MAY 2000

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

MAY 2000

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

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. WEVA 98-148. (Judge Feldman, March 31, 2000)

Bryce Dolan v. F & E Erection Company, Docket No. CENT 97-24-DM. (Judge Feldman, April 25, 2000)

Secretary of Labor, MSHA v. Justis Supply & Machine Shop, Docket No. CENT 99-272. (Judge Manning, April 20, 2000)

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

Secretary of Labor, MSHA v. Earl Begley, employed by Manalapan Mining Company, Docket No. KENT 99-233. (Judge Weisberger, April 19, 2000)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 3, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of KEVIN T. DONALD	: : : : :	
v.	:	Docket No. VA 99-110-DM
ATLANTIC STATES MATERIALS, INC.	:	

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

ORDER AND AMENDED DECISION APPROVING SETTLEMENT

BY: Jordan, Chairman; Marks and Verheggen, Commissioners

This discrimination proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On November 17, 1999, Administrative Law Judge Michael Zielinski issued a Decision Approving Settlement, granting a settlement motion filed by the Secretary in this proceeding. The Secretary now requests the Commission to substitute a corrected motion to approve settlement and to modify the judge's decision.

On June 21, 1999, the Secretary filed a complaint on behalf of Donald alleging a violation of section 105(c) of the Mine Act, 30 U.S.C. § 815(c). S. Mot. to Substitute Mot. to Approve Settlement at 1 (Feb. 25, 2000) ("S. Substitute Mot."). In her Motion to Substitute, the Secretary states that, on approximately November 10, 1999, the parties "reached an agreement in principle regarding the settlement of this case." S. Substitute Mot. at 2. On November 15, 1999, the Secretary inadvertently filed with the judge a draft motion to approve a settlement agreement, which had not been reviewed by the operator's counsel. *Id.*; *see* S. Mot. to Approve Settlement (Nov. 15, 1999). On November 17, the judge issued his decision approving the settlement and directing Atlantic States to pay the amounts set forth in the settlement agreement. Unpublished Dec. dated Nov. 17, 1999. On February 25, 2000, the Secretary filed an unopposed motion to substitute her November 15 motion to approve settlement, noting that she had mistakenly filed a draft motion, and that Atlantic States had requested various changes to be made, including requiring Donald to sign. S. Substitute Mot. at 2.

The judge's jurisdiction over this case terminated when his decision approving settlement was issued on November 17, 1999. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may

be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The Secretary's motion was received by the Commission on February 28, 2000, about two months after the judge's decision became final. Under these circumstances, we treat the Secretary's motion as a late-filed petition for discretionary review requesting amendment of a final Commission decision. *See Molloy Mining, Inc.*, 22 FMSHRC 292, 293 (Mar. 2000); *General Chemical Corp.*, 18 FMSHRC 704, 705 (May 1996).

A final Commission judgment or order may be reopened under Fed. R. Civ. P. 60(b)(1) & (6) in circumstances such as mistake, inadvertence, excusable neglect, or other reasons justifying relief. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *e.g.*, *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). The Secretary inadvertently filed a draft motion to approve settlement with the judge prior to its approval by Atlantic States. The judge entered his decision approving settlement, directing Atlantic States to pay the amounts set forth in the settlement agreement. The amended motion to approve settlement does not materially alter the terms of the agreement set forth in the draft motion. The filing of the draft motion to approve settlement amounts to mistake or inadvertence under Rule 60(b).

Accordingly, we reopen the final decision, and grant the Secretary's motion to substitute her February 25 motion to approve settlement for her November 15 motion.[1] *See Molloy Mining, Inc.*, 22 FMSHRC at 294 (amending judge's decision approving settlement where the Secretary mistakenly listed incorrect amounts for three proposed penalties settled by the parties); *General Chemical Corp.*, 18 FMSHRC at 705 (amending judge's dismissal order where the judge mistakenly left out a citation in the caption and body of his order); *Martin Marietta Aggregates*, 16 FMSHRC 189, 190 (Feb. 1994) (amending judge's decision approving settlement to reflect correct penalty amount agreed to by the parties).

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[1] Commissioner Riley concludes that, because the judge committed no error in this matter, this case should be remanded to the judge to allow him to correct the Secretary's clerical error.

Further, it is ordered that the amended motion to approve settlement is granted. The Decision Approving Settlement issued November 17, 1999, is hereby amended to reflect that the Secretary filed an amended motion to approve settlement on February 25, 2000 which accurately represents the settlement agreement between the parties in this discrimination proceeding. The parties shall comply with the terms of the settlement as set forth in the amended Motion to Approve Settlement.

Mary Lu Jordan, Chairman

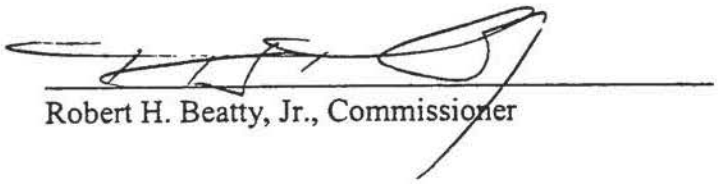
Marc Lincoln Marks, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Beatty, dissenting:

I respectfully dissent from the majority's amended decision approving settlement in this case. Consistent with my dissenting opinion in *Secretary of Labor on behalf of Maxey v. Leeco Inc.*, 20 FMSHRC 707 (July 1998), I continue to adhere to my position that this Commission has no authority to approve back pay awards in discrimination cases under section 105(c) of the Mine Act, 30 U.S.C. § 815(c). In my view, the only portion of the Secretary's Motion to Approve Settlement that we have jurisdiction over is found in paragraph 3(d) of the Settlement Agreement regarding the amount of the proposed civil penalty. S. Mot. to Approve Settlement (Feb. 25, 2000) at 3. Since a civil penalty is involved, I would remand this matter to the judge with strict instructions that he only review and approve the language in paragraph 3(d).

I find it interesting in this case that the complainant and the operator have entered into a separate settlement agreement and release to which the Secretary is not a party and whose terms have not been disclosed. If the majority believes that this Commission has the authority to review and approve the terms of back pay settlements in discrimination cases, I question why they would not insist upon disclosure of the terms of this side agreement. Giving their stamp of approval to a settlement agreement without full knowledge of all the terms of the agreement appears to be inconsistent with their position.



Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 9, 2000

GARY D. MORGAN	:	
	:	
	:	Docket No. LAKE 98-17-D
	:	
v.	:	
	:	
	:	
ARCH OF ILLINOIS	:	

ORDER

On April 21, 2000, the Commission received a Motion to Reconsider Previous Petition for Discretionary Review and Motion to Have Test Results Scientifically Analyzed from the complainant, Gary D. Morgan. Under Commission Procedural Rule 78, 29 C.F.R. § 2700.78, a motion for reconsideration must be filed within 10 days after a decision or order by the Commission. The Commission denied Morgan's petition for discretionary review on March 24, 2000. Accordingly, Morgan's motion for reconsideration is untimely under the Commission's rules.

Moreover, having examined the arguments raised by Morgan's motion, we would deny the request for reconsideration in any event. In his motion, Morgan has not raised any new arguments concerning the judge's decisions that the Commission has not already considered. Further, Morgan's motion to have his test results scientifically analyzed is essentially a request to reopen the record, which would be inappropriate at this stage of these proceedings.

For the foregoing reasons, the Motion to Reconsider and the Motion to Have Test Results Scientifically Analyzed are denied.[1]

MaryLu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

[1] Commissioner Marks would grant the relief requested in the motions.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 11, 2000

SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	:	Docket No.	WEST 2000-155-M
ADMINISTRATION (MSHA)	:		WEST 2000-156-M
	:		WEST 2000-157-M
v.	:		WEST 2000-158-M
	:		WEST 2000-159-M
SAN BENITO AGGREGATES,	:		WEST 2000-160-M
INCORPORATED	:		

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

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On February 7, 2000, the Commission received from San Benito Aggregates, Inc. ("San Benito") a request to reopen six penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On March 2, the Commission received the Secretary's response, opposing the request.

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

In his letter, David Grimsley, owner of San Benito Aggregates, Inc. ("San Benito"), a small quarry in Hollister, California, asserts that he was not informed by his staff of the violations associated with these penalty assessments until he received a demand letter for payment from the Department of Labor's Mine Safety and Health Administration ("MSHA") in late December 1999. Mot. Grimsley states that he was not informed "for reasons unbelievable to me." *Id.* He claims that he has reevaluated his operations and has made "serious adjustments where needed." *Id.* He offers that his company is in financial crisis and that the penalties would have a substantial impact. *Id.* Accordingly, San Benito requests an opportunity to contest the six proposed penalties. *Id.*

The Secretary asserts that San Benito does not meet the standards for relief under Fed. R. Civ. P. 60(b) because it has failed to establish that its conduct amounts to "excusable neglect." S. Opp'n. to Mot. at 1-2. She states that the only explanation San Benito offers for its failure to contest the penalty assessments is that it had internal management problems, and that mistakes and omissions of an operator's staff do not constitute excusable neglect. *Id.* at 5-7. The Secretary notes that San Benito received the six penalty assessments at issue, which include 61 violations totaling $33,722 in penalties, over the course of 6½ months. *Id.* at 2-3, 7; Attach. A. She asserts that San Benito also received five notices, one for each of the first five penalty assessments, but failed to respond to either the penalty assessments or the notices until it received a letter from MSHA dated December 8, 1999, demanding payment of all six penalty assessments and threatening referral to the Department of Justice for collection. *Id.* at 3-4; Attach. B-D. The Secretary also offers that San Benito is familiar with MSHA procedure because it received penalty assessments for 120 violations over the past 13½ years. *Id.* at 4; Attach. E. Finally, the Secretary contends that granting San Benito relief under these circumstances would be unfair to compliant operators and inconsistent with effective enforcement of the Mine Act. *Id.* at 7-8. Accordingly, the Secretary requests that the Commission deny San Benito's request for relief. *Id.* at 8.

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

On the basis of the present record, we are unable to evaluate the merits of San Benito's request. Although it appears that San Benito has offered an explanation for its failure to timely file a hearing request, it has not attached sufficiently reliable documents to substantiate its allegations. Moreover, the Secretary, in her opposition, has alleged facts in addition to those raised by San Benito. We are unable to evaluate this factual record at an appellate level.[1] In the interest of justice, we thus remand the matter for assignment to a judge to determine whether San Benito has met the criteria for relief under Rule 60(b). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary L. Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

[1] Commissioners Beatty and Riley believe that the Commission should remand to an administrative law judge to determine whether the criteria for relief under Rule 60(b) have been met whenever the request to reopen or any response thereto raises factual issues irrespective of whether or not the Secretary of Labor objects to or opposes an operator's request for relief. Commissioners Beatty and Riley believe that any factual issues raised by a request to reopen under Rule 60(b) or any response should be resolved in the first instance by a judge, as the trier of fact.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 18, 2000

DONALD L. RIBBLE	:	
	:	
v.	:	Docket No. LAKE 2000-25-DM
	:	
T & M DEVELOPMENT COMPANY	:	

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

DIRECTION FOR REVIEW AND DECISION

BY: THE COMMISSION

Pursuant to Commission Procedural Rule 71, 29 C.F.R. § 2700.71, on our own motion, we direct review of the judge's April 18, 2000 Order of Dismissal in this case on the ground that it is contrary to law and Commission policy. 30 U.S.C. § 823(d)(2)(B). For the reasons set forth below, we vacate the judge's decision and remand this matter to him to conduct further proceedings consistent with this order.

I.

Factual and Procedural Background

On December 20, 1999, Donald Ribble filed a pro se discrimination complaint with the Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (1994) ("Mine Act").[1] In his complaint, Ribble alleges that his former employer, T & M Development Company ("T & M"), fired him on August 17, 1999 after he

[1] In order to succeed in a discrimination case under the Mine Act, a miner has to present evidence that could convince a judge that (1) the miner engaged in protected activity (for example, reporting a safety violation), (2) the miner suffered an adverse employment action, and (3) the adverse action was motivated by the protected activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

sustained a back injury on August 11, 1999. Ribble also alleges that after his injury, but before being fired, he repeatedly and unsuccessfully attempted to obtain an accident report from T & M. Compl. at 1. Ribble also submitted to the judge notes of a September 20, 1999, interview between Ribble and two Mine Safety and Health Administration ("MSHA") investigators in which Ribble details several complaints he made to mine inspectors regarding safety problems at T & M, although it is unclear when these complaints were made. Notes at 7-8.

Ribble's complaint was assigned to Commission Administrative Law Judge Gary Melick. On March 28, 2000, Judge Melick issued on his own motion an Order to Show Cause in which he stated that Ribble's complaint failed to "allege facts constituting a violation" of the Mine Act's anti-discrimination provision, section 105(c)(1), 30 U.S.C. § 815(c)(1). Order at 2. The judge directed Ribble "to show cause (explain why) *on or before April 14, 2000*, why this case should not be dismissed." *Id.* (emphasis in original).

On April 18, 2000, Judge Melick issued an Order of Dismissal reiterating the points made in his Order to Show Cause, stating that Ribble failed to respond to that order, and dismissing the case. On April 21, 2000, the Commission received a letter from Ribble dated April 17 bearing a postmark of April 18, 2000, in which he essentially responded to the judge's Order to Show Cause. Ribble stated, inter alia, that when he "asked for a[n] accident report form to fill out at the time [he] fell," his supervisor "had all kind[s] of excuse[s]," and that "three day[s] before I got fired they didn't even want me to fill out a[n] accident report form." Letter at 1.

II.

Disposition

Although in his Order to Show Cause and Order of Dismissal the judge did not cite Rule 12(b)(6) of the Federal Rules of Civil Procedure or use its terminology, he in essence dismissed Ribble's complaint for failure to state a claim upon which relief could be granted.[2] In *Perry v. Phelps Dodge Morenci, Inc.*, the Commission stated as follows regarding Rule 12(b)(6):

> It is well settled that "[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." The Supreme Court has held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Additionally, we hold the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. In cases brought by pro se complainants, motions to

[2] *See* 29 C.F.R. § 2700.1(b) ("On any procedural question not regulated by [the Commission's Procedural] Rules . . . the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure . . .").

> dismiss for failure to state a claim should rarely be granted. Instead, in such a case, a judge should ensure that he informs himself of all the available facts relevant to his decision, including the complainant's version of those facts.

18 FMSHRC 1918, 1920 (Nov. 1996) (citations omitted).

Here, as in *Perry*, a pro se discrimination complaint was dismissed for failure to state a claim — although in this case, Ribble's complaint was dismissed by the judge sua sponte rather than on any motion filed by a party. Under the stringent standard set forth in *Perry*, we find the judge's initial conclusion in his Order to Show Cause that Ribble's "Complaint does not allege facts constituting a violation of Section 105(c)(1)" erroneous. It follows that his decision to dismiss Ribble's complaint was also erroneous.

To state a claim, Ribble's complaint had to set forth "a short and plain statement of the facts, setting forth the alleged . . . discrimination . . . and a statement of the relief requested." 29 C.F.R. § 2700.42. We find that the complaint met this minimal burden. Ribble alleged that he engaged in protected activity, namely, requesting an accident report form on which to report his injury.[3] The protected nature of Ribble's request arises from T & M's obligation under 30 C.F.R. § 50.20 to report Ribble's injury to MSHA. In addition, we note that Ribble's statement to MSHA, included as part of his complaint, mentions safety problems he reported to mine inspectors, which would also clearly be protected activity. Furthermore, Ribble's allegation that T & M terminated him is an assertion of adverse action. There may also be a close connection in time between the adverse action allegedly taken by T & M against Ribble and his request (as reported in his complaint) that he be permitted to fill out an accident report, which could indicate discriminatory motivation. *See Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2511 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983) (coincidence in time between protected activity and adverse action may be circumstantial indicia of discriminatory intent). On the record before us, we therefore find that Ribble has met his burden of alleging discrimination actionable under section 105(c).

In *Perry*, we warned against requiring a pro se complainant to begin proving his or her "prima facie case at a stage in the proceedings when [the complainant is] simply obligated to meet the Commission's minimal pleading requirements." 18 FMSHRC at 1921. Accordingly, Ribble must now be afforded the opportunity to prove his allegations, and to avail himself of all the other rights afforded under our Procedural Rules, including discovery and, if necessary, a full hearing.

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[3] Under Rule 12(b)(6), we must construe the complaint in the light most favorable to Ribble, and must assume that his allegations are true. *See* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil* § 1357, at 304 (2d ed. 1990). We must also liberally construe the complaint, which was filed pro se. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992).

III.

Conclusion

For all the foregoing reasons, we vacate the judge's dismissal order and remand this matter for further evidentiary proceedings consistent with this order.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 25, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. YORK 99-39-M
DOUGLAS R. RUSHFORD TRUCKING	:	

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

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 801 et seq. (1994). At issue is Commission Administrative Law Judge Gary Melick's decision assessing a penalty against Douglas R. Rushford Trucking ("Rushford") for a violation of 30 C.F.R. § 56.14104(b)(2), as charged in a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") in connection with a fatal accident that occurred at Rushford's Seymour Road Pit. 22 FMSHRC 74, 76-78, 80 (Jan. 2000) (ALJ). The Commission granted the Secretary's petition for discretionary review challenging the judge's penalty assessment. For the reasons that follow, we vacate the judge's penalty assessment and remand for reassessment.

Our decision in this matter is one of three decisions we are issuing today regarding the Commission's penalty assessment authority under section 110(i) of the Mine Act, 30 U.S.C. § 820(i).[1]

[1] The other decisions concerning Commission penalty assessments we are issuing today are *Hubb Corp.*, Docket No. KENT 97-302, and *Cantera Green*, Docket No. SE 98-141-M.

I.

Factual and Procedural Background

Rushford Trucking operates the Seymour Road Pit in Clinton County, New York. S. Pretrial Statement, Stipulations ¶ 1. On August 28, 1998, when Rushford employee Nile Arnold attempted to inflate a tire on a fuel truck, the wheel rim exploded and struck Arnold in the head. 22 FMSHRC at 74-75. At the time, Arnold was not using a stand-off inflation device, nor was there such a device available on the mine site. *Id.* at 75-76. On August 30, 1998, Arnold died as a result of the injuries he sustained. *Id.* at 74.

After conducting an investigation, MSHA charged Rushford with violating section 56.14104(b)(2), which requires that stand-off inflation devices be used "[t]o prevent injury from wheel rims during tire inflation." 30 C.F.R. § 56.14104(b)(2). MSHA also alleged that Rushford's violation was significant and substantial ("S&S") and the result of Rushford's unwarrantable failure to comply with section 56.14104(b)(2).[2] The agency proposed that the Commission assess a penalty of $25,000 against Rushford. Pet. for Assessment of Civil Penalty, Ex. A (May 24, 1999).

The judge found the violation "proven as charged." 22 FMSHRC at 76. He also found the violation S&S and due to Rushford's unwarrantable failure to comply with the cited standard. *Id.* at 76-78. In his discussion of the violation, the judge also found Rushford grossly negligent. *Id.* at 77-78. He based his unwarrantable failure and negligence findings on evidence that Rushford "never bothered to obtain a copy of the health and safety regulations governing the operation of [the] mine and the credible evidence that not only did the deceased fail to use an appropriate device for protection during tire inflation but that no such device was available either at the mine site . . . or at the mine shop." *Id.* at 77. The judge also found "credible [MSHA] Inspector Gadway's testimony that mine owner Douglas Rushford did not even know what a stand-off inflation device was." *Id.* at 78.

