. It's one piece of equipment.

THE COURT: If "this" the belt drive?

A. Yes.

Q. So the belt drive, is that the one system that we're trying to monitor?

A. Yes.

Q. Okay. Now, this system, then, this belt-drive system, we're having power coming in from how many different places?

A. Two different power feeds: AC/DC.

Q. AC and DC. All right. So, is A and B both part of this whole system to power this drive?

A. Yes.

Q. Now within A and B, let me just ask you this: If you have to have a pilot monitor, do you have to have a pilot monitor wire connection in A and B?

A. No. Sir.

Q. And why not?

A. Because they are interconnected through the interlocked circuit of Cable B. going internally into the power center.

Q. So, if we only have a pilot monitoring system in Cable A, does that provide the monitoring system for the entire drive?

A. Yes sir.

Q. Does it provide it for the entire four motors of that drive?

A. Yes sir. (Tr. 161-162)

* * *

Thus, I find that Sheffield's testimony fails to convincingly establish how there can be a complete circuit for the entire belt system, i.e., from the power center, through all four motors and back to the power center, if there are two cables running to the power center, one of which does not have the pilot ground wire connected to the circuit box.

Therefore, for all the above reasons. I find that the Secretary has established that Lone Mountain violated Section 902, supra. Considering all the factors set forth in Section 110(i) of the Act, I find that a penalty of $60.00 is appropriate.

B. Citation No. 7537389

In the inspection on November 24, Clay observed that a conduit leading to the No. 4 continuous haulage bridge carrier was cut in two locations, and that the pick breaker handle was missing. Clay issued a citation alleging a violation of 30 C.F.R. § 75.503, which, in essence, provides that electrical equipment used inby the last open crosscut be maintained in a "permissible condition".

According to Clay, the purpose of the conduit was to protect the power cable within and to eliminate a possible flame path in the event of a methane release. Clay indicated that the interior cable was exposed in the two locations where the conduit was damaged.

Clay opined that the lack of a handle made the pick breaker non-permissible because "... it comes approved in a certain manner by Mine Safety and Health. (Sic.) And that piece of equipment being approved in its entirety is with the permissible and explosion-proof covers on it; and that includes handles and lock-washers, and everything that goes with it." (Tr. 175) Aside from this opinion, the Secretary did not proffer any documentary evidence to establish the permissibility of the pick breaker, i.e., that a handle was required to make it permissible.

"Permissible" is defined in Section 318(i) of the 1977 Mine Act, 30 U.S.C. § 801, supra, et seq., and 30 C.F.R. §75.2(i) as follows:

> "[P]ermissible' as applied to electric face equipment means all electrically operated equipment taken into or used inby the last open crosscut of an entry or a room of any coal mine the electrical parts of which ... are designed, constructed, and installed, that such equipment will not cause a mine explosion or mine fire, and the other features of which are designed and constructed, in accordance with the specification of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment ... . [Emphasis added.]

Based on this definition, it appears that the test of permissibility regarding a non-electrical feature, i.e., a handle, is based on the specification of the Secretary. In the case at bar, the Secretary has failed to adduce any evidence or make any reference to any of the Secretary's specifications that would indicate that the pick breaker at issue requires a handle in order to be permissible. Further,

that the purpose of permissibility is to assure against a mine explosion or fire. (See, Solar Fuel Co., 3 FMSHRC 1384 (June 1981)). The inspector did not explain how the missing handle contributed to a risk of a fire or an explosion. According to the uncontradicted testimony of Webb, although the handle was missing, there was no damage to the shaft, and the breaker could still be de-energized at the power center by pulling the cathead or plug.

According to the citation issued by Clay, a 480 volt power cable was exposed because of a cut in the conduit. However, on cross-examination, he indicated that "this was a 480 volt system; ... ." (Tr. 177), but admitted that he did not know the voltage of the cable. On the other hand, Webb indicated, in testimony that was not contradicted or impeached, that the cable at issue was a communication cable carrying approximately two volts, and that the purpose of the cable was to transmit computer signals. The Secretary has not proffered any evidence to establish that such a cable must be permissible. Indeed, Clay admitted on cross examination that "the law" does not require communication cables to be in a conduit. (Tr. 178)

Within the framework of this evidence, I find that the Secretary has failed to establish that the cited conditions regarding the conduit, and pick breaker handle, made any equipment non-permissible. Thus, I find that it has not been established that Lone Mountain violated Section 503, supra.

C. Citation No. 77537390

According the Clay, the conduit leading into the No. 2 continuous haulage bridge carrier had been cut in two locations. The cuts were approximately one-half inch wide and one inch long. Clay indicated that the purpose of the conduit was to protect the power cable within, and eliminate a possible flame path in the event of a methane release. Clay cited Lone Mountain for violating Section 503, supra.

According to Clay, there was not any damage to the cable enclosed within the conduit. Further, based on the uncontradicted and unimpeached testimony of Webb, the capacity of the cable at issue was approximately two volts and served as a communication cable similar to that discussed regarding Citation No. 7536389. Aside from the Secretary's assertion in its brief that the cut "was clearly violative of the permissibility requirement", the Secretary did not adduce any evidence establishing such a communication cable was required to be permissible. Essentially for the same reasons set forth above regarding Citation No. 7537389 I find that the Secretary herein has not established a violation under Section 503, supra.

D. Citation Nos. 7536378, 7536381, 7536382, 7536383, 7536384, 7536385, 7536391, and 7536392

The parties filed a Joint Motion to Approve Settlement of the civil penalty proceedings regarding these citations. The original assessment for these citations was $1,824.00. The parties agreed to settle for a penalty of $756.00. Based on the parties' representations, and the record

regarding these citations, I find that the proposed penalty is proper within the framework of the Federal Mine Safety and Health Act of 1977, and I grant the Motion.

Order

It is **Ordered** that, within 30 days of this decision, Respondent pay a total civil penalty of **$816.00** based on the parties' settlement, and the violation of Section 75.902, supra. It is further **Ordered** that Citation Nos. 7536380, 7537389, and 7537390 be **Dismissed.**

Avram Weisberger
Administrative Law Judge

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