The judge made the following findings in support of his assessment of both a $3,000 penalty for the violation of section 56.14104(b)(2) and a $100 penalty for a violation of 30 C.F.R. § 50.10 not at issue here: "In assessing civil penalties herein I have also considered the operator's small size, lack of a history of recent violations, apparent good faith abatement and absence of evidence that the penalties would affect its ability to stay in business." *Id.* at 80.

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

II.

Disposition

On appeal, the Secretary argues that the judge erred in failing to sufficiently explain how he weighed the six statutory penalty criteria (S. PDR at 10-11),[3] to explain his pronounced departure from the Secretary's penalty proposal (*id.*), and to make specific factual findings on each of the individual penalty criteria (*id.* at 11). In its Statement in Opposition, Rushford argues that, as to his penalty assessment, the judge "clearly took into account the six (6) statutory penalty criteria and applied [the] same in reducing the penalty." Opp. at 2. Rushford also argues that the Secretary's PDR should be dismissed because it was filed late and that review should not be granted because the company already paid the penalty assessed by the judge. *Id.* at 2-3.

The principles governing the Commission's authority to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission shall consider" the six statutory penalty criteria:

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

30 U.S.C. § 820(i).

In keeping with this statutory requirement, we have held that "findings of fact on the [six] statutory penalty criteria must be made." *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Although findings on each of the criteria may be entered by the Commission on review based on undisputed record evidence (*see Sellersburg*, 736

[3] In our Direction for Review, we stated that we would consider the Secretary's PDR as her opening brief. We also gave Rushford leave to file a response to the Secretary's PDR in addition to the Statement in Opposition it filed February 24, 2000. Rushford filed no response.

F.2d at 1153), this duty lies with the judge in the first instance, as is made clear in our Procedural Rules. Rule 30(a) provides:

> In assessing a penalty the Judge shall determine the amount of penalty in accordance with the six statutory criteria contained in section 110(i) . . . and incorporate such determination in a written decision. The decision shall contain findings of fact and conclusions of law on each of the statutory criteria and an order requiring that the penalty be paid.

29 C.F.R. § 2700.30(a). When reviewing a judge's factual findings on the six penalty criteria, we apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I).

Findings of fact on the penalty criteria are necessary to provide the respondent with notice as to the basis upon which the penalty is being assessed. *Sellersburg*, 5 FMSHRC at 292. The findings also provide the Commission and any reviewing court with the information they need to accurately determine whether a penalty is appropriate. *Id.* at 292-93.

Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty assessment scheme. *Id.* at 294. Although we review a judge's penalty assessment under an abuse of discretion standard (*U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984)), in order for us to determine whether a judge has properly considered the statutory criteria, the judge must provide a reasoned explanation for his or her penalty assessment. As we have held in another context, "[a] judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision." *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994).[4]

An explanation is particularly essential when a judge's penalty assessment substantially diverges from the Secretary's original penalty proposal. *Sellersburg*, 5 FMSHRC at 293. As we noted in *Sellersburg*, without an explanation for such a divergence, "the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Id.*; *see also Unique Electric*, 20 FMSHRC 1119, 1123 n.4 (Oct. 1998); *Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994).

The majority of cases decided by this Commission and its judges demonstrate that, generally, our judges' penalty assessments are made in accordance with these principles. Nevertheless, we reiterate them at some length here because, as we also note in the other

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[4] *See also Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981) ("Our function is essentially one of review. Without findings of fact and some justification for the conclusions reached by the judge, we cannot perform that function effectively.").

decisions issued today, in recent years we have found it necessary to remand several cases due to penalty assessments that lacked the requisite findings on the section 110(i) penalty criteria.

The instant proceeding is such a case as it presents us with a penalty assessment that lacks the precision necessary for appellate review. We find that the judge erred in several respects. First, he neglected to make findings on all of the section 110(i) criteria. Specifically, he made no explicit finding on the gravity of Rushford's violation of section 56.14104(b)(2).[5] He must do so on remand.

Second, although we agree with the Secretary that a judge "is not required to provide a lengthy or exhaustive analysis of the evidence" when assessing a penalty under the Mine Act (S. PDR at 8 n.3), a penalty assessment must provide enough explanation and analysis to enable meaningful appellate review. Here, although the judge stated he "considered the operator's small size, lack of a history of recent violations, apparent good faith abatement and absence of evidence that the penalties would affect its ability to stay in business" (22 FMSHRC at 80), he neglected to explain how his consideration of these factors affected his penalty assessment — leaving us with no rationale to examine in determining whether the judge properly considered the statutory criteria and the deterrent purposes of the Act. On remand, the judge must provide a more complete explanation of his penalty assessment. If on remand the judge again decides that a substantial reduction in the penalty proposed by the Secretary is warranted, he must explain any such decision, especially in light of his finding of "gross negligence."

Regarding the judge's finding that Rushford has a "lack of a history of recent violations" (22 FMSHRC at 80), the record indicates that between 1993 and 1998, the company did not file quarterly reports with MSHA as required under 30 C.F.R. § 50.30. Tr. I 239-41. Although the Secretary asserts that the reason MSHA did not inspect the mine during the relevant period was because of Rushford's failure to file quarterly reports (S. PDR at 12), she offers inadequate record support to substantiate this contention. If due in some way to the company's failure to meet a reporting requirement, Rushford's lack of a history of violations certainly could not properly be considered as a mitigating factor in a penalty assessment. Given that the record is unclear on this point, however, we direct the judge on remand to examine all relevant evidence on this issue, including whether any inspections occurred during this period and if not, the reason why they were not conducted. He may also order the record to be reopened on this issue if necessary. He must then enter a new finding on Rushford's history of violations.

We reject Rushford's argument that the Secretary's PDR was filed one day late and should be dismissed. Opp. at 2-3. The Secretary's PDR was timely filed on February 18, which is thirty days after January 20, "the day from which the designated period [began] to run." 29 C.F.R. § 2700.8. Rushford also argues that "it would clearly be prejudicial and unfair to the Respondent to now grant a review . . . after [Rushford] has paid in full the penalties imposed."

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[5] Such a finding is necessary despite the judge's determination that the violation was S&S.

Opp. at 3. This argument lacks merit. The appeal provisions of the Mine Act are not superseded by payment of a disputed penalty. *See* 30 U.S.C. § 823(d)(2)(A). Finally, Rushford raises several factual issues in its Statement in Opposition to the Secretary's PDR. Opp. at 2. The factual contentions, however, are outside the scope of the grounds on which we granted review, as set forth in the Secretary's PDR, 30 U.S.C. § 823(d)(2)(A)(iii), and therefore we do not reach them.

III.

Conclusion

For the foregoing reasons, we vacate the judge's penalty assessment and remand for reassessment consistent with this opinion.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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May 25, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. KENT 97-302
HUBB CORPORATION	:	

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

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Avram Weisberger determined that Hubb Corporation ("Hubb") committed significant and substantial ("S&S") violations of two mandatory safety standards. 20 FMSHRC 615, 617-19, 620-22 (June 1998) (ALJ). He found that the violations were of high gravity and assessed penalties of $4,000 for each violation. *Id.* at 620, 622. The Commission granted Hubb's petition for discretionary review challenging the judge's penalty assessments. For the following reasons, we vacate the penalty assessments and remand for reassessment.

Our decision in this matter is one of three decisions we are issuing today regarding the Commission's penalty assessment authority under section 110(i) of the Mine Act, 30 U.S.C. § 820(i).[1]

[1] The other decisions concerning Commission penalty assessments we are issuing today are *Cantera Green*, Docket No. SE 98-141-M, and *Douglas R. Rushford Trucking*, Docket No. YORK 99-39-M.

I.

Factual and Procedural Background

On November 7, 1996, Inspector William R. Johnson of the Department of Labor's Mine Safety and Health Administration ("MSHA") inspected the 005 Section at Hubb's No. 5 Mine in Perry County, Kentucky, and found that the ventilation deflector curtain in the No. 7 heading was 66 feet beyond the deepest point of penetration of the working face. 20 FMSHRC at 617; G. Ex. 5 at 7. He issued a section 104(d)(1) order (No. 4582535) alleging an S&S violation of 30 C.F.R. § 75.370(a)(1)[2] due to Hubb's unwarrantable failure to follow its approved ventilation plan, which provided that the maximum distance from the end of the ventilation curtain to the point of deepest penetration of the working face should be 40 feet. 20 FMSHRC at 617, 619-20; G. Ex. 5 at 8.

Also on November 7, Inspector Johnson observed two blocks of rib in the No. 6 entry that were loose from the wall. 20 FMSHRC at 620. One block was 15 feet long, 6 feet high, and 1 foot thick, and was located just inby the last open crosscut. *Id.* The other block was 10 feet long, 4 feet high, and 1 foot thick, and was located just inby the next-to-last open crosscut. Tr. 287; G. Ex. 7. The inspector issued a section 104(d)(1) order (No. 4582536) alleging an S&S violation of 30 C.F.R. § 75.202(a)[3] resulting from Hubb's unwarrantable failure. 20 FMSHRC at 620, 622. The Secretary of Labor proposed $6,000 and $6,500 penalties for the ventilation and rib violations, respectively. S. Pet. Assessment of Penalty, Ex. A. Although Hubb did not dispute either violation, it did dispute the Secretary's S&S and unwarrantable failure designations for both violations. H. Post-hearing Br. at 15-16, 19-20.

The judge determined that Hubb violated 30 C.F.R. § 75.370(a)(1) by failing to follow the approved ventilation plan. 20 FMSHRC at 617. He concluded that the violation was S&S because of the lack of adequate ventilation at the face, the mine's history of methane releases, the possibility of an explosion caused by sparks created by the continuous miner's bits and, in the event of an explosion, the possibility of injury to seven miners. *Id.* at 617-18. The judge determined that, because Hubb management was not aware of the violation prior to citation, the violation was not the result of unwarrantable failure, and he modified the order to a section 104(a) citation that was S&S. *Id.* at 620. He found that the violation resulted from "more than moderate" negligence and was of a high degree of gravity, in that it could have resulted in miners suffering serious burns or suffocation. *Id.* The judge assessed a penalty of $4,000. *Id.*

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[2] 30 C.F.R. § 75.370(a)(1) states in pertinent part that "[t]he operator shall develop and follow a ventilation plan approved by the [MSHA] district manager."

[3] 30 C.F.R. § 75.202(a) states in pertinent part that "[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs . . . ."

The judge found that Hubb violated 30 C.F.R. § 75.202(a) by failing to adequately ensure that the two blocks of rib would not fall on persons traveling or working nearby. 20 FMSHRC at 620. He determined that the rib violation was S&S because it exposed miners to possible rib falls. *Id.* at 621. However, he concluded that, because Hubb management was not aware of the violation prior to citation, the violation was not due to unwarrantable failure, and he amended the order to a section 104(a) citation that was S&S. *Id.* at 621-22. The judge determined that the violation resulted from "not more than moderate" negligence but was of a high degree of gravity, in that it could have resulted in a fatality. *Id.* at 622. The judge assessed a penalty of $4,000. *Id.*

II.

Disposition

Hubb first argued that the judge erred in assessing $4,000 penalties for each violation because he did not make findings sufficient to waive the assessment formula under 30 C.F.R. § 100.3, and assess the penalty under 30 C.F.R. § 100.5. H. Br. at 4-6. The Secretary responded that, because 30 C.F.R. Part 100 is only binding on the Secretary and not Commission judges, the judge acted within his discretion in assessing a $4,000 penalty for each violation. S. Br. at 6-15. In its reply brief, Hubb acknowledges that the judge could not have assessed the penalties under 30 C.F.R. Part 100. H. Reply Br. at 1. However, Hubb argues that the judge was required to consider the criteria listed in section 110(i) of the Mine Act, 30 U.S.C. § 820(i),[4] when assessing the penalties, and that he failed to consider the criterion of good faith in attempting to achieve rapid compliance as applied to Hubb. H. Reply Br. at 1.

Hubb also asserts that substantial evidence does not support the judge's findings that the ventilation and rib violations were of high gravity and could have resulted in serious injuries or fatalities. H. Br. at 7-8. Regarding the ventilation violation, Hubb contends that there was no danger of a serious injury or fatality because no methane was present at the time of the violation. *Id.* at 7. Regarding the rib violation, Hubb argues that there was no likelihood of any fatalities from a rib fall because of the size of the rib blocks in question and the fact they were hard to remove. *Id.* at 8; H. Reply Br. at 4-5.

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

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

30 U.S.C. § 820(i).

The Secretary contends that the judge found correctly that there was high gravity associated with the ventilation violation because the mine had a history of methane releases and sparks from the bits of the continuous miner "created a reasonable likelihood of an explosion [that] would likely cause a serious or fatal injury . . . ." S. Br. at 11-12. The Secretary also argues that the judge determined correctly that the rib violation involved high gravity because it was undisputed that there were cracks around the cited ribs and that miners traveled close to the cited ribs. *Id.* at 12-15. She requests that the Commission affirm the judge's decision in its entirety. *Id.* at 16.

In reviewing a judge's penalty assessment, the Commission must determine whether the penalty is supported by substantial evidence and is consistent with the statutory penalty criteria.[5] While "a judge's assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal . . . ." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

A. Gravity

The gravity penalty criterion contained in section 110(i) of the Mine Act requires an evaluation of the seriousness of the violation. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996); *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). In evaluating the seriousness of a violation, the Commission has focused on "the effect of the hazard if it occurs." *Consolidation Coal Co.*, 18 FMSHRC at 1550. The judge's discussions of gravity are admittedly terse. Nevertheless, we conclude that his findings are sufficient to support his conclusions of high gravity for both violations.

1. Ventilation Violation

We are not persuaded by Hubb's contention that the absence of methane at the time of the inspection, and that the continuous miner will automatically cut off power if 2 percent or more methane is detected, requires the Commission to reverse the judge's high gravity finding. The judge accepted Inspector Johnson's uncontradicted testimony that the mine had a history of methane releases, that during the ventilation violation there was a lack of adequate ventilation at the face, that sparks from the continuous miner provided ignition sources, and that in the event of an explosion, seven miners could have suffered burns. 20 FMSHRC at 617-20. MSHA Inspector Darlus Day also gave uncontradicted testimony that additional ignition sources sometimes occur when sparks are caused by rocks or roof bolts falling from the roof and striking

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

rocks on the ground. Tr. 370, 385, 398. Accordingly, we find that substantial evidence supports the judge's high gravity determination.[6]

2. Rib Violation

We disagree with Hubb's argument that, because the cited rib blocks were small, hard to remove, and unlikely to fall, substantial evidence does not support the judge's finding that the rib violation was of a high degree of gravity. H. Br. at 8; H. Reply Br. at 4. The judge considered Inspector Johnson's uncontradicted testimony that cracks ran the length of the blocks. 20 FMSHRC at 620-21. He noted that Johnson had previously investigated rib falls that had resulted in injuries and fatalities and that Johnson believed that the cited blocks might fall. *Id.* at 620. He further considered Johnson's testimony that all miners in the unit passed near the cited blocks in shuttle cars and, although the shuttle cars had canopies, the miners inside could still be injured by falling rib because the sides were open. *Id.* The judge also noted that neither section foreman "[Scott] Day nor Denny Whitaker, Hubb's superintendent, contradicted or impeached Johnson's testimony regarding the exposure of miners to the hazard contributed to by the violation at issue." *Id.* at 619, 621. We find that the evidence relied on by the judge constitutes substantial evidence which supports his determination that the rib violation was of high gravity.[7]

B. Abatement, Violation History, Size, and Effect on Ability to Continue in Business

1. Motion to Strike

The Secretary filed a motion to strike those portions of Hubb's reply brief that argue the judge failed to consider Hubb's good faith in achieving rapid compliance under section 110(i). S. Mot. to Strike at 1. She contends that the issue is not before the Commission because Hubb did not raise it in its petition for discretionary review. *Id.* In response to the Secretary's motion to strike, Hubb argues that it raised the good faith criterion under section 110(i) because it raised a similar good faith requirement in its original brief when it discussed the penalty assessment requirements of section 100.3(f). H. Resp. to Mot. to Strike at 1-2.

Section 113(d)(2)(A)(iii) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(iii), and Commission Procedural Rule 70(g), 29 C.F.R. § 2700.70(f), provide that Commission review is limited to the questions raised in a granted petition for discretionary review or by the Commission sua sponte.

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[6] Although the gravity penalty criterion and a finding of S&S are not identical, they are frequently based upon the same or similar factual circumstances. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n.11 (Sept. 1987). The judge's uncontested S&S findings concerning the likelihood of an explosion and the severity of the resulting injuries (*see* 20 FMSHRC at 617-19) provide further support for the judge's high gravity determination.

[7] As with the curtain violation, the judge's uncontested S&S findings (*see* 20 FMSHRC at 621) provide further support for the judge's high gravity determination for the rib violation.

See Wyoming Fuel Co., 16 FMSHRC 1618, 1623 (Aug. 1994), *aff'd*, 81 F.3d 173 (10th Cir. 1996) (table) (holding that Commission "review is limited to the questions raised in the petition and by the Commission sua sponte"); *Broken Hill Mining Co.*, 19 FMSHRC 673, 678 n.9 (Apr. 1997) (same).

As the Secretary points out, instead of citing the abatement penalty criterion under section 110(i) in its petition, Hubb mistakenly discussed the abatement penalty criterion under sections 100.3 and 100.5. H. PDR at 6-8. It is well settled that the Commission assesses penalties de novo and is not bound by the Secretary's Part 100 regulations. *Topper Coal Co.*, 20 FMSHRC 344, 350 n.8 (Apr. 1998); *Sellersburg*, 5 FMSHRC at 291, *aff'd*, 736 F.2d at 1152. The first time Hubb referenced the section 110(i) penalty criteria was in its reply brief.

The abatement penalty criteria in section 100.3(a)(5) and in section 110(i), however, share virtually identical language. The good faith penalty criterion is described in section 100.3(a)(5) as "[t]he demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation" (30 C.F.R. § 100.3(a)(5)) while in section 110(i) it is described as "the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation" (30 U.S.C. § 820(i)). In view of the complete substantive overlap of the two provisions, we find that Hubb's discussion of the penalty criteria under section 100.3 in its petition was sufficiently related to the good faith penalty criterion under section 110(i) to conclude that Hubb raised the criterion in its petition. *See Rock of Ages Corp.*, 20 FMSHRC 106, 115 n.11 (Feb. 1998), *aff'd in part on other grounds*, 170 F.3d 148 (2d Cir. 1999) (holding that, although not explicitly discussed in petition, issue was raised because it was sufficiently related to another issue raised in petition); *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1514 & n.4 (Sept. 1997) (finding that issue was raised in petition by implication). Therefore, we deny the Secretary's motion to strike those portions of Hubb's reply brief that argue the judge failed to consider Hubb's good faith in achieving rapid compliance under section 110(i).

2. Consideration of the Section 110(i) Penalty Criteria

As a general rule, Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). We have held, however, that such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act. *Id.* (citing *Sellersburg*, 5 FMSHRC at 290-94). In *Sellersburg*, we stated unequivocally that "[w]hen an operator contests the Secretary's proposed assessment of penalty, thereby obtaining the opportunity for a hearing before the Commission, findings of fact on the statutory penalty criteria *must* be made." 5 FMSHRC at 292 (emphasis added). In addition, our Procedural Rules also make this duty unequivocally clear. Rule 30(a) provides:

> In assessing a penalty the Judge *shall* determine the amount of penalty in accordance with the six statutory criteria contained in

> section 110(i) . . . and incorporate such determination in a written decision. The decision *shall contain findings of fact and conclusions of law on each of the statutory criteria* and an order requiring that the penalty be paid.

29 C.F.R. § 2700.30(a) (emphasis added).

The requirement that our judges make findings of fact on each of the section 110(i) penalty criteria serves two important and distinct purposes. First, from a strictly due process standpoint, these findings provide the respondent and the regulated community with the appropriate notice as to the basis upon which the penalty is being assessed. *Sellersburg*, 5 FMSHRC at 292-93. Second, findings of fact on the section 110(i) penalty criteria supply the Commission and any reviewing court with the information needed to accurately determine if the penalties assessed by the judge are appropriate, excessive, or perhaps insufficient. *Id.* This is consistent with the broader requirement that "[a] judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision." *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994). As the Commission explained in an earlier decision: "Our function is essentially one of review. Without findings of fact and some justification for the conclusions reached by the judge, we cannot perform that function effectively." *Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981) (citations omitted).

This latter purpose is particularly important in the instant case, where the judge made a significant reduction in the penalties he assessed ($4,000 per violation) from the penalty amount proposed by the Secretary ($6,500 and $6,000). As a unanimous Commission stated in *Sellersburg*:

> When . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

5 FMSHRC at 293.

Despite the Commission's clear mandate in *Sellersburg* and related cases, and in its Procedural Rules, we have repeatedly found it necessary to remand cases for penalty assessments because judges have failed to enter the requisite findings. *See, e.g., Secretary of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 119, 142 (Feb. 1999); *Rock of Ages*, 20 FMSHRC at 126; *Secretary of Labor on behalf of Glover v. Consolidation Coal Co.*, 19 FMSHRC 1529, 1539 (Sept. 1997); *Fort Scott*, 19 FMSHRC at 1518; *Thunder Basin Coal Co.*,

19 FMSHRC 1495, 1502-03 (Sept. 1997). In the majority of cases heard under the Act, records are developed on the section 110(i) criteria and penalties are assessed properly and efficiently. Cases in which this does not occur, however, have become frequent enough to give us pause. We intend that the three decisions we issue today will convey our message that it is imperative that this Commission avoid giving short shrift to our statutory duty to assess Mine Act penalties under section 110(i).

Therefore, we remand this case for reassessment of civil penalties because the judge failed to make findings on several of the section 110(i) penalty criteria, in accordance with the express requirements of the Mine Act. We agree with Hubb that, as to both violations, the judge did not make findings on the operator's good faith in achieving rapid compliance when he assessed penalties under section 110(i).[8] Furthermore, as to both violations, the judge made no findings on the operator's size, effect on ability to continue in business, and history of violations[9] penalty criteria under section 110(i). We also note that at trial the Secretary did not introduce adequate evidence or advance any arguments on the section 110(i) criteria.

Accordingly, we vacate the penalties imposed for the two violations and remand for entry of detailed findings as to each of the six section 110(i) criteria and reassessment of an appropriate penalty for each violation.

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[8] Chairman Jordan notes that although the judge erred by failing to even acknowledge the need to consider the operator's "demonstrated good faith . . . in attempting to achieve rapid compliance after notification of a violation" (30 U.S.C. § 820(i)), she believes this factor carries little weight in the instant case. Since the operator in this case received a withdrawal order, not merely a citation, it could not resume normal operations until it had achieved compliance. In light of this fact, Chairman Jordan believes prompt abatement should not serve as a mitigating factor.

[9] Although the judge stated that he took "into account Hubb's history of violations" when assessing the ventilation violation (20 FMSHRC at 620), he failed to make any separate findings of fact, as required by section 110(i), concerning Hubb's previous violations. When he makes such a finding on remand, we direct him to review Hubb's previous violations and enter a *qualitative* finding rather than merely bare information on the number of Hubb's violations. *See Secretary of Labor on behalf of Hannah v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1305 n.14 (Dec. 1998).

III.

Conclusion

For the foregoing reasons, we vacate the penalty assessments for both violations and remand for reassessment for both violations.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 25, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. SE 98-141-M
CANTERA GREEN	:	

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

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Gary Melick assessed civil penalties in amounts lower than those proposed by the Secretary of Labor for a citation and orders issued to Cantera Green ("Cantera") pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1). 21 FMSHRC 310, 315-22 (Mar. 1999) (ALJ). The Commission granted the Secretary's petition for discretionary review challenging the judge's penalty assessments for the violations alleged in ten orders. For the following reasons, we vacate the penalty determinations and remand for reassessment.

Our decision in this matter is one of three decisions we are issuing today regarding the Commission's penalty assessment authority under section 110(i) of the Mine Act, 30 U.S.C. § 820(i).[1]

I.

Factual and Procedural Background

On February 17, 1998, Inspector Alejandro Peña of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection at the Cantera Green

[1] The other decisions concerning Commission penalty assessments we are issuing today are *Hubb Corp.*, Docket No. KENT 97-302, and *Douglas R. Rushford Trucking*, Docket No. YORK 99-39-M.

Mine, a surface aggregate mine in Quebradilla County, Puerto Rico. 21 FMSHRC at 311; Tr. 13; S. Proposal for Assessment of Civ. Penalty (Aug. 10, 1998), Ex. A. Inspector Peña issued a section 104(d)(1) citation and sixteen section 104(d)(1) orders for violations of numerous mandatory health and safety standards at the Cantera facility. 21 FMSHRC at 310; S. Exs. 1-20. He determined that each violation was the result of Cantera's unwarrantable failure to comply with the cited health or safety standard[2] and that eleven of the violations were significant and substantial ("S&S").[3] 21 FMSHRC at 310-22; S. Exs. 1-20.

On December 8, 1998, a hearing was held in Hato Rey, Puerto Rico before Judge Melick. During the hearing, Cantera contested both the violations and proposed penalty assessments with respect to five orders and one citation and contested only the penalties with respect to the remaining eleven orders. 21 FMSHRC at 310-315; Tr. 5.

In assessing civil penalties for the violations found, the judge summarized his findings regarding four of the statutory penalty criteria[4] in a single footnote:

> In assessing civil penalties in this case I have also considered the small size of the operator (12 employees), that the violative conditions were abated in good faith, that the operator had a history of 18 violations within the previous two years and that there was an absence of evidence regarding the effect of the penalties on the operator's ability to stay in business.

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[2] At the hearing, the Secretary deleted the unwarrantable failure designation of one violation not at issue in this proceeding. 21 FMSHRC at 310.

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

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

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

30 U.S.C. § 820(i).

21 FMSHRC at 312 n.2. The judge considered negligence and gravity criteria separately for each of the ten violations at issue in this proceeding, determining that Cantera's negligence and gravity were high for every violation based on the facts and testimony presented at the hearing. *Id.* at 316-22. For nine of the ten violations at issue, for which the Secretary had proposed penalties ranging from $500 to $1,500, the judge assessed penalties of $400. *Id.* at 316-18, 320-22. He also provided the following additional discussion in assessing penalties for the ten violations at issue in this proceeding:

Order No. 4545862 involved the failure to guard a pinch point between a conveyor belt and tail pulley in violation of 30 C.F.R. § 56.14107(a). 21 FMSHRC at 315-16. While concluding that the violation was of high gravity and the result of high operator negligence, "[i]n particular consideration of the size of the operator," the judge assessed a penalty of $400 for this violation, rather than the $800 penalty proposed by the Secretary. *Id.* at 316.; S. Br. at 2.

Order No. 4545863 involved the operation of a front-end loader without a functioning backup alarm in violation of 30 C.F.R. § 56.14132(a). 21 FMSHRC at 316-17. After finding high gravity and high negligence, the judge concluded that a penalty of $400 was appropriate "[b]ecause of the size of the operator and lack of a recent history of similar violations." *Id.* at 316. The Secretary had proposed a penalty of $1,500 for this violation. S. Br. at 2.

Order No. 4545864 charged that Cantera operated the same front-end loader without a functioning parking brake in violation of 30 C.F.R. § 56.14101(a). 21 FMSHRC at 317. Noting Cantera's claim that no similar violation had occurred in ten years, the judge explained: "Considering the size of the operator and the absence of a recent history of prior violations of this standard, I find that a civil penalty of $400.00, is appropriate." *Id.* The Secretary had proposed a penalty of $1,000. S. Br. at 2.

Order No. 4545865 involved Cantera's failure to perform examinations of working places on each shift as required by 30 C.F.R. § 56.18002. 21 FMSHRC at 317-18. The judge stated that, "[p]articularly in light of the absence of a recent history of similar violations and the size of the operator," a penalty of $1,500 was appropriate. *Id.* at 318. The Secretary proposed a penalty of $2,500 for this violation. S. Br. at 2.

Order No. 7795305 charged that the plant motor feeder at Cantera's Green Mine did not have a safe means of access as required by 30 C.F.R. § 56.11001. 21 FMSHRC at 318. The judge found high gravity and high negligence, noting there was undisputed evidence that Cantera's owner knew of this condition for two or three weeks. *Id.* Without further explanation, he concluded that a civil penalty of $400 was warranted, rather than the $1,000 penalty proposed by the Secretary. *Id.*; S. Br. at 2.

Order No. 7795308 charged that the fan and motor belts of the primary crusher were not guarded in accordance with 30 C.F.R. § 56.14107(a). 21 FMSHRC at 319-20. After finding that

the violation was of high gravity and the result of high negligence, the judge stated: "Considering the criteria under Section 110(i) of the Act, I find that a civil penalty of $400.00, is appropriate." *Id.* at 320. The Secretary had proposed a penalty of $800 for this violation. S. Br. at 2.

Order No. 7795312 involved the lack of a cover plate for an electrical junction box in violation of 30 C.F.R. §.56.12032. 21 FMSHRC at 320. The judge stated that "[c]onsidering the criteria under Section 110(i) of the Act, an appropriate civil penalty of $400.00 will be assessed." *Id.* The Secretary had proposed a penalty of $600. S. Br. at 2.

Order No. 7795313 involved a violation of 30 C.F.R. § 56.14107(a), based upon the lack of a guard for a conveyor belt tail pulley. 21 FMSHRC at 320-21. After finding high gravity and high negligence, the judge, without any further explanation, assessed a penalty of $400; the Secretary had proposed a penalty of $500. *Id.* at 321; S. Br. at 2.

Order No. 7795314 involved another violation of 30 C.F.R. § 56.14107(a) for failing to provide a guard for another conveyor belt tail pulley. 21 FMSHRC at 321. After finding high gravity and high negligence, the judge, without any further explanation, again assessed a penalty of $400 for this violation, rather than the $500 proposed by the Secretary. *Id.*; S. Br. at 2.

Order No. 7795315 charged that there was no cover plate on an electrical junction box on a conveyor motor in violation of 30 C.F.R. § 56.12032. 21 FMSHRC at 321-22. After finding that the violation posed a serious hazard and was the result of high negligence, the judge, without any additional explanation, assessed a penalty of $400; the Secretary had proposed a penalty of $600. *Id.*; S. Br. at 2.

The Secretary filed a petition for discretionary review challenging only the judge's penalty assessments for these ten violations. S. PDR at 1.

II.

Disposition

The Secretary argues that the judge abused his discretion when he assessed the ten civil penalties at issue. First, the Secretary argues that when the judge assessed the civil penalties for these violations, he assessed penalties widely divergent from those proposed by the Secretary without providing an adequate explanation. S. Br. at 8, 10-12. Second, the Secretary asserts that the judge "appeared to pick and choose" which of the criteria besides gravity and negligence were relevant for the purpose of justifying his lower penalty assessment. *Id.* at 8. The Secretary asserts that while the judge made general findings on four of the criteria in a footnote, there is no indication that the judge applied those findings in determining the appropriate penalty for each of the violations. *Id.* at 13. The Secretary also submits that if, in fact, the judge did apply the findings in his footnote to each of the violations, he committed error by applying some of the

statutory criteria twice. *Id.* at 13 n.4. Third, the Secretary contends that the judge erred when he relied on the operator's lack of recent history of similar violations as opposed to the operator's entire violation history over the previous two years. *Id.* at 15. Finally, the Secretary argues that the judge assessed penalties which were inconsistent with the findings he did make since he assessed penalties in amounts lower than those proposed by the Secretary despite findings of high gravity and negligence. *Id.* at 15-17. The Secretary requests that the Commission vacate the judge's civil penalty assessments and remand the case for reassessment and further findings on the penalty criteria. *Id.* at 17.

Cantera argues that the judge's decision was correct, adequately explained, consistent with the judge's own factual findings, and also complied with the six statutory penalty criteria. C.G. Br. at 1. Cantera argues that since "neither the judge nor the Commission shall be bound by a penalty proposed by the Secretary," the judge's penalties should be considered proper and adequate. *Id.* Cantera states that it rests on the record to support its argument and requests that the Commission affirm the civil penalty assessments. *Id.* at 1-2.

A. General Legal Principles

As a general rule, Commission judges are accorded broad discretion in assessing civil penalties under the Mine Act. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). We have held, however, that such discretion is not unbounded and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act. *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). In *Sellersburg*, we stated unequivocally that "[w]hen an operator contests the Secretary's proposed assessment of penalty, thereby obtaining the opportunity for a hearing before the Commission, findings of fact on the statutory penalty criteria *must* be made." *Id.* at 292 (emphasis added). In addition, our Procedural Rules also make this duty clear. Rule 30(a) provides:

> In assessing a penalty the Judge *shall* determine the amount of penalty in accordance with the six statutory criteria contained in section 110(i) . . . and incorporate such determination in a written decision. The decision *shall contain findings of fact and conclusions of law on each of the statutory criteria* and an order requiring that the penalty be paid.

29 C.F.R. § 2700.30(a) (emphasis added).

Despite the Commission's clear mandate in *Sellersburg* and in its Procedural Rules, we have often found it necessary to remand cases for penalty assessment where judges have failed to enter the requisite findings. *See, e.g., Secretary of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 119, 142 (Feb. 1999); *Rock of Ages Corp.*, 20 FMSHRC 106, 126 (Feb. 1998), *aff'd in part*, 170 F.3d 148 (2d Cir. 1999); *Secretary of Labor on behalf of Glover v.*

Consolidation Coal Co., 19 FMSHRC 1529, 1539 (Sept. 1997); *Fort Scott Fertilizer-Cullor, Inc.*, 19 FMSHRC 1511, 1518 (Sept. 1997); *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1502-06 (Sept. 1997). Because this case and its companion cases, *Hubb Corp.* and *Douglas R. Rushford Trucking*, present further examples of this trend, we believe it is necessary to reiterate the significance of our holding in *Sellersburg*.

As we emphasize in our decisions in *Hubb Corporation*, 22 FMSHRC ___, Docket No. KENT 97-302, slip op. at 7 (May 2000), and *Douglas R. Rushford Trucking*, 22 FMSHRC ___, Docket No. YORK 99-39-M, slip op. at 4 (May 2000), the requirement that our judges make findings of fact on each of the section 110(i) penalty criteria serves two important and distinct purposes. First, these findings provide the respondent and the regulated community with the appropriate notice as to the basis upon which the penalty is being assessed. *Sellersburg*, 5 FMSHRC at 292. Second, findings of fact on the section 110(i) penalty criteria supply the Commission and any reviewing court with the information needed to accurately determine if the penalties assessed by the judge are appropriate, excessive, or perhaps insufficient. *Id.* at 292-93. This is consistent with the broader requirement that "'[a] judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision.'" *Hubb,* 22 FMSHRC at ___, slip op. at 7, (quoting *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994)). *See also Anaconda Co.*, 3 FMSHRC 299, 299-300 (Feb. 1981) ("Our function is essentially one of review. Without findings of fact and some justification for the conclusions reached by the judge, we cannot perform that function effectively.").

As a unanimous Commission stated in *Sellersburg*:

> When . . . it is determined that penalties are appropriate which substantially diverge from those originally proposed, it behooves the Commission and its judges to provide a sufficient explanation of the bases underlying the penalties assessed by the Commission. If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

5 FMSHRC at 293. *See also Unique Electric*, 20 FMSHRC 1119, 1123 & n.4 (Oct. 1998) (concluding that judge failed to explain the wide divergence between the penalty of $400 assessed and the Secretary's proposed penalties of $8,500); *Thunder Basin*, 19 FMSHRC at 1504 (concluding that judge failed to provide adequate explanation for 95% reduction in penalty assessed); *Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994) (finding that the judge was required to explain a 60% increase in his civil penalty assessment). While the findings and explanations relating to a penalty assessment do not have to be exhaustive, they must at least provide the Commission with a basis for determining whether the judge complied with the requirement to consider and make findings concerning the section 110(i) penalty criteria.

B. The Judge's Penalty Assessments

Although the judge in this case did make some findings concerning the section 110(i) penalty criteria, he failed to provide an adequate explanation of how these findings contributed to his penalty assessments. The judge made brief findings and conclusions on four statutory criteria (history of violations, operator size, effect on the ability to continue in business, and good faith compliance) in a footnote and analyzed the remaining two criteria (gravity and negligence) for each violation individually. 21 FMSHRC at 312 n.2, 316-22. However, the judge failed to explain how these findings related to the penalties assessed and, for certain violations, appears to have placed particular reliance on some penalty criteria without indicating if he considered others. This lack of a clear explanation for the assessed penalties takes on additional significance because the penalties assessed for ten violations, totaling $5,100, deviated substantially from the $9,800 in penalties proposed by the Secretary.

The judge in this case assessed significantly lower penalties for the ten violations at issue despite concluding that the record supported a finding of high negligence and high gravity for these violations. *Id.* at 316-22. Because the Commission and its judges are required to assess penalties de novo (*Sellersburg*, 5 FMSHRC at 291), a finding that Cantera's negligence and gravity were as great or even greater than the Secretary originally alleged does not preclude the judge from assessing lower penalties based on consideration of the other statutory criteria and the evidence adduced during the adjudicative process. As the Commission has recognized, "there is no requirement that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin*, 19 FMSHRC at 1503. As discussed above, however, the Commission has also consistently held that adequate "[f]indings are critical if the judge is assessing a penalty that differs significantly from that proposed by the Secretary." *Dolese*, 16 FMSHRC at 695; *see also Sellersburg*, 5 FMSHRC at 293 (concluding that the judge failed to explain the wide divergence between the penalties assessed and the penalties proposed by the Secretary).

Here, although the judge found high gravity and negligence, the amount he assessed for the ten violations only ranged from approximately 20% to 70% of the penalties proposed by the Secretary. For six of these violations, the judge offered no explanation for this divergence outside of the footnote setting forth his general findings with respect to the four criteria.[5] For the

[5] Aside from separately considering gravity and negligence, the judge stated generally with respect to two of the violations (Order Nos. 7795308, 7795312), that he was "considering the criteria under section 110(i)," and with regard to two other violations (Order Nos. 779314, 779315), that they were "affirmed as written." 21 FMSHRC at 319-20, 321-22. For two other violations (Order Nos. 7795305, 7795313), the judge, after finding high gravity and negligence, provided no further explanation for the penalties assessed. *Id.* at 318, 321.

other four orders at issue herein, the judge again referred to certain criteria which he had already discussed in the footnote.[6] Even as to these violations, however, the judge did not explain why he considered these selected criteria to be particularly relevant to these violations, but apparently not the others, nor why they warranted significant reductions in the penalty proposed by the Secretary. Thus, while the judge technically complied with *Sellersburg* by discussing four of the criteria in an opening footnote, and the remaining two criteria (gravity and negligence) in his discussion of each separate violation, he failed to provide an adequate explanation of the basis for his penalty assessments to permit meaningful review by this Commission.

We discuss below certain additional ambiguities and deficiences in the judge's decision with respect to particular penalty criteria[7] and the penalty amounts assessed, that provide further grounds for vacating the judge's penalty determinations and remanding for reassessment.

1. History of Violations

As noted above, for three of the violations at issue (Order Nos. 4545863, 4545864, and 4545865), the judge relied on the operator's lack of a recent history of similar violations when he assessed penalties that were significantly less than those proposed by the Secretary. 21 FMSHRC at 317-18. The only other discussion of Cantera's history of violations was in the footnote where the judge found that "the operator had a history of 18 violations within the previous two years." *Id.* at 312 n.2.

The Commission has recognized that "the language of section 110(i) does not limit the scope of history of previous violations to similar cases." *Secretary of Labor on behalf of Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 557 (Apr. 1996). The Commission has explained that "section 110(i) requires the judge to consider the operator's general history of previous violations as a separate component when assessing a civil penalty. Past violations of *all* safety and health standards are considered for this component." *Peabody Coal Co.*, 14 FMSHRC 1258, 1264 (Aug. 1992) (emphasis added); *see also Glover*, 19 FMSHRC at 1539 (remanding to the judge with instructions to consider the operator's general history of violations, not only its prior section 105(c) violations).

The judge made a finding concerning Cantera's entire history of previous violations,

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[6] For Order Nos. 4545862, 4545863, 4545864, and 4545865, the judge relied on Cantera's small size in assessing a lower penalty than that proposed by the Secretary. 21 FMSHRC at 316-18. For three of those four orders, the judge also separately relied on the operator's lack of recent history of similar violations as justification for the reduced assessments. *Id.* at 317-18.

[7] We conclude that the judge's analysis and findings concerning the gravity criterion with respect to the ten violations was adequate, and therefore do not further discuss his consideration of that factor.

noting that it had a history of 18 violations over the past two years. That finding, and the impact it played in the penalty assessments, is difficult to review, however, because the judge failed to evaluate whether that history was high, moderate, or low. *See Secretary of Labor on behalf of Hannah v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1305 n.14 (Dec. 1998) (noting that, in the absence of a qualitative allegation, "bare" information regarding the number of previous violations is of limited use).

It was not necessarily erroneous for the judge to consider the operator's lack of recent similar violations with respect to three violations. The Commission has found that a history of similar violations may be relevant in considering an operator's negligence for purposes of setting a penalty. A history of similar violations may demonstrate that the operator had prior knowledge of the specific safety or health standard cited. The Commission has explained that problems in the cited area noted several times in examination books may demonstrate prior notice that a problem existed in the cited area and that greater efforts were necessary to ensure compliance. *Peabody*, 14 FMSHRC at 1262. In *Peabody*, the Commission rejected the operator's argument that the judge improperly considered the history of violations twice — once when considering the general history criterion and a second time in consideration of the negligence criterion — explaining that such consideration was not improper or duplicative because the purpose of the two criteria are different. *Id.* at 1264.

We conclude, however, that the judge erred by failing to set forth his rationale for considering the operator's lack of recent similar violations in certain instances, or to explain how that analysis impacted on his penalty assessments.[8] Without such an explanation, it is not clear whether, for the three orders in which it was discussed, the judge considered similar violations to the exclusion of all violations, or whether the judge made the consideration in conjunction with his negligence finding. In addition, the judge offered no explanation for his failure to consider the history of recent similar violations for the other seven disputed penalties. Such problems in the judge's analysis of Cantera's history of prior violations constitute additional grounds for vacating his penalty assessments, and require further explanation and findings by the judge on remand.

2. Operator Size

Although the operator's size was a constant factor for all violations, and was discussed briefly in a footnote, the judge appears to have relied upon the operator's small size in lowering the penalty assessed for only four of the ten disputed penalties. The judge did not provide any

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[8] It also appears that the judge erred in determining that there was no history of a prior violation of the standard cited in Order No. 4545865. 21 FMSHRC at 318. At the hearing, the Secretary submitted a copy of a citation issued to Cantera on April 9, 1997 for a violation of the same standard. Jt. Ex. 2, at 7.

explanation why the operator's size should mitigate the penalties only for Order Nos. 4545862, 4545863, 4545864, and 4545865, or whether he also considered that factor in lowering the penalty assessed for the other six disputed penalties. Without an adequate explanation by the judge regarding his separate consideration of the operator's size, the Commission does not have the necessary foundation to determine whether the judge abused his discretion in his consideration of this criterion. *See Sellersburg*, 5 FMSHRC at 292-93. This ambiguity provides yet another reason for vacating the judge's penalty assessments and remanding them for further consideration and findings.

3. Negligence

The judge made findings of high negligence in his separate discussion of each of the ten violations at issue herein. 21 FMSHRC at 316-22. In addition, as discussed above, for three of the violations at issue, the judge noted the operator's lack of a recent history of similar violations in assessing penalties — a factor that the Commission has held may be relevant in evaluating an operator's negligence. However, the judge did not relate these findings regarding the lack of history of previous similar violations to his findings on negligence, or explain how they influenced the amount of the penalties assessed. This is another ambiguity in the judge's penalty assessments that warrants further consideration on remand.

4. Operator's Ability to Continue in Business

In a footnote, the judge concluded that there was "an absence of evidence regarding the effect of the penalties on the operator's ability to stay in business." *Id.* at 312 n.2. Under Commission law, such a finding provides a basis for a presumption that the penalties proposed would not have a detrimental affect on the operator. *See Sellersburg*, 5 FMSHRC at 294. In his decision, however, the judge never confirmed that he applied this presumption or explained how this factor influenced the penalties that he assessed.

5. Good Faith in Achieving Compliance

The judge also found in a footnote, without any further explanation, that all of the violative conditions "were abated in good faith." 21 FMSHRC at 312 n.2. While it thus appears that the judge complied with the requirement to make a finding concerning this criterion, he once again failed to explain the basis for this finding and how it influenced the amounts of the penalties he assessed.

6. Penalty Amounts

For nine of the violations at issue, the judge assessed penalties of $400 although the Secretary had proposed penalties ranging from $500 to $1,500. 21 FMSHRC at 316-18, 320-22; S. Br. at 2. For the remaining violation (Order No. 4545865), involving the operator's failure to

examine the working places on each shift, the judge reduced the $2,500 penalty proposed by the Secretary to $1,500. 21 FMSHRC at 318; S. Br. at 2. Thus, the extent of the reduction in the penalties assessed by the judge ranged from over 70% to 20%. With the exception of a few brief references to the operator's small size and lack of recent history of similar violations, however, the judge never fully explained why greater reductions were warranted with respect to certain violations than to others. Nor did the judge offer any logic for selecting a penalty amount of $400 for nine violations, and $1,500 for the remaining disputed violation.

On the basis of the foregoing, we conclude that the judge failed to adequately explain the basis for the penalties he assessed for the violations at issue herein. We vacate the penalty assessments and remand with instructions to the judge to provide a reasoned explanation of the basis for the penalties assessed. *See Jim Walter Resources, Inc.*, 19 FMSHRC 498, 501 (Mar. 1997) (remanding to the judge where he failed to indicate how or whether his findings and conclusions regarding abatement related to his penalty assessments); *Dolese*, 16 FMSHRC at 695-96 (remanding to the judge where he failed to enter findings on four of the penalty criteria or explain the significant divergence of the penalty assessed from the Secretary's proposed penalty assessment). On remand, the judge must provide a clearer explanation of his basis for reducing the amount of the penalties proposed by the Secretary and his determination of particular penalty amounts for each of the violations at issue here.

III.

Conclusion

For the foregoing reasons, we vacate the penalty assessments for Order Nos. 4545862, 4545863, 4545864, 4545865, 7795305, 7795308, 779312, 7795313, 7795314, and 7795315, and remand for reassessment of an appropriate penalty for each violation consistent with this decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Commissioner

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1730 K STREET N.W., 6TH FLOOR
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May 30, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	: :	Docket No. KENT 99-233 A.C. No. 15-16318-03656 M
EARL BEGLEY, employed by MANALAPAN MINING CO., INC.	: :	

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

ORDER

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 25, 2000, the Commission received via facsimile transmission a petition for discretionary review from Earl Begley, employed by Manalapan Mining Co., Inc., challenging a decision issued by Administrative Law Judge Avram Weisberger on April 19, 2000. In his decision, Judge Weisberger found that Begley had violated section 317(c) of the Mine Act, 30 U.S.C. § 877(c), by carrying smoking materials underground, and ordered Begley to pay a civil penalty of $250. 22 FMSHRC 537, 540-43 (Apr. 2000) (ALJ).

The judge's jurisdiction in this matter terminated when his decision was issued on April 19, 2000. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Begley's petition was received by the Commission on May 25, 2000, six days past the 30-day deadline. Under the Commission's Procedural Rules, the filing of a petition for discretionary review is effective upon receipt. 29 C.F.R. § 2700.70(a).

The Commission has entertained late-filed petitions for discretionary review where good cause has been shown. *See, e.g.*, *DeAtley Co.*, 18 FMSHRC 491, 492 (Apr. 1996) (excusing late filing of petition for discretionary review where operator's predecessor failed to inform operator of unconsummated settlement agreement); *McCoy v. Crescent Coal Co.*, 2 FMSHRC 1202, 1204

(June 1980) (vacating judge's order of dismissal and finding good cause where petitioner was pro se during part of the proceedings, subsequently-retained counsel obtained judge's decision only 10 days prior to deadline for petition, and petition was mailed on 30th day). In circumstances in which a hearing on the merits has taken place, the Commission has rejected a late-filed petition for discretionary review where the petitioner has offered no explanation for the late filing. *See Dykhoff v. U.S. Borax Inc.*, 21 FMSHRC 976, 977-78 (Sept. 1999); *Duval Corp. v. Donovan*, 650 F.2d 1051, 1054 (9th Cir. 1981); *Sunbeam Coal Corp.*, 2 FMSHRC 775 (Mar. 1980). *But see Dykhoff v. U.S. Borax, Inc.*, 21 FMSHRC 1279, 1280-81 (Dec. 1999) (reopening proceedings where pro se miner filed motion for reconsideration explaining he mistakenly believed he had 40 days to file his petition for discretionary review).

Here, Begley, who is represented by counsel, has availed himself of the opportunity to have his case heard by a judge. He also offers no explanation for his failure to timely submit a petition for discretionary review. Thus, Begley has failed to show "good cause," excusing his late filing. Accordingly, we reject this petition as untimely. *See Duval Corp.*, 650 F.2d at 1054 (upholding finding of no good cause where counsel obtained judge's decision 24 days prior to deadline for filing petition, and petition was mailed within 30 days of judge's decision but received by the Commission one day after filing deadline); *Sunbeam*, 2 FMSHRC at 775 n.1 (dismissing petition as untimely where good cause for late filing was neither claimed nor shown in the petition).

For the foregoing reasons, Begley's petition for discretionary review is denied as untimely filed.[1]

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

[1] Commissioner Marks would grant Begley's petition.

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May 31, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 98-156-M
MARTIN MARIETTA AGGREGATES	:	

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

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), former Chief Administrative Law Judge Paul Merlin[1] determined that Martin Marietta Aggregates ("MMA") committed a significant and substantial ("S&S") violation of 30 C.F.R. § 56.14207.[2] 21 FMSHRC 76, 85 (Jan. 1999) (ALJ). He found that, although the violation was caused by a miner's high degree of negligence, the miner's negligence was not imputable to MMA for penalty assessment and unwarrantable failure purposes, because the miner was not an agent of MMA. *Id.* at 85-88. The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's finding that the miner's negligence was not imputable to MMA. The United Steel Workers of America ("USWA") and the National Mining Association ("NMA") sought and were granted amicus status in this proceeding. For the following reasons, we affirm the judge's decision.

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[1] Judge Merlin retired on December 31, 1999.

[2] Section 56.14207 provides in pertinent part that "[m]obile equipment shall not be left unattended unless the controls are placed in the park position and the parking brake, if provided, is set."

I.

Factual and Procedural Background

MMA operates the Camak Quarry, a stone quarry in Camak, Georgia. At the loadout point in the quarry, railcars were loaded with crushed stone and gravity-dropped to a storage area before being weighed on scales. After the cars were dropped, a loader was routinely used to push them forward so they would attach to a locomotive parked a few feet in front of the scales. The cars were weighed on the scales and then the locomotive moved them to a dispatch point from where they were transported from the mine. On October 20, 1997, the decedent, Jut Anderson, was the leadman of the loadout crew. At the start of the shift, plant foreman Donny Reese gave Anderson his work assignment for the day, which included cleaning the scales with a shovel. Later in the morning, Anderson told foreman Reese and the loadout crew that he was going to clean the scales. He did not, however, tell Robert Hobbs, the loader operator. On the shift in question, Billy Moss, a member of the loadout crew, parked the locomotive 18 inches to 3 feet before the scales and set the air brake. Subsequently, ten railcars were gravity-dropped and attached to the locomotive. Anderson asked Jason Jones, a backhoe operator, to assist him in cleaning the scales by shoveling debris off the scales and later by digging a ditch to drain water under the scales. Anderson used compressed air from the locomotive to clean the scales. Hoping to increase the air pressure from the locomotive, he asked Jones to release the air brake on the locomotive and Jones did so. 21 FMSHRC at 78-80; Tr. 246, 293.

Later, Anderson was in front of the locomotive, cleaning the scales, and Jones was in his backhoe. At that time, four cars previously gravity-dropped from the loadout area had come to a stop and were blocking an intersection. Unaware that Anderson was on the track cleaning the scales, Hobbs used a loader to push the four cars out of the intersection and into the ten cars that were attached to the locomotive. The impact of the four additional cars caused the first ten cars and the attached locomotive to move forward. The locomotive hit and killed Anderson. 21 FMSHRC at 80.

Following an investigation of the accident, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued an order under section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), alleging a violation of section 56.14207. The order alleged that the violation was S&S, resulted from MMA's unwarrantable failure, and involved a high level of negligence by the operator. MSHA proposed a civil penalty of $45,000. Pet. for Assessment of Civil Penalty at 2. At trial, MMA disputed the amount of the proposed penalty and the Secretary's imputation of Anderson's negligence to it for penalty assessment and unwarrantable failure purposes. MMA Post-hearing Br. at 2-3, 27-31.

The judge found an S&S violation of section 56.14207. 21 FMSHRC at 84-85. He held that Anderson displayed extreme negligence in instructing Jones to release the locomotive's brake and in failing to notify the loader operator that he was cleaning the scales. *Id.* at 85.

However, in considering whether to impute Anderson's negligence to the operator for purposes of deciding whether the violation was caused by an unwarrantable failure and for assessment of the appropriate penalty, the judge determined that, although Anderson assigned specific tasks to other miners, he was not MMA's agent. *Id.* at 85-88. Accordingly, the judge determined that Anderson's negligence was not imputable to MMA, vacated the Secretary's unwarrantable failure allegation, and declined to find that the violation resulted from MMA's high negligence. *Id.* at 88-89. The judge assessed a penalty of $2,000. *Id.* at 89.

II.

Disposition

The Secretary contends the judge erred in finding that Anderson's negligence was not imputable to MMA for purposes of an unwarrantable failure determination and penalty assessment. S. Br. at 7. She argues that the judge erred in failing to accept her interpretation that, under the plain language of section 3(e) of the Mine Act,[3] 30 U.S.C. § 802(e), the term "agent" includes a miner such as Anderson who has the authority to assign tasks to other miners and the responsibility of keeping an area of the mine safe. S. Br. at 9-16; S. Reply Br. at 13. She also argues that, even if the meaning of section 3(e) is ambiguous, the judge erred by not deferring to her interpretation of the term "agent." S. Br. at 13 n.7; S. Reply Br. at 13-15. The Secretary contends that, under both existing case law and common law principles of agency, the judge erred in concluding that Anderson was not an agent. S. Br. at 16-22.

MMA responds that substantial evidence supports the judge's finding that Anderson was not an agent and that his negligence should not be imputed to MMA. MMA Br. at 7-13. It argues that, even if Anderson was an agent, his negligence should not be imputed to MMA because his negligence did not endanger any other persons. *Id.* at 14-16. The operator contends that the Secretary's interpretation of section 110(i), 30 U.S.C. § 820(i), is not entitled to deference because the Commission has authority under the Mine Act to impose penalties under that provision. *Id.* at 17-22. It also argues that imputing Anderson's negligence to it for penalty assessment and unwarrantable failure purposes is contrary to common law principles of agency. *Id.* at 23-24.

Amici USWA and NSA both contend that the judge correctly found that Anderson was not an agent of the operator. USWA Br. at 2, 5-6; NSA Br. at 8-10. USWA argues that the judge erred in not finding high negligence and unwarrantable failure by MMA because the operator failed to appropriately train and supervise the rank-and-file miners in the loadout area. USWA Br. at 6-7. NSA contends that the Secretary is not entitled to deference concerning her interpretation of section 110(i) because the Mine Act specifically authorizes the Commission to

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[3] Section 3(e) provides that an agent is "any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine." 30 U.S.C. § 802(e).

assess penalties under that provision. NSA Br. at 13-16. It further argues that imputing Anderson's negligence to MMA would discourage operators from seeking the highest safety standards. *Id.* at 11.

Under Commission precedent, the negligence of a rank-and-file miner is not imputable to the operator for the purposes of penalty assessment or unwarrantable failure.[4] *Whayne Supply Co.*, 19 FMSHRC 447, 451, 453 (Mar. 1997); *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982) ("*SOCCO*"). However, it is well established that the negligence of an operator's agent is imputable to the operator for penalty assessment and unwarrantable failure purposes. *Whayne*, 19 FMSHRC at 451; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991) ("*R&P*"); *SOCCO*, 4 FMSHRC at 1463-64. The main issue in this case is whether substantial evidence[5] supports the judge's finding that Anderson was not an agent of MMA, and, as a consequence, that his negligence was not imputable to the operator for unwarrantable failure and penalty assessment purposes.[6]

A. Deference

We note that the Secretary's argument regarding deference is not properly before the Commission.[7] Section 113(d)(2)(A)(iii) of the Mine Act provides that "[e]xcept for good cause

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[4] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

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

[6] Although an operator is not liable for unwarrantable failure based on the aggravated conduct of a rank-and-file miner, its "supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner's violative conduct." *Whayne*, 19 FMSHRC at 452-53 (quoting *SOCCO*, 4 FMSHRC at 1464) (emphasis in original). The Secretary has not argued on appeal that MMA's supervision, training, or discipline of Anderson was inadequate.

[7] The Secretary's formulation of her "plain meaning" argument is contradictory. If the statute is plain, then no "interpretation" of the Secretary is required and, hence, no deference is due. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii). The Secretary supported her argument before the judge that Anderson was an agent by quoting section 3(e) and citing to *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560 (Sept. 1996), which itself employs common law principles of agency. S. Post-hearing Br. at 28-29. However, she made no reference below to either the plain meaning or ambiguity of section 3(e), did not interpret that provision, and did not request the judge to defer to any interpretation of that provision. Accordingly, we need not reach the Secretary's contention regarding deference. *See Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1320-21 (Aug. 1992) (declining to consider theory raised for the first time on review). Even if the deference argument had been presented below, we would reject it. The fundamental premise of the Secretary's argument is that the inquiry into Anderson's status as an agent is determined solely by reference to section 3(e). This premise is inconsistent with Commission case law.

In determining whether a miner is an agent of an operator for purposes of imputing negligence to the operator, the Commission has developed a multi-factor test. In formulating the factors, the Commission has in some cases considered the statutory definition of agent contained in section 3(e). *REB Enters., Inc.*, 20 FMSHRC 203, 211 n.11 (Mar. 1998); *Ambrosia*, 18 FMSHRC at 1560; *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1686 n.3 (Oct. 1995). It has also been guided in some cases by common law principles of agency. *See R&P*, 13 FMSHRC at 195 ("The Commission has previously employed both the Act's definition and common law principles in resolving agency problems."); *Ambrosia*, 18 FMSHRC at 1561 n.12 (citing 3 Am. Jur. 2d *Agency* §§ 78-79 (1986) for the proposition that "a principal is liable for the acts of an agent that are apparently within the agent's authority and which the principal permits the agent to exercise"); *see also Pocahontas Fuel Co.*, 8 IBMA 136, 147 (Sept. 1977), *aff'd*, 590 F.2d 95 (4th Cir. 1979) (Coal Act case) (adopting the common law principle that the acts or knowledge of an agent are attributable to the principal). Thus, the Commission's multi-factor test is not limited to the terms of section 3(e). Moreover, the core concepts of imputation of an agent's negligence to the operator for purposes of penalty assessment and unwarrantable failure are Commission-fashioned doctrines that do not spring solely from specific statutory language. *Whayne*, 19 FMSHRC at 451; *R&P*, 13 FMSHRC at 194-97; *SOCCO*, 4 FMSHRC at 1463-64; *see Nacco Mining Co.*, 3 FMSHRC 848, 850 (Apr. 1981).

The Secretary's request for deference here is, at bottom, a request that the Commission defer to the Secretary's application of the Commission's test for agency to the record facts. This is the essence of the adjudicative function and is therefore the Commission's province, not the Secretary's. We therefore find that the judge correctly based his analysis of Anderson's status as an agent on the Commission's multi-factor test as elaborated in Commission precedent.

B. Substantial Evidence Supports the Judge's Finding that Anderson Was Not an Agent of MMA

When deciding whether a miner is an agent of an operator, the Commission has focused on the miner's function and not his job title. *REB Enters.*, 20 FMSHRC at 211; *Ambrosia*, 18

FMSHRC at 1560. It has examined whether the miner's function involved responsibilities normally delegated to management personnel and whether his responsibilities were crucial to the mine's operation. *REB Enters.*, 20 FMSHRC at 211; *Ambrosia*, 18 FMSHRC at 1560; *U.S. Coal*, 17 FMSHRC at 1688. It has also considered whether the miner exercised managerial responsibilities at the time of his negligent conduct. *R&P*, 13 FMSHRC at 194.

Commission cases that have found the lack of an agency relationship include *U.S. Coal*, 17 FMSHRC at 1688 (electrician was not an agent even though he was authorized to tell miners to stop working on dangerous equipment and to remove such machinery from service); *Whayne*, 19 FMSHRC at 451-52 (experienced repairman who needed little supervision and helped less experienced employees was not a supervisor); and *REB Enters.*, 20 FMSHRC at 211-12 (leadman on highwall was not an agent because he did not have authority to hire and fire employees, did not assign equipment to employees, and was not given any instructions regarding discipline of employees).

In deciding agency questions, the Commission has also examined precedent on the distinctions between supervisors and employees under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 et seq. (1994). *Whayne*, 19 FMSHRC at 451. The National Labor Relations Board ("NLRB") has consistently found that the authority to assign tasks is not by itself sufficient to find supervisory status. *See Micro Pacific Dev. Inc. v. NLRB*, 178 F.3d 1325, 1333 (D.C. Cir. 1999) (holding that leadmen waiters and bartenders were not supervisors under NLRA even though they made assignment and scheduling decisions); *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 921-23 (6th Cir. 1991) (holding that leadmen warehouse workers were not supervisors under NLRA even though they assigned work to other employees every day). In *NLRB v. Lauren Mfg. Co.*, 712 F.2d 245, 248 (6th Cir. 1983), the court held that "the mere performance of routine tasks or the giving of instructions to others is not sufficient to afford an individual supervisory status."

The Secretary relies on *NLRB v. Ajax Tool Works, Inc.*, 713 F.2d 1307 (7th Cir. 1983), for the proposition that Anderson was an agent because he had the authority to assign tasks. S. Br. at 11 & n.4. *Ajax* is readily distinguishable. The employee in *Ajax* had the authority to assign work without management approval, maintain discipline, send employees home if they were drunk or did not work, and make recommendations to discharge employees. 713 F.2d at 1312. Anderson's narrow authority to assign specific tasks under close management supervision in this case does not constitute the level of supervisory responsibility involved in *Ajax*. We also disagree with the Secretary (S. Br. at 16) that under the theory of *NLRB v. Thermon Heat Tracing Servs.*, 143 F.3d 181 (5th Cir. 1998), Anderson was an agent because he was responsible for the safety of part of the mine. The court in *Thermon Heat* stated that the employee was an agent because "he was the safety professional for [the company] and that his duty was to assist in promoting, providing, and maintaining a safe work environment at the company." 143 F.3d at 186 (internal quotations omitted). The employee at issue in that case was the company's safety director. *Id.* at 184. As such, he was responsible for the safety of at least 100 employees, and had authority to issue safety rules for the company. *Id.* Anderson's narrow work duties in the

loadout area are not comparable to the far-reaching responsibilities of the company's safety director in *Thermon Heat*.

The judge found that Anderson assigned specific tasks to miners in the loadout area and "had the authority to tell them how he wanted the job done and to stop them if he did not like what they were doing."[8] 21 FMSHRC at 87. However, the judge concluded that, although Anderson exercised "a certain degree of control over the loadout area and the miners who worked there," his control was "tightly circumscribed."[9] *Id.* at 88. He found that Anderson was closely supervised by foreman Reese and it was Reese who decided what daily jobs were to be completed. *Id.* at 87-88. The judge found that Anderson could not hire, fire, evaluate, or discipline other miners and that Anderson could not take any action to abate citations, or change a miner's job or the equipment on the job without Reese's permission. *Id.* The judge also found that Anderson was paid at an hourly rate and did not hold himself out in any capacity to be an agent of MMA. *Id.* Similarly, the Commission in *REB*, 20 FMSHRC at 211-12, found that a leadman was not an agent because, like Anderson, he did not have the authority to hire, fire, or discipline other miners, and could not independently change other miners' jobs or assign equipment.

We conclude that the facts upon which the judge relied constitute substantial evidence in support of his conclusion that Anderson was not an agent of MMA. Under the substantial evidence test, the Commission may not "substitute a competing view of the facts for the view [an] ALJ reasonably reached." *Donovan ex rel. Chacon v. Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983); *accord Wellmore Coal Corp. v. FMSHRC*, No. VA-95-9-D, 1997 WL 794132, at *3 (4th Cir. Dec. 30, 1997). Under the deferential substantial evidence standard, our task is a narrow one. "[E]ven if we would have weighed the evidence differently," our sole responsibility

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[8] We disagree with the Secretary's argument that Anderson was responsible for safety in the loadout area. S. Br. at 2, 12. Although the judge found that Anderson conducted safety meetings with the loadout crew (21 FMSHRC at 86), he made no findings regarding Anderson's responsibilities for the safety of the loadout area and we do not think the record compels a conclusion that he had such responsibilities. The Secretary bases her claim on the following colloquy at trial between her counsel and backhoe operator Jones: Q. "Anderson was the man you relied on to make sure the work area was safe?" A. "Right." Tr. 249-50. We agree with MMA (MMA Br. at 9 n.4) that this exchange reveals little about what Anderson's safety responsibilities were in the loadout area.

[9] The Secretary claims that Anderson was an agent in part because when Moss, an hourly worker in the loadout area, was asked if Anderson was a supervisor, he answered "Yes." S. Br. at 2; Tr. 108. However, we do not think that this evidence compels a finding that Anderson was an agent. As MMA points out (MMA Br. at 9 n.4), Moss's answer is of limited value because the record does not explain what Moss understood the term "supervisor" to mean. In addition, the Commission has focused on a miner's function and not his job title when determining agency status. *REB Enters.*, 20 FMSHRC at 211; *Ambrosia*, 18 FMSHRC at 1560.

is to "determine whether a . . . reasonable factfinder could have reached the conclusions actually reached by . . . the ALJ." *Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1104 (D.C. Cir. 1998) (internal quotations omitted); *see also Eastern Associated Coal Corp.*, 13 FMSHRC 178, 185 (Feb. 1991) ("The Commission's task is not a de novo reweighing of somewhat conflicting evidence but a determination of whether there is substantial evidence in the record to support the judge's conclusions.").[10] We conclude that the judge's finding that Anderson was not an agent was reasonable given Anderson's very limited responsibilities to assign work, and his close supervision by management.[11]

We disagree with the agency standard proposed by the dissent under which a miner would be an agent if he or she had the "authority to tell . . . other miners what to do." Slip op. at 17. This overly-broad standard could potentially reclassify the vast majority of rank-and-file miners as agents — every time an experienced miner tells a less experienced miner "what to do" on the job, the experienced miner would be acting as the operator's agent. In our view, however, a standard that would automatically transform a rank-and-file miner into an agent merely by providing guidance to co-workers is ill-advised. Indeed, the real world ramifications of such an approach are alarming. A miner learns the intrinsic nature of the environment in which he or she works primarily through "on-the-job" training with guidance and support provided by fellow rank-and-file miners. Yet if such guidance and support were to be considered proof of agency, many experienced rank-and-file miners would likely be reluctant to instruct less experienced miners on how to safely perform their jobs. Moreover, as an agent, an experienced rank-and-file miner could be individually exposed to the "civil penalties, fines, and imprisonment" imposed on agents under section 110(c) for violations of the Mine Act. *See* 30 U.S.C. § 820(c). The very threat of exposure under section 110(c) would likely result in an erosion of the current apprenticeship environment, and replace it with an "every man for himself" atmosphere that would clearly be detrimental to the health and safety of our nation's miners.

Our dissenting colleague's claim that our decision takes "a giant step" toward establishing an overly restrictive agency standard which may "insulat[e] management from negligence findings" (slip op. at 16) is overstated and ignores that the question of Anderson's agency is quite close — and depends on the particular facts and circumstances of this case. Indeed, *any* case where agency is at issue will turn on its facts. Any operator that attempts to insulate itself from negligence findings by providing its miners with substantial supervisory

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[10] Rather than applying the substantial evidence test to the judge's findings, the dissent reweighs the evidence de novo, concludes that Anderson was an agent, and advocates reversing the judge's agency findings. But even if the record evidence could support a finding that Anderson was an agent, the Commission would not be permitted to overturn the judge's conclusion to the contrary, which in this case is supported by the record.

[11] Commissioner Riley notes that USWA takes specific exception to the Secretary's "misguided perception of the term 'agent' and its application to rank-and-file miners." USWA Br. at 5-6.

responsibilities without calling them supervisors will run the risk of crossing the line at issue in this case and rendering such miners agents.

We do not mean to suggest that the violation was anything other than extremely serious. Nor do we hold that the judge's reduction of the penalty from $45,000 to $2,000, based on his finding that Anderson's negligence could not be imputed to MMA, was required by this record. Judges have the discretion to accord different weight to the six statutory penalty criteria for assessing civil penalties based on the facts and circumstances of the case.[12] *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). Here, the gravity of the violation, one of the six criteria, was very high. However, the question whether the judge abused his discretion by reducing the penalty by over 95% has not been presented to the Commission on review, and we therefore do not reach the issue.

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[12] The six penalty criteria set forth in section 110(i) include:

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

30 U.S.C. § 820(i).

III.

Conclusion

For the foregoing reasons, we affirm the judge's finding that Anderson's negligence was not imputable to MMA for unwarrantable failure and penalty assessment purposes because he was not an agent of MMA.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Marks, concurring:

While I concur in the result of this case, based on the limited issue it presents and our law on that issue, I write separately to delineate some differences with the majority's approach to this case.

Like the judge, I believe that this case, when viewed in light of Commission precedent, is a close one with respect to the question of whether decedent Anderson was an "agent" of MMA for purposes of imputing his negligence to MMA for unwarrantability and penalty assessment purposes. *See* 21 FMSHRC at 87. I am concerned that our decision will be interpreted by operators as a license to delegate more and more supervisory responsibilities to rank-and-file miners in order to avoid the negligence of those miners being imputed to the operators. As the majority opinion makes clear, we presently look at a number of factors in deciding this issue. Slip op. at 5-6. Operators will no doubt be tempted to get "as close to the line" as possible, and may assign as many supervisory responsibilities as they can to rank-and-file miners, without crossing the now very complex line between rank-and-file miner and agent. The present multi-factor analysis we use to determine whether a miner is an "agent" of the operator may increase that temptation. For that reason, I would be very interested in hearing from parties in future cases regarding whether the Commission should abandon its policy of not imputing to operators the negligence of rank-and-file miners for purposes of unwarrantable failure and penalty determinations.[1]

Eliminating this Commission doctrine would greatly simplify some of the unwarrantable failure issues that come before us. For instance, in the present case the majority, incorrectly in my opinion, discounts the importance of Anderson's safety responsibilities in the loadout area, because of the judge's failure to make a finding on the degree of Anderson's responsibilities. *See* slip op. at 7 n.8.[2] The judge's failure to make such a finding is understandable, given that the complexity of the Commission's present multi-factor analysis requires that a number of fact-intensive findings be made in a case such as this.

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[1] As the majority points out this is a Commission-created doctrine (slip op. at 5), so there is no potential in our revisiting this issue that we would disturb the distinction between rank-and-file miners and agents for purposes of individual liability, which is governed by section 110(c) of the Mine Act and therefore cannot be altered by Commission decision. *See* 30 U.S.C. § 820(c).

[2] The majority holds that the record does not compel the conclusion that Anderson was responsible for safety in the loadout area. Slip op. at 7 n.8. The judge found that Anderson conducted the safety meetings for the miners in the loadout area (21 FMSHRC at 86), and backhoe operator Jones testified that he relied upon Anderson to make sure the loadout area was safe. Tr. 249-50. I believe this is more than enough evidence to establish Anderson's responsibility for safety.

In addition, like amicus curiae United Steelworkers of America ("USWA"), I am struck by evidence in this case that the operator failed to appropriately train and supervise rank-and-file miners with respect to use of the locomotive air brake. *See* USWA Br. at 6-7. Anderson's use of compressed air from the locomotive air brake to clean the scales was not, as operator MMA would have the Commission believe, "unforeseeable," "contrary to all reasonable expectation," or "wholly aberrant and unpredictable." MMA Resp. to USWA Br. at 9, 10. As Anderson's immediate supervisor, plant foreman Reese, acknowledged, compressed air had been used on a prior occasion to clean the scales (Tr. 294-95), and there was additional testimony that air from a locomotive had been so used (Tr. 120), so the air brake's utility for cleaning the scales was not unknown in the loadout area. Moreover, there was testimony that Anderson had on a prior occasion attempted to use the air compressor on the locomotive for something other than its ususal purpose. Tr. 123.

Despite this history, there is no evidence that the operator's training or supervision was directed at warning miners of the danger of the particular action that led to Anderson's death — using air pressure from a locomotive to clean the scales and failing to inform everybody that he would be cleaning the scales. There is also no evidence that, despite this history, Reese was vigilant in his supervision of Anderson to prevent him from engaging in such a risky practice, even though he knew that Anderson was going to be cleaning the scales on the day of the accident. Tr. 293. Indeed, the judge implicitly criticized Reese's supervision of the loadout area on the day of the accident, remarking that it was strange for Reese to neither know of or be curious about the important question of whether the brakes on the rail cars had been set. 21 FMSHRC at 82. In light of the foregoing, I must take issue with the judge's conclusion that operator fulfilled its duties with respect to training and supervising Anderson. *See id.* at 86. However, because the Secretary did not pursue the issue of the extent of the operator's negligence in training and supervising Anderson, we cannot consider it in determining unwarrantable failure or the degree of the operator's negligence.

Lastly, I must express my concern regarding the penalty that was assessed by the judge in this case. Reducing it from the $45,000 proposed by the Secretary to a mere $2,000 is simply not justified by the fact that Anderson's negligence cannot under Commission case law be imputed to MMA. Moreover, even if were, the judge's reduction in this case contravenes a number of Commission instructions regarding penalty assessments. Even though we have held that a judge's assessment may not "substantially diverge" from the penalty proposed by the Secretary without sufficient explanation (*Unique Electric*, 20 FMSHRC 1119, 1123 n.4 (Oct. 1998); *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983)), the judge provided no such explanation. *See* 21 FMSHRC at 88. In addition, in *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1504-05 (Sept. 1997), we pointed out the inequity of a judge's 95% reduction in the penalty the Secretary had assessed against a large operator, because of our common-sense concern that small penalties are insufficient to get the attention of a large operator. *See Coal Employment Project v. Dole*, 889 F.2d 1127, 1135 (D.C. Cir. 1989). Yet incredibly, a similar reduction occurred in this case against a large conglomerate. The threat of a $2000 penalty is hardly sufficient to get the attention of the likes of MMA.

Marc Lincoln Marks, Commissioner

Chairman Jordan, dissenting:

I disagree with my colleagues' conclusion. Substantial evidence does not support the judge's finding that Jut Anderson was not an agent of Martin Marietta Aggregates. It is clear from this record that Anderson had been delegated authority over the employees in the loadout area. In light of this fact, the record compels the conclusion that Anderson must be considered an agent of the operator and the Secretary could appropriately rely on Anderson's negligence in determining that an unwarrantable failure violation occurred. Likewise, it is appropriate for the Commission to consider Anderson's negligence in determining a penalty in this case.

The detailed and unequivocal testimony of both rank-and-file and management employees demonstrates that Anderson was responsible for work assignments and miner safety in the loadout area. Tr. 108, 302-04. Robert Hobbs, the loader operator, stated that he took instructions from Anderson, who assigned work to him. Tr. 139. Foreman Earl D. Reese testified "it's up to him [Anderson] to direct what individuals he wants each task to be done [sic]." Tr. 303. Reese also stated that Anderson could stop a worker and redirect him if he did not like his performance. Tr. 303-04. Although Anderson did not conduct performance evaluations, Reese received information from him regarding the performance of members of his crew.[1] Tr. 281. Reese further testified that Anderson's leadman job required him to constantly inspect the area and see that crew members understood how to perform their jobs safely. Tr. 282. Anderson held the weekly safety meetings with the crew and it was Anderson on whom the miners on the loadout crew depended to keep the loadout area safe. Tr. 249-50.

It would appear from the record that Anderson also viewed himself as being in charge of the loadout area. About a month or two prior to the accident, Anderson told Billy Moss, a member of his crew, to hook a valve up so that he could use the air compressor on the locomotive for purposes other than a braking system. Tr. 123. According to Moss, there was no indication that Anderson felt it necessary to consult with superiors before ordering that adjustment. Tr. 123. On the day of the accident, Anderson again ordered the air pressure from the air compressor to be diverted from the locomotive. Tr. 248. Ultimately, it was that order to redirect the air pressure and release the brake which led to the tragic accident underlying this case. Tr. 49, 248.

The description of Anderson recounted by the witnesses does not fit the profile of a rank-and-file miner. The record evidence shows that Anderson was in control of the activities in the loadout area — telling workers what to do, correcting their mistakes, and adapting equipment. Moreover, the workers on the crew perceived him as being in charge. Under the plain language of the Mine Act (which defines "agent" as "any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine," 30 U.S.C. § 802(e)), Anderson must be deemed an agent.

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[1] At least some members of the crew believed that Anderson could fire them. Tr. 278.

My colleagues point out that, when deciding whether a miner is an agent of an operator, the Commission has

> focused on the miner's function and not his job title. It has examined whether the miner's function involved responsibilities normally delegated to management personnel and whether his responsibilities were crucial to the mine's operation. It has also considered whether the miner exercised managerial responsibilities at the time of his negligent conduct.

Slip op. at 5-6 (citations omitted).

Applying this approach to the case at hand merely reinforces the appropriateness of designating Anderson an agent. Although Anderson did not have a job title such as superintendent or foreman (which would readily convey managerial status), focusing on his function — the person in charge of the loadout area — confirms that it is proper to consider Anderson an agent. Did he carry out responsibilities normally delegated to management? Absolutely. He supervised the employees in his crew and conducted the weekly safety meetings. Were his responsibilities crucial to the mine's operation? I don't think anyone could deny that the loadout area is an integral part of the mining operation. Lastly, was Anderson exercising managerial responsibility at the time of his negligent conduct? It is undisputed that the accident occurred as a direct result of Anderson instructing backhoe operator Jason Jones to release the air brake on the locomotive.

In declining to consider Anderson an agent, my colleagues claim support for the judge's finding that the control Anderson exercised over the loadout area was "tightly circumscribed." However, other than visiting the loadout area several times a shift to check on how things were going, Tr. 154; 267, 281, it is unclear how Reese, the plant foreman, exercised this allegedly tight control. Although Reese may have told Anderson what work was to be performed each day, it was Anderson who decided how to direct the crew in order to get that work done. Indeed, far from exhibiting a tight control over the loadout area, the record would indicate instead that supervision by Reese was quite loose. Like Commissioner Marks, I also find telling the judge's remarks that it was strange for Reese, on the day of the accident, to neither know of, nor be curious about, whether the brakes on the rail cars had been set. 21 FMSHRC at 82. In fact, I find such stunning lack of involvement by higher management to be inconsistent with, and indeed to fatally undermine, the claim that Anderson's control of the loadout area was "tightly circumscribed."

My conclusion regarding Anderson's status is consistent with Commission decisions resolving whether certain miners should be considered agents or supervisors. Cases where the Commission has considered a miner to be an operator's agent include *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1560-61 (Sept. 1996) (miner was agent when he accompanied inspectors on their inspections, gave work orders to abate citations, was responsible for seeing

that equipment repairs were made, was paid a salary like management, and did not receive extra pay for overtime) and *Rochester & Pittsburgh Coal Co.* ("*R&P*"), 13 FMSHRC 189, 194-96 (Feb. 1991) (miner was an agent when he conducted statutorily mandated weekly shift examination); *see also Pocahontas Fuel Co.*, 8 IBMA 136, 146-48 (Sept. 1977), *aff'd*, 590 F.2d 95 (4th Cir. 1979) (Coal Act case) (miner was an agent when he conducted pre-shift examination which was statutorily mandated duty of operator). Although the particular job duties in these cases differed from Anderson's, the level of responsibility was comparable.

The cases cited by the majority, in which the Commission found that the miner was not an agent or supervisor, are readily distinguishable. In *Whayne Supply Co.*, 19 FMSHRC 447, 451 (Mar. 1997), for example, the miner simply carried out routine repair duties, and helped less experienced miners. In *U.S. Coal, Inc.*, 17 FMSHRC 1684, 1688 (Oct. 1995), the miner was an electrician qualified to repair and maintain equipment, who could take it out of service when warranted. Finally, in *REB Enters., Inc.*, the miner did not have the authority to directly initiate the assignment of work to employees. 20 FMSHRC 203, 211 (Mar. 1998). The Commission in *REB* noted that, unlike in the instant case, the Secretary had failed to present evidence that the miner was directly responsible for controlling the acts of miners or that he was responsible for their safety. *Id.* at 211-12.[2]

In holding that only an agent's negligence may be imputed to an operator, *R&P*, 13 FMSHRC at 194, the Commission has already eliminated the actions of rank-and-file miners as a basis for unwarrantable failure findings. I share the concern expressed by Commissioner Marks that if the Commission adopts an overly-restrictive view regarding who qualifies as a supervisor or agent, we may be insulating management from negligence findings in some circumstances where it is warranted. This could ultimately undermine the optimal vigilance about safety and health matters which is the core purpose of the Mine Act, as operators who know that they will avoid unwarrantable findings and be subject to only minor penalties for the actions of most individuals under their control may be tempted to cut corners when it comes to complying with safety and health regulations.

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[2] In addition, the majority observes that the Commission has also been guided by common law principles of agency, stating that "the acts or knowledge of an agent are attributable to the principal" (slip op. at 5 (citing *Pocahontas Fuel Co.*, 8 IBMA at 147)), and that "a principal is liable for the acts of an agent that are apparently within the agent's authority and which the principal permits the agent to exercise," (*id.* (quoting *Ambrosia*, 18 FMSHRC at 1561 n.12)). These precepts are not violated by a determination that Martin Marietta (the principal) unwarrantably violated the Act on the basis of the actions of Anderson (the agent) . The manner in which Anderson attempted to clean the scales is the behavior which underlies the citation. Cleaning the scales was within Anderson's authority and was a job that Marietta permitted him to exercise.

Unfortunately, I believe my colleagues have taken a giant step toward that overly-restrictive approach with their decision in this case. They decline to consider Anderson an agent even though Anderson regularly supervised employees in the loadout area, an activity which brings him squarely within the Act's definition of agent. The fact that Anderson did not have responsibility for hiring or firing these individuals, and the fact that Anderson was himself subject to supervision does not change his status as agent. The relevant factor, it seems to me, is that Anderson had ongoing authority to tell the other miners what to do. The miners acknowledged this authority. Accordingly, when Anderson told Billy Moss to hook up the valve which allowed the air compressor on the locomotive to be used for purposes other than braking, Moss complied. Likewise, on the day of the accident, when Anderson told Jones to release the air brake, Jones did as instructed. Anderson died as he was cleaning the scales with the compressed air from the locomotive. Had Anderson chosen instead to instruct a member of his crew to clean the scales, that miner would no doubt have complied, and would have been killed instead of Anderson. I suggest that when the operator gives an individual like Anderson the authority to direct miners regarding what tasks will be performed, and how those tasks will be carried out, that individual should be considered acting on the operator's behalf and the operator should be held accountable for that individual's actions.

For the reasons stated above, I would reverse the judge's determination that Anderson was not an agent of Martin Marietta Aggregates. I would find that he was an agent, hold that the violation was the result of the operator's unwarrantable failure, and impute his negligence to the operator for the purpose of determining a penalty. Accordingly, I respectfully dissent.

Mary Lu Jordan

Mary Lu Jordan, Chairman

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 3, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-111
Petitioner	:	A. C. No. 46-01318-04348
v.	:	
	:	Robinson Run No. 95
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Mine:

DECISION ON REMAND

Before: Judge Bulluck

This civil penalty proceeding involves a violation of 30 C.F.R. § 75.214, a mandatory safety standard for underground coal mines, requiring that, "(a) A supply of supplementary roof support materials and the tools and equipment necessary to install the materials shall be available at a readily accessible location on each working section or within four crosscuts of each working section," and "(b) The quantity of support materials and tools and equipment maintained available in accordance with this section shall be sufficient to support the roof if adverse roof conditions are encountered, or in the event of an accident involving a fall." By decision issued June 9, 1999, I concluded that the Secretary had proven a "significant and substantial" violation, not the result of Consolidation Coal Company's ("Consol") unwarrantable failure to comply with the standard, modified the 104(d)(2) order to a 104(a) citation, and assessed a $2,000.00 penalty. 21 FMSHRC 612 (June 1999) (ALJ). The Secretary appealed my unwarrantable failure determination.

The Commission concluded that the violation was the result of Consol's unwarrantable failure, reversed my determination, and remanded the proceeding for my assessment of an appropriate penalty. *Consolidation Coal Company*, 22 FMSHRC 328 (March 2000).

FACTUAL BACKGROUND

In its decision, the Commission summarized the facts as follows:

> Consol owns and operates Robinson Run No. 95, an underground coal mine in West Virginia. On January 15, 1998, MSHA inspector Charles Thomas

was conducting a Triple-A inspection at the mine. While in the 12-D section of the mine to check on safety equipment, Thomas noticed the absence of any centrally located supplementary roof support, including posts, caps, wedges, and a saw. As a result, Thomas spoke with Consol day foreman Kevin Carter. Thomas asked Carter about the location of the supplementary roof support and number of roof posts. According to Carter, Thomas told him to "count your posts." Carter told Thomas that he would "take care of it." As Thomas left the mine, accompanied by miner safety representative Dave McCullough, Thomas also spoke with Consol safety director Robert Church and told him that attention was needed to address supplementary roof support in the 12-D section.

Subsequently, during his shift on January 15, Carter counted the posts and caps along the supply track and found that there were only 11. Carter then spoke with mine foreman Tom Harrison and requested additional posts and other roof support materials. Around 3:00 or 4:00 that afternoon, Harrison ordered the posts from the supply yard, which is located about 10 miles from the 12-D section.

MSHA inspector Thomas returned to the mine to continue his Triple-A inspection on January 17 during the midnight shift, 2 days and four shifts after he left the mine on January 15. Consol foreman Frank Slovinsky was substituting for the regular foreman of section 12-D. Thomas asked Slovinsky where the emergency roof supports were located. Slovinsky responded that they should be in the tool car. When the posts could not be located there, the two searched along the supply track outby four crosscuts of the section. They eventually located 11 posts and some cap pieces and wedges, but never found a saw.

Inspector Thomas then issued Order No. 4888994 charging Consol with a violation of 30 C.F.R. § 75.214 for failing to maintain a supply of supplementary roof support material at a readily accessible location within four crosscuts of the 12-D section.

* * * * *

Consol's roof control plan for the Robinson Run mine further specified that "[t]he quantity of supplementary roof support material required by [section] 75.214(b) shall consist of a minimum of twenty (20) posts of proper length with sufficient cap pieces and wedges."

The inspector designated the violation as significant and substantial (S&S) and alleged that it was the result of Consol's unwarrantable failure. The violation was abated between 3:30 and 5:00 a.m. the following morning when miners were able to locate additional posts along the supply and main tracks, and stored 20 posts, along with wedges, cap pieces, and a saw, in the No. 11 crosscut.

Id. at 328 (citations and footnote omitted).

PENALTY

In accordance with the Commission's decision, I reassess the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(j), in light of the elevated degree of negligence ascribed to Consol. Consol is a large operator, with an overall history of violations that is not an aggravating factor in assessing an appropriate penalty, and the $5,000.00 penalty proposed by the Secretary will not affect its ability to continue in business. The gravity of the violation is serious since, as previously stated in the original decision, time is of the essence in providing safe passage for rescue of miners who have been injured by unforseen adverse roof conditions. In light of the Commissions's conclusion that "[f]ailing to follow up on the inspector's admonition in such a way as to insure that the request for required roof control supplies did not get lost in the company's own bureaucracy is inexcusable," I ascribe high negligence to Consol. *Id.* at 333. I also take into account the Commission's finding that "Consol officials made some effort to address the violation," albeit inadequate, and consider that effort to be a mitigating factor. *Id.* at 332.

Accordingly, having considered Consol's large size, insignificant history of violations, seriousness of the violation, high degree of negligence, good faith abatement and measures that it took for compliance as a mitigating factor, I find that a penalty of $4,000.00 is appropriate.

ORDER

Accordingly, it is **ORDERED** that 104(d)(2) Order No. 4888994 is **AFFIRMED**, as issued, and that Consol pay a penalty of $4,000.00 within 30 days of the date of this remand decision.

Jacqueline R. Bulluck
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 5, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-35-M
Petitioner	:	A. C. No. 34-01781-05509
v.	:	
	:	Allied Custom Gypsum Fairview
ALLIED CUSTOM GYPSUM INC.,	:	Mine
Respondent	:	

DECISION

Appearances: Ernest A. Burford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner;
Peter T. VanDyke, Esq., McAfee & Taft, Oklahoma City, Oklahoma, 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 Allied Custom Gypsum, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges three violations of the Secretary's mandatory health and safety standards and seeks a penalty of $165.00. A hearing was held in Oklahoma City, Oklahoma. For the reasons set forth below, I vacate the three citations and dismiss the proceeding.

Background

The Fairview Mine is a small gypsum mine, owned and operated by Allied Custom Gypsum, near Fairview, Oklahoma. Eight employees usually work at the mine, which consists of a mine and crusher plant. The crusher is portable and can be moved on mine property.

The mine and crusher were inspected on July 29, 1999, by MSHA Inspector W. DeWayne Thompson and the supervisor of the local MSHA Field Office, Art Ellis. During the inspection, Thompson issued several citations. The company contested three of them, which are discussed below.

Findings of Fact and Conclusions of Law

Citation No. 7878361

Inspector Thompson observed a portable diesel fuel tank on a trailer. The tank had a sign on it which stated: "Danger Flammable." (Govt. Ex. 4, Resp. Ex. G-2.) Part of the sign was partially obscured by dust which had adhered to diesel fuel apparently spilled during the loading of the tank. It was extremely windy and dusty on the day of the inspection.

The inspector issued Citation No. 7878361, alleging a violation of section 56.1401 of the Secretary's regulations, 30 C.F.R. § 56.1401, because: "The portable diesel fueling trailer was not provided with the proper warning to alert others to 'no smoking or using open flames.' At present, only flammable liquids signs are provided." (Govt. Ex. 2.) Section 56.1401 provides that: "Readily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists."

There is no dispute that the Respondent's sign did not specifically state that smoking and open flames were prohibited. Thus, it would appear that the company violated the regulation. However, the inspectors permitted the company to abate the violation by posting a sign that stated: "Danger Diesel No Smoking." (Tr. 186.) On its face, this sign does not prohibit open flames.

The regulation is clearly designed to prevent fires or explosions. I find that a sign that says "Danger Flammable" is just as likely to serve that purpose as is a sign that states "Danger Diesel No Smoking." A reasonable person seeing a "Danger Flammable" sign would know that smoking and open flames should be kept away from the area. Moreover, it is inconsistent on MSHA's part to cite the company for not having a sign specifically prohibiting smoking and open flames, and then to find that they have satisfied the regulation with a sign that specifically prohibits smoking, but not open flames.

I conclude that Allied Gypsum's sign complied with the intent and purpose of section 56.4101. Accordingly, I will vacate the citation.[1]

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[1] Although mentioned neither in the citation nor the inspector's notes about the violation, the inspector gave as one of the reasons for issuing the citation that the sign was partially obscured by dust and fuel. However, it is apparent from the picture of the tank, (Resp. Ex. G-2), that the sign could still be read through the dust. In addition, it is also apparent that the windy, dusty conditions on the morning of the inspection contributed to the obscurity. Consequently, I do not find that this condition was a violation.

Citation No. 7878359

During the inspection, Inspectors Thompson and Ellis asked Alan Robinett, the plant manager, who was accompanying them on the inspection, how the diesel fuel tank for the crusher's primary drive motor was filled. After he showed them, Thompson issued Citation No. 7878359 alleging a violation of section 56.11001, 30 C.F.R. § 56.11001, because:

> The company has not provided a safe means of access to the top of the fueling hatch for the diesel holding tank for the primary drive motor. At present, to gain access they must stand on the mid-rail of the set of hand railing that surrounds the drive engine for the primary and reach over to remove the cover. The hatch cover is approximately ten feet above the ground level and from the platform of the drive motor, about three feet from the hand railing that they use to stand on.

(Govt. Ex. 5.)

Section 56.11001 requires that: "Safe means of access shall be provided and maintained to all working places." The Commission has held, with regard to an identically worded regulation, that "the standard requires that each 'means of access' to a working place be safe." *Hanna Mining Co.*, 3 FMSHRC 2045, 2046 (September 1981); *accord Homestake Mining Co.*, 4 FMSHRC 146, 151 (February 1982). In this case, the evidence is that there were two means of access to the filler neck on the fuel tank. One was the one described in the citation and the other was by reaching through an opening in the hand railing instead of standing on it.[2]

Inspector Thompson testified that reaching through the opening was a safe means of access. (Tr. 124-26.) He also testified that standing on the mid-rail, holding on to the top rail, and using the free hand to unscrew the top off of the filler neck and stick the nozzle of the hose used to fill the tank into the filler neck was a safe means of access. (Tr. 129-30.) Thus, if it was unsafe at all, the method demonstrated to the inspector was unsafe only if the top rail was not held on to.

The obvious conclusion to be drawn from this is that the company provided safe means of access to the filler neck, but that shorter employees may not always have availed themselves of that means. Consequently, I conclude that the company did not violate the regulation and will vacate the citation.

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[2] The evidence also indicated that only shorter employees had to stand on the hand railing; the taller ones could reach the filler neck standing on the platform. (Tr. 258-59.)

Citation No. 7878362

Inspector Thompson issued Citation No. 7878362, charging a violation of section 56.14107(a), 30 C.F.R. § 56.14107(a), because:

> The head pulley to the Main Reversible Conveyor Belt for the primary was not guarded to prevent a persons [*sic*] from contacting the moving machine parts. The ten inch smooth pulley was approximately 6.5 feet (2 meters) above the spillage. This condition expose [*sic*] employees to an entanglement hazard. The moving machine parts could be accessed, but not easily, because of height of the head pulley, making the chance of an accident in [*sic*] unlikely.

(Govt. Ex. 8.) The regulation states:

> **§ 56.14107 Moving machine parts.**
>
> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.
>
> (b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

The head pulley in question moves a conveyor belt which carries material from the crusher and deposits it on a belt below it.[3] The material is conveyed on the lower belt to a pile where it is removed by front-end loader. Inspector Thompson testified that he measured six feet eight inches from the top of the head pulley to the top of the spillage under it. He admitted that the "6.5 feet" measurement in the citation was a mistake. (Tr. 136.) The company terminated the violation by removing the spillage so that the distance from the ground to the pulley was "about 7.5 feet." (Govt. Ex. 8.)

According to the inspector's notes, the head pulley is "located in [a] remote section away from [a] common travelway" and "no one is assigned to work on the ground" in the area. (Govt. Ex. 10.) It is apparent from the evidence that any work performed in the immediate area of the head pulley would be to adjust the lower belt. The higher belt would not be operating while that work is being discharged. (Tr. 267-68.) Moreover, it was the company's policy to clean up the spillage at least once a day. (Tr. 270-71.)

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[3] Contrary to the inspector's belief, the belt was not reversible.

Although there is nothing to prevent miners from walking in the vicinity of the head pulley, it is clearly not a common walk way. Someone would have to go out of his way to walk under the head pulley and there is no reason why someone would just walk in that area. Consequently, the head pulley is not within seven feet of a walking surface. In addition, when work is being performed on the lower belt, the upper belt is shut down and would not be a hazard. Accordingly, while operating, the head pulley is not within seven feet of a working surface. Finally, most of the time, even if the area below it were a working surface, the head pulley comes within the seven foot exception to the regulation. Therefore, I conclude that the Respondent did not violate section 56.14107(a) and will vacate the citation.

Order

It is **ORDERED** that Citation Nos. 7878359, 7878361 and 7878362 are **VACATED** and this proceeding is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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May 8, 2000

DAVID MORALES,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 99-188-DM
v.	:	
	:	Mission Mine Complex
ASARCO INCORPORATED,	:	
Respondent	:	Mine I.D. 02-02626

DECISION

Appearances: David Morales and Manny A. Rojas, Jr., Legal Researcher, Tucson, Arizona for Complainant; David Farber, Esq., Patton Boggs, Washington, DC, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by David Morales against Asarco Incorporated ("Asarco") under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the "Mine Act"). The complaint alleges that Asarco terminated Mr. Morales on August 13, 1998, in violation of section 105(c). A hearing in this case was held in Tucson, Arizona, and Asarco filed a post-hearing brief. Although Mr. Morales speaks English, a Spanish-English translator was provided by the Commission at the hearing.[1] For the reasons set forth below, I find that Mr. Morales did not establish that he was discriminated against under the Mine Act and I dismiss his complaint of discrimination.

I. FINDINGS OF FACT

Asarco operates the Mission Mine Complex in Pima County, Arizona, south of Tucson. Mr. Morales began working at the mill in April 1995. In August 1996, he transferred to the surface mine as a haul truck driver. Mr. Morales received training on the safe operation of the haul trucks mostly in English but he also received some training in Spanish. He may not have understood everything that he was told in English. The haul trucks are large 240 ton off-road vehicles.

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[1] Everything that occurred at the hearing was translated from English into Spanish by the translator. Mr. Morales spoke mostly in Spanish, which was translated into English.

On April 7, 1997, Mr. Morales filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that fumes in the cab of his haul truck were making him sick. MSHA investigated the complaint but did not issue any citations as a result of Mr. Morales's complaint. (Exs. R-8, R-9). Mr. Morales told a number of people at the mine that he had called MSHA about the fumes. Prior to filing the complaint with MSHA, Morales told his supervisors that exhaust from a haul truck entered the cab making it hard for him to breath and giving him headaches. Mr. Morales was examined by the mine's EMT and was taken to a local hospital for examination. He was released to return to work on the same day. Asarco's truck shop could not find any problems with the haul truck and it was returned to service. Mr. Morales filed the complaint with MSHA because he did not believe that Asarco fixed the problem.

Mr. Morales alleges that from April 7, 1997 until he was terminated on August 13, 1998, he was harassed by Asarco management. He contends that the events that are described below all relate back to this health complaint that he filed with MSHA. Mr. Morales alleges disparate treatment because he believes that the disciplinary actions taken against him by Asarco were more severe than discipline given to other similarly situated employees. He believes that because Asarco knew that it could not immediately fire him for the health complaint, mine management carefully monitored his work and charged him with infractions of the company's work rules in situations where other employees were not charged. He alleges that he was under constant pressure to comply with every work rule or face termination. Mr. Morales testified that once Asarco accumulated a sufficient number of infractions against him, it terminated him and used these infractions to hide the fact that he was really terminated for complaining to MSHA.

Mr. Morales relies on a number of factors to establish his case. He testified that Todd Parks, who was the General Mine Supervisor in April 1997, called him into his office after the MSHA inspector left the mine. Morales testified that Parks asked him why he called MSHA. Morales testified that after a short discussion, Parks told him that he was going to be fired for making the health complaint. (Tr. 42). Morales complained to the union but was later told that the company could do what ever it wanted. *Id.* It is Morales's understanding that, although a citation was not issued, Asarco was required to fix the haul truck that was leaking fumes into the cab. Asarco denies this statement. The MSHA report indicates that it tested the cab for carbon monoxide, carbon dioxide, and nitrogen dioxide and determined that the air in the cab did not violate MSHA's health standards. (Ex. R-9).

Morales also testified that other employees at the mine told him that he was being watched very closely by mine supervisors so that he had better be careful. Mr. Morales testified that supervisors were very disrespectful towards him, they cussed at him, and they called him a "wetback." He also stated that when he was involved in any sort of "incident," he was not given a full opportunity to tell his side of the story. The incidents that Morales is referring to are the incidents that Asarco set forth as justification for his termination. Finally, Mr. Morales contends that Asarco unjustly considered the fact that he was frequently absent from work when it terminated him. He states that he was absent from work because of injuries that occurred on and off the job and because his wife was recovering from surgery. (Tr. 44).

I discuss each of these incidents in chronological order. In July 1995, before he made his health complaint with MSHA, Mr. Morales was working in the mill at the Mission Complex. Mr. Morales was disciplined when he broke a fitting on a piece of machinery because he drove the machinery away from a ball mill that he had charged without disconnecting a hose. (Tr. 217-18; Ex R-10). Because Mr. Morales had received earlier verbal counseling, he was given a written warning for this event. Mr. Morales does not dispute that this accident occurred, but contends that he was new at the job and was trying to work a little too fast. He does not believe that he should have been disciplined because he was new at the job.

In June 1996, after Mr. Morales had become a haul truck driver, he backed his truck into the truck shop without having a spotter present. Asarco's safety rules provide that when backing large trucks in congested areas, a second person must be on the ground to make sure the area is clear. (Ex. R-5 at 13). Mr. Morales received a disciplinary write-up for this event. The write-up stated that disciplinary action, including termination, could result from further safety infractions. Mr. Morales testified that he only backed up about 20 meters and he did not know that a spotter was required. (Tr. 343-44). This incident also occurred before he made his health complaint.

On April 5, 1997, Mr. Morales parked his haul truck in the "ready line" in a tight space between two other haul trucks. When he was asked why he parked in such a tight area, he replied that he was in a hurry. (Ex. R-14). When Mr. Morales pulled the truck out of this tight space, his truck struck the adjacent truck's mirror breaking the brace for the mirror. Mr. Morales was given counseling and a disciplinary write-up for this event. (Ex. R-14). Mr. Morales testified that parking close to other haul trucks was a common practice at the mine. He took a photograph in November 1999 of parked haul trucks that shows two trucks parked close together. (Ex. C-4). He also testified that when other truck drivers were in minor accidents that caused only slight damage to company property, they were not disciplined. This accident occurred before he called MSHA with his health complaint.

On August 8, 1997, Mr. Morales parked his haul truck near a dumping point for lunch. He had not placed chock blocks ("chocks") behind the tires of his truck.[2] Asarco's safety rules provide that anytime a haul truck driver parks his truck and leaves his vehicle, the wheels of the truck must be chocked. Several years earlier, two miners were killed at the Mission Mine when a parked truck that was not chocked rolled forward while they were working on the truck. Morales was written-up for this event. (Ex. R-15). Mr. Morales testified that he was still in the cab of the truck when Harlan Young, a pit supervisor, observed the truck without chocks. (Tr. 354-55, 529). Morales believes that he was not required to chock the truck. Morales stated that he did not really understand the company's rule on chocks at the time of this incident so he simply put chocks under the wheels as Mr. Young requested.

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[2] The word "chocks" was incorrectly transcribed as "chalks" in the transcript.

On December 13, 1997, Morales parked his haul truck without putting chocks under the wheels and then proceeded to wash out the cab of his truck with water. Because the truck is equipped with rather complex electrical equipment in the cab, including a computer, miners are not permitted to wash out the cab with water. Mr. Morales then attempted to remove the cap on the radiator without turning off the "master switch" as he had been instructed. He could have been severely burned as a result. Indeed, he had been burned by radiator fluid on a previous occasion. Mr. Morales received a disciplinary write-up for these events. (Ex R-16). Morales states that Raymond Bell, another front line supervisor, was very disrespectful to him when Bell saw what he was doing and that Bell used vulgar language with him. (Tr. 357, 530-31). This disrespectful attitude upset Mr. Morales and he discussed it with the general mine operations supervisor, Mark Kalmi. Morales believes that the company "used the thing with the chocks as an excuse to use it against me now." (Tr. 531). He believes that Asarco did not require trucks to be chocked until after this incident.

On January 26, 1998, Mr. Morales's truck was observed zig-zagging from side-to-side down a ramp at the pit. (Tr. 454-56; Ex. R-26). Asarco management did not believe that he was maintaining proper control of his truck in violation of company safety rules. Most of the witnesses at the hearing testified that Mr. Morales had a reputation as a rather fast and careless driver, both at the mine and in his own vehicle. Mr. Morales testified that the truck that he was driving was old and was not in good shape.

On February 13, 1998, two Asarco supervisors observed Mr. Morales without his safety glasses while standing on the deck of his truck. Asarco safety rules provide that safety glasses must be worn at all times. He was written-up for this event. (Ex. R-18). Mr. Morales contends that he took off his glasses to look at something and talk to supervisors and that he generally wears them. (Tr. 363).

On February 28, 1998, Mr. Morales was assigned a haul truck that used compressed air to start the engine. A mechanic attached a compressed airline to his haul truck at the ready line. Mr. Morales failed to disconnect this airline before he drove away from the ready line. When he drove away, part of the air hose was ripped from the air compression system. When his truck was inspected later that shift, it was discovered that only one of six tail lights was working. From these two events, the company concluded that Mr. Morales did not do a pre-shift examination of his truck before he drove away from the ready line. Mr. Morales was given a one-day disciplinary layoff for failure to do a proper pre-operational check of the truck and leaving the ready line with the airline attached. (Ex. 19). Mr. Morales believes that the mechanic should have removed the airline. He also states that he did a pre-operational check but that he could not check the lights without assistance from someone else. (Tr. 364-70, 532-33). Morales states that Asarco management abused him after this event by interrogating him about it for over an hour looking for an excuse to blame him. (Tr. 366-67).

On March 20, 1998, Mr. Morales was driving to work on Interstate 19. Morales testified that there was a pickup truck in the left lane driving slowly and a larger truck in the right lane. When Morales attempted to pass the trucks, the driver of the pickup accelerated but he was able

to pass between the two trucks. (Tr. 63). The man driving the pickup was Ken Dickey, a fellow miner at the Mission Mine. Apparently, Mr. Dickey thought that Morales cut him off and he picked up a handgun that he had in his truck and held it up to show Mr. Morales through the truck window. When Mr. Morales arrived at the mine he waited for Mr. Dickey in the parking lot and confronted him about the incident. Dickey and Morales started verbally fighting about the incident as they entered the mine and walked to the change room. At one point Mr. Dickey said something like "this is the West and I can shoot anybody I want." This angered Morales who told Dickey that he was a good boxer. An altercation ensued and Asarco supervisors had to separate the two men. Morales called the police. Both employees were issued disciplinary letters and were suspended for the remainder of the day with pay.

On March 30, 1998, Mr. Morales drove his haul truck into a berm while turning around and damaged the automatic fire suppression system on the truck. The damage was not significant but it set off the extinguishers. He drove away from the site of the accident but later reported to dispatch that the fire extinguishers had gone off and he felt dizzy. Asarco charged him with a violation of the company's safety rules by recklessly operating his haul truck and leaving the scene of an accident. (Ex. R-21). Mr. Morales received a two-day disciplinary layoff. Mr. Morales does not believe that he is responsible for the accident. He testified that he left the area to get out of the travelway and that because the truck was old it had malfunctioned. (Tr. 534-37).

On May 11, 1998, Mr. Morales was driving along a two-lane county road on the way to work when he passed Nancy Baca, who also drove trucks in the pit. He was driving very fast, up to 70 mph as he passed her. She apparently made an obscene gesture at him with her hand. She arrived at the mine's parking lot shortly after he did. When Ms. Baca arrived, he confronted her and, in Spanish, cussed at her and called her obscene names. Later, Mr. Morales apologized to Ms. Baca, but she would not accept his apology and reported the incident to management. Morales received a two-day disciplinary layoff for exhibiting confrontational and threatening behavior to another employee. (Ex. R-22). This discipline was the last step before termination under Asarco's progressive disciplinary system. Mr. Kalmi was especially concerned because this incident occurred less than two months after the Dickey incident. Mr. Morales testified that Ms Baca did not like him and that she took advantage of this situation to get him into trouble with management. (Tr. 371-76, 538-39). He believes that Ms. Baca should have been disciplined too. In addition, he points out that his supervisors have cussed at him and have called him names.

On August 8, 1998, Mr. Morales drove his haul truck around the blind side of another haul truck and pulled up close to the front of this other truck, nose-to-nose. He apparently pulled up in this manner because he wanted to discuss the possibility of car pooling with the driver of the other haul truck, Gilbert Sanchez. When Mr. Morales backed away, the trucks became entangled causing damage to the other truck. Asarco contends that Morales violated a company safety rule which provides, "[h]aul trucks should not be parked front-end to front-end, parallel, or cab to cab for purposes of conversation." (Ex. R-5 at 34). Morales testified that as he approached the other truck, Mr. Sanchez assisted him through the use of hand signals. Consequently, Mr. Morales believes that Mr. Sanchez was partly to blame for the damage to the truck. Mr. Sanchez

did not testify at the hearing, but according to the testimony of mine manager Sylvester Lakowski and Messrs. Kalmi and Young, Sanchez was signaling Morales to stay away from his truck.[3]

Asarco conducted an investigation of this accident. In his summary of this investigation, Mr. Young wrote:

> During the meeting [about the accident], Gilbert [Sanchez] said he tried to waive David [Morales] from approaching when he quite unexpectedly saw him pull up to his truck. He further said that David was driving stupidly for most of the night, and driving fast.

(Ex. R-23). Sally Koos was operating the shovel in the pit at the time. She did not see the trucks make contact. According to Young's report she related the following:

> [S]he noticed that 359 [Sanchez's truck] was waiting at the crossover mat while she cleaned up in front of the shovel, and then saw 357 [Morales's truck] backing up around the side of 359 and to the back of it and then leave the shovel area without loading. She also made mention that 357 had been driving wildly during the night and backing up to the shovel too fast and crooked. One other unsafe action she witnessed was when 357 would pull in at the right hand side of the shovel, he would come in fast, make the turn hard, slamming on the brake and slid quite a few feet in the mud toward the pit edge berm before backing in.

Id.

During the investigation, Mr. Sanchez drew a map showing the position of the trucks. (Ex. R-24). Mr. Morales did not dispute the drawing. Mr. Morales believes that Sanchez was equally responsible for this accident and that Asarco blamed Morales because they wanted to fire him for complaining to MSHA about fumes in his truck cab. He stated that other employees park their trucks front-end to front-end without receiving any discipline.

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[3] I required the parties to exchange witness and exhibit lists. Both parties complied with my order. Asarco sent its list to Morales via Federal Express. Several days after the close of the hearing, Morales informed my office that he did not receive Asarco's witness list until after the hearing because the FedEx driver left the package at the office for his apartment complex. He stated that he assumed that Asarco would call Mr. Sanchez as a witness. Mr. Morales did not inform me at the hearing that he had not received Asarco's witness list and he could have called Sanchez as a witness. Morales subpoenaed a number of Asarco employees who testified at the hearing.

At the conclusion of its investigation, Asarco terminated Mr. Morales from his employment. It based the termination on the infractions described above and his excessive absenteeism. (Ex. R-23). As stated above, Mr. Morales believes that all of the discipline that he received came about as a result of his health complaint to MSHA.

II. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine] Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

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

A. Did David Morales Engage in Protected Activity?

Mr. Morales engaged in protected activity when he complained to Asarco about fumes in the cab of his haul truck and when he called MSHA to complain about these fumes. His complaint to MSHA was made on April 7, 1997

B. Was David Morales's Discharge from Employment Motivated in any part by his Protected Activity?

In determining whether a mine operator's adverse action was motivated by the miner's protected activity, the judge must bear in mind that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (November 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir 1983). "Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence." *Id.* (citation omitted).

Some of the circumstantial indicia of discriminatory intent include (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action.

Mr. Morales is claiming disparate treatment. He points to the above events to establish that he was treated more harshly than other employees. He believes that he was watched very closely by management between April 1997 and August 1998 for any mistakes he made no matter how minor. He alleges that supervisors would follow him looking for a chance to discipline him. He alleges that on two occasions he was required to take drug tests in situations where he did not think it was warranted.

I agree with Mr. Morales that it is quite feasible for a mine operator to take the approach that he is suggesting. A sophisticated operator like Asarco can target a miner for discharge and closely monitor his conduct over a lengthy period. It can impose discipline for every violation of company rules in order to create a record on which to base the termination. Many employees could be subject to termination in such a fashion. Indeed, one miner on layoff status testified that Asarco was closely watching everyone because it wanted to reduce the workforce. (Tr. 152).

I find, however, that Mr. Morales failed to show that he was treated differently. Most of the events discussed above are serious violations of Asarco's safety or work rules. Although there is some evidence that these rules were not consistently enforced at the mine, there is nothing to suggest that Mr. Morales was targeted for discharge, that he was being closely watched because of his MSHA complaint, or that his discipline was unusually harsh.

Mr. Morales believes that his discipline and discharge were unfair. It is important to understand that I do not have the authority to determine whether this discipline was fair or reasonable. The "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990)(citations omitted). The issue is whether the discipline given to Mr. Morales was motivated in any part by his protected activity.

The discipline for three of the incidents discussed above occurred before Mr. Morales engaged in protected activity. These incidents are his accident in the ball mill, parking his truck too close to another truck in the ready line, and backing his truck into the shop without a spotter. As a consequence, the discipline given for these incidents do not support Mr. Morales's case.

The first incident after his complaint occurred in August 1997 when Mr. Morales was cited for failing to chock his truck near the dumping area. Morales testified that he was sitting in his truck with the air conditioning on waiting for clearance to take his lunch break. Under such a circumstance, it does not appear that chocks were required unless he left his truck. Mr. Young's report states that Morales's truck had stopped for lunch and the truck was not chocked. (Ex. R-15). The report states that Young stopped to let Morales know that he must always chock his truck when he is not parked in a designated tie down area. *Id.* Mr. Young testified that he wrote

down his reminder to Morales. (Tr. 449). It does not appear that Morales was seriously disciplined in this instance but he was simply reminded to use chocks. Young's action did not constitute harassment of Morales. There is no showing that he was singled out for this type of write-up. As stated above, two miners were killed in the early 1990s when they failed to chock a truck they were working on. I credit the testimony of Asarco's witnesses that the company attempted to enforce its safety rules requiring the use of chocks. It appears that some supervisors did not consistently enforce this rule, especially on the graveyard shift, but that does not establish that Morales was singled out for harsher discipline under the rule.

In December 1997, Morales parked his truck, washed the cab out with water, got out onto the front of the vehicle, and was attempting to remove the radiator cap so he could add more water. Messrs. Bell and Young saw him there and investigated. Mr. Bell was quite agitated and directed vulgar words and epitaphs at Mr. Morales. These Asarco managers were upset that he had not chocked his truck, that he washed out the cab with water, and that he was attempting to remove the radiator cap without releasing the pressure with the master switch. Morales was at a water station and chocks were present in the area that he could have used.
He had been reminded a few months before to use chocks. In addition, he had been told to release the pressure in the radiator before removing the cap. Indeed, he had been burned before while removing a radiator cap. As discussed above, Morales received a disciplinary write-up for this event.

Morales was particularly concerned about the disrespectful tone and vulgar language used by Bell. The following day there was a meeting in Kalmi's office about this incident. A Spanish speaking union steward was present. Mr. Bell apologized to Mr. Morales for his vulgar language. The reasons for the company's safety rules were explained to Morales in Spanish. Mr. Bell was subsequently disciplined for using vulgar language with Morales.

This incident does not help establish that Asarco was out to get Morales for his MSHA complaint. Morales put himself in danger by failing to chock the truck and attempting to take the cap off the hot radiator. He violated company safety rules. Mr. Bell's conduct when he saw what Morales was doing may have been disrespectful, but there is no indication that he was attempting to use this incident as an excuse to discipline Morales for his health complaint. I find that Bell, Young, and Kalmi were genuinely concerned about the safety violations that Morales committed.

In January 1998, Morales was observed driving down a ramp to the pit. It appeared to Young and Bell that he did not have control of his truck. When Young questioned Morales about it, Morales told him that his truck was functioning correctly. Mr. Lakowski testified that other truck drivers in the pit told supervisors that they were concerned about Morales's driving abilities. (Tr. 211). Morales had a reputation for driving too fast. I find that this event and the write-up that Morales received fails to support Morales position that the charges brought against him were trumped up and that, as a result, he was treated differently than other employees.

In February 1998, Morales was written up for failing to wear his safety glasses. It appears that he did not understand that he must wear safety glasses at all times. This incident was not a major infraction but Morales was written up for it. In isolation, one could argue that this infraction of the company's safety rules supports Morales's belief that Asarco was closely watching him to catch him violating company rules. However, even if I accept his theory, this event is one of many relied upon by Asarco that are of a more serious nature.

In February 1998, Morales drove away from the ready line without disconnecting a compressed air hose. The compressed air hose was damaged as a result. Supervisor Jim Brown reminded Morales when he arrived at the ready line that day to remove the airline before driving away. (Ex. R-19). The evidence also establishes that Morales did not perform a thorough pre-operational check of his truck. Morales testified that it was his belief that the truck should not have been placed on the ready line if it were not ready to operate. It appears that he did not have an appreciation of the requirement that each driver inspect his own truck for defects that could affect safety. Morales was given a one-day disciplinary layoff.

The discipline Morales received for the February 28 incident does not support his case. Truck drivers are required to do pre-operational checks of their equipment and they use another driver when checking the lights. If another driver is not available to help, they call dispatch for assistance. Although Asarco questioned Morales about these events, there is no corroborating evidence that he was abused or interrogated about the incident in order to blame him for something that he did not do. The charges against him were not fabricated.

The two events involving conflicts with other miners also do not support Morales. In each case, these disputes originated off mine property but continued at the mine. I find that it was reasonable for Asarco to discipline Morales for these confrontations. There has been no showing of disparate treatment with respect to these incidents. Mr. Dickey was also disciplined for his behavior at the mine.

With respect to the discharge of the fire suppression system on his truck, Morales contends that it was never established that he caused any damage. He believes that Asarco incorrectly assumed that system was damaged when he drove up against a berm. He testified that it is just as likely that the system malfunctioned. Even if I assume that Morales's argument is supported by the evidence, it does not establish that discipline was an excuse to get back at him for his MSHA complaint. Morales received a two-day disciplinary layoff. There is nothing to indicate that his discipline was motivated in any way by the MSHA complaint. The discipline Morales received was becoming more severe with each infraction under Asarco's progressive disciplinary system because of his prior history of violating company rules.

The event that ultimately led to his termination was fully investigated by Asarco. Morales believes that Mr. Sanchez should also have been disciplined. Asarco did not discipline Sanchez because his truck was stationary and the company credited his rendition of the events. Asarco managers believe that Sanchez did not want Morales to drive up close to his truck and that he was trying to motion Morales away. The company also credited the statements of

Sanchez and Ms. Koos that Morales had been driving too fast and in a reckless manner during the shift. I find that the evidence presented at the hearing concerning this accident does not support a conclusion that Morales's termination from employment was connected to the complaint he filed with MSHA in 1997.

Morales also testified that Asarco managers said that he would be fired for filing the MSHA health complaint. Morales relies on statements made by Mr. Parks to support his case. It must be noted that Parks no longer worked for Asarco when Morales was terminated and he was not involved in that decision. The two conversations that Morales relies upon occurred at the time MSHA investigated his health complaint and in March 1998. Morales testified that Parks told him that he was going to be fired for getting MSHA involved in the health complaint. Mr. Parks, who now works as a salesman, was not available to testify at the hearing. James Coxon, the mine's human resources manager, testified that he called Parks about his conversations with Morales. Coxon testified that Parks told Morales in the first conversation that he would prefer that Morales come to him rather than MSHA if he had safety or health concerns. Parks said that in the second conversation, in March 1998, Morales mentioned that he was thinking about getting a job with the railroad. Parks told Coxon that in response to this statement he told Morales that getting another job was a good idea "because if you continue on with the safety violations you have here, you will be discharged." (Tr. 502). Since Parks did not testify, it is difficult to judge the credibility of Coxon's testimony in this regard. I note, however, that English is not Mr. Morales primary language and it is possible that he misinterpreted Parks's statement of March 1998 to mean that he would be discharged for making safety complaints.

Morales also believes that he was harassed when Asarco treated him like a drug addict. He testified that he never uses illegal drugs. Asarco does not allege that Morales uses drugs. Asarco tested Morales for drugs in accordance with policies agreed to by the unions at the mine. He was tested after his accident on August 8, 1998. Although I can understand why Morales might be offended by these tests, the fact that these tests were taken does not help establish that Asarco was retaliating against him for making the health complaint to MSHA. There has been no showing that the drug tests were taken in contravention of Asarco's standard policies and procedures for drug testing.

Morales also generally alleges that he was disciplined more harshly than others at the mine. Mr. Coxon testified that many Asarco employees have been disciplined for infractions similar to Mr. Morales's. (Tr. 490-91). He stated that during the two years prior to the hearing in this case, Asarco issued about 70 disciplinary letters each year for time off and discharge.

Morales called a number of witnesses on his behalf, but none of these witnesses testified that Morales was terminated because of his health complaint to MSHA. Ben Barela, an officer with the Steelworkers Union at the mine, testified. When he was asked if he had reason to believe that Morales was terminated for his health complaint to MSHA, he replied "[n]ot to my knowledge." (Tr. 123). Lennis Hunnicutt, chief steward for the Steelworkers, testified that he is not sure that Morales had a sufficient understanding of English to safely work at the mine or to understand Asarco's safety rules. (Tr.134). He does not believe that Morales should have been

terminated for driving up to Sanchez's truck. (Tr. 136). Frank Urbano, a truck driver at the mine who was on layoff status, testified that drivers did not always chock their trucks and that some drivers have been in accidents without receiving any discipline. (Tr 149). He also testified that Morales had a reputation in the pit of being an unsafe driver. (Tr. 156). Jerry Peña, who had been a truck driver in the pit, testified that management kept a close eye on Morales starting in April 1997, but he did not know if that was because Morales had called MSHA or because Morales was involved in a number safety infractions. (Tr. 162, 177). He stated that drivers sometimes do not chock their trucks, especially on the graveyard shift. (Tr. 171). Miguel Moreno, a former truck driver at the pit, testified that he did not believe that Morales was treated differently by management than other truck drivers. (Tr. 192).

Randall Groce, another truck driver at the pit, testified that Morales had the reputation of being an aggressive driver. (Tr. 304). He stated that some drivers thought Morales was unsafe and wild when he drove his haul truck. (Tr. 309). Allen Auguello, who also works in the pit, testified that drivers do not always put chocks under the wheels of haul trucks when they park them. (Tr. 315). He also stated that Morales brought attention to himself because he was an aggressive driver. (Tr. 320). He further stated that front line supervisors are not always consistent when they discipline employees. (Tr. 325).

Although the testimony of Mr. Morales's witnesses generally supports his position that he was closely watched by supervisors, it does not establish that he was closely watched because he made his health complaint to MSHA. There is insufficient evidence on which to draw such an inference. This testimony also establishes that discipline is not always consistent and that some miners violate safety rules without being caught. But this evidence does not advance Morales's case. I cannot infer from this evidence that there was a connection between Morales's MSHA complaint and the enforcement of safety rules at the mine.

If I review the evidence presented in this case against the indicia of discriminatory intent frequently relied upon by the Commission, I find that Mr. Morales did not establish that his discharge was motivated in any part by his protected activity. It is clear that Mr. Parks had knowledge of Mr. Morales's protected activity. The mine manager, Mr. Lakowski, testified that he did not become aware that Morales had called MSHA with a health complaint until after he was terminated from his employment at Asarco. (Tr. 214). Mr. Kalmi testified that he did not know about Morales's health complaint to MSHA until the MSHA investigator arrived at the mine to investigate Morales's discrimination complaint after he was discharged. (Tr. 387-88). I accept their testimony, although I find that it was widely known among employees in the pit that Mr. Morales called MSHA. Because Mr. Parks and front line supervisors in the pit had knowledge of the complaint, I find that Asarco had knowledge of the protected activity.

Although Morales testified that Asarco supervisors displayed strong animosity towards his protected activity, there is little other evidence to support his claim. The fact that individual managers may have been annoyed with Morales is not sufficient to establish animosity towards the protected activity. I dare say that every mine operator is annoyed when MSHA shows up. I cannot draw an inference that Asarco went to the lengths described above to terminate Morales

because he made a health complaint to MSHA especially since MSHA did not issue any citations as a result of his complaint. It is important to recognize that Morales had a lengthy disciplinary record that started well before he made his complaint to MSHA.

Finally, there is little coincidence in time between the protected activity and the adverse action. As stated above, I believe that it is possible for a mine operator to bide its time so it can get rid of a miner who complains about safety or health conditions without leaving tracks. In this case, however, there is insufficient evidence on which to draw such an inference. The two events do not appear to be related. In any event, even if his health complaint to MSHA played some part in Asarco's decision to terminate Morales, I find that Asarco established that it would have terminated Morales for his unprotected activity alone based on his violations of the company's safety and work rules, his accidents, and his absenteeism.

III. ORDER

For the reasons set forth above, the complaint of discrimination filed by David Morales against Asarco, Inc. under section 105(c) of the Mine Act is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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May 12, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 98-121
Petitioner	:	A.C. No. 15-07201-03712
	:	
v.	:	
	:	C-2 Mine
HARLAN CUMBERLAND COAL CO.,	:	
Respondent	:	

DECISION

Appearances: Thomas A. Grooms, Esq.,
U.S. Department of Labor, Nashville, Tennessee,
for Petitioner;
H. Kent Hendrickson, Esq., Harlan, Kentucky,
for Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty under §105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Mine Act" in which the Secretary charged Harlan Cumberland Coal Company (Harlan) with a violation of a mandatory safety standard 30 C.F.R. § 75.202(a).

The general issues before me are whether Harlan violated the cited standard as alleged in the citation and, if so, the appropriate civil penalty to be assessed for the violation taking into consideration the criteria in § 110(i) of the Mine Act.

The Mandatory Standard

The cited standard involved in this case is 30 C.F.R. § 75.202(a) which is a broadly worded mandatory standard that reads as follows:

> (a) The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.

The Cited Condition or Practice

The 104(a) citation charges Harlan with an S&S violation of 30 C.F.R. § 75.202(a) for its alleged failure to protect persons from the hazard of a coal burst from a pillar block while retreat mining pillars. The citation charges the operator with moderate negligence for its failure to prevent what some of the mine experts who testified agree was an unpredictable coal burst. The citation reads as follows:

> The coal ribs were not controlled to protect persons from the hazards of a coal burst in the three rooms in Second Left (MMU-005-0) off the Nine Right Panel, an active working section where persons worked and traveled. On November 20, 1996, retreat mining was started in the rooms and as the initial cut of coal was taken from the middle of the No. 1 pillar block, a coal burst was triggered. The coal burst damaged the coal ribs of all nine pillars in the rooms, blowing in excess of 1,500 tons of coal into the room entries and crosscuts. The blown coal injured six miners, two fatally. The potential for a coal burst was known to the mine operator, expecially (sic) when mining beneath areas of high ground cover. The mine operator had made some adjustments to the numbers of and size of the pillars in the rooms in the Second Left section; however, the adjustments were not sufficient to control the high ground pressures experienced by the active working section before the coal burst occurred. This citation is issued as a result of MSHA's fatal accident investigation and the the violation contributed to the occurrence of the accident.

MSHA charges Harlan with "moderate negligence" and proposes a penalty of $50,000.00.

Stipulations

1. The C-2 mine is a medium-sized underground coal mine producing 726,077 tons during the relevant period which, combined with the additional production of 9,000 tons by the controlling entity, results in an overall total production of less than one million tons during the relevant period. (Joint Ex. 1).

2. The amount of the appropriate penalty, if any, is in issue but the proposed penalty "will not put Respondent out of business."

3. The history of previous violations is shown on the computer printout received into evidence as Government's Exhibit 1.

4. The operator demonstrated good faith in attempting to achieve rapid compliance after notification of the alleged violation.

Background

The Harlan Cumberland Coal Company's C-2 mine is a medium-sized mine located near Dione, Harlan County, Kentucky where the operator is engaged in the mining of underground coal. The C-2 mine employs a total of 55 miners and produces coal two shifts a day, six days a week. Equipment maintenance is performed on a separate non-producing shift. The mine has an active advancing unit and an active retreat pillar-extraction unit.

The mine is developed and serviced through three portals consisting of drift openings into the Creech coal seam. The coal seam ranges in thickness from 42 to 96 inches. Overburden above the mine varies in the mountainous terrain from under 100 feet to over 1,600 feet at the deepest point under Black Mountain.

The Coal Burst

On November 20, 1996, there was an unpredicted coal burst in the 005-0 section located in the Second Left panel off Nine Right off of the No. 3 East Main entries of the C-2 mine. The overburden at the site of the accident was 1,420 feet. At the time of the coal burst, the foreman and his crew of eight other miners in the retreat pillar unit were underground engaged in retreat mining in the 005-0 section. Two of the miners sustained fatal injuries and four other miners in the crew sustained varying degrees of injury.

At the time of the November 20, 1996, coal burst, an MSHA regular AAA Safety and Health inspection was ongoing and the previous AAA MSHA inspection was completed less than two months earlier. It is undisputed that at the time of the accident Respondent was following the mine's MSHA approved roof-control plan. The mining method and procedure that was being followed in the deep cover area where the coal burst occurred had been approved by MSHA as well as by the state regulatory mining agency, the Kentucky Department of Mines and Minerals. There was also an ongoing inspection by state inspectors at the time of the coal burst.

On November 20, 1996, the day of the coal burst, the retreat mining day shift crew, consisting of eight miners and their foreman, arrived at 005-0 section about 6:25 a.m. They were met by Ernest Boggs, the maintenance foreman, who had conducted the pre-shift examination earlier that morning. Mr. Boggs reported to foreman Darrell Lewis that nothing unusual had been found during his pre-shift examination. Instructions were issued to the crews and production commenced about 6:30 a.m. Successive cuts were advanced in all three rooms without incident and the room entries and crosscuts were connected to the gob. The continuous mining machine was then moved to the No. 1 room pillar to take the initial cut beginning pillar extraction in that area. It was the practice to extract room pillars first, followed by adjacent entry pillars. This initial cut had advanced into room pillar No. 1 approximately 15 feet when at 2:08

p.m. it triggered the coal burst. The burst damaged the ribs of all nine room pillars, over 1,500 tons of coal was blown into the rooms and room crosscuts and, as previously stated, the burst resulted in the death of two of the retreat section mining crew and the injury of four other miners on that crew. The No. 2 and 3 pillars were damaged, particularly along the gob side. The timber set at the mouth of the last open crosscut between numbers 1 and 2 rooms were broken and the roof in that area was damaged. Practically all of the test holes which had been drilled during the advance mining cycles contained cracks from 39 to 78 inches into its roof as a result of the force of the coal burst.

There was very little dispute with the conclusion of the MSHA accident investigators that the presence of thick sandstone layers above and below the coal seam enhance the ability of the coal pillars in the area of the burst to withstand high stress and store energy. As room pillar No. 1 was mined, much of its load was released and transferred to the already stressed adjacent pillars. It was this sudden pressure increase on the adjacent pillars that was sufficient to cause failure of coal near or into the core of these pillars resulting in this massive, unpredicted coal burst.

MSHA and the Kentucky Department of Mines and Minerals, as part of the investigation, conducted interviews of persons with knowledge of the facts and circumstances surrounding the coal burst. The parties offered into evidence as joint exhibits Nos. 2 through 26, the statements taken by MSHA. These joint exhibits include the statements MSHA took from the seven surviving members of the crew that were engaged in retreat mining in section 005-0 at the time of the coal burst, namely:

Jim Carr	Continuous Mining Machine Operator (Joint Ex. 27)
David Harris	Continuous Mining Machine Operator (Joint Ex. 13)
John Carroll	Roof Bolter/Scoop Operator (Joint Ex. 8)
Darrell Lewis	Foreman (Joint Ex. 16)
Ron Painter	Shuttle Car Operator (Joint Ex. 22)
Mike Pennington	Shuttle Car Operator (Joint Ex. 24)
Mike Pacholewski	Repairman (Joint Ex. 21)

In general it can be stated that the ground conditions on the 005-0 section prior to the coal burst were thought to be "normal" by the miners working in the section. These miners asserted that there were no "signs of abnormal pressure evident" before the coal burst. (Govt.'s Ex. 2 pg. 10). The MSHA Report of Investigation, Govt.'s Ex. 2, under heading "Summary and Conclusion" sub-heading "Cause of Accident" at pg. 11 states:

Cause of the Accident

> The investigation team concluded that the increasing size of the frontal gob, the existence of a side gob, and increasing depth of overburden (in excess of 1,400 feet), resulted in high stresses and pressures on the coal pillars as they were extracted. The side gob had narrowed to approximately 130 feet wide adjacent to the accident site. The narrowness of the side gob may have restricted caving, contributing to excessive loading of the pillar line.
>
> The presence of thick sandstone layers above and below the Creech coal seam enhanced the ability of the coal pillars to withstand high stresses and store energy. As room pillar No. 1 was mined, much of its load was released and transferred to the already highly stressed adjacent pillars. This sudden pressure increase on the adjacent pillars was sufficient to cause failure of coal near or into the core of these pillars, and resulted in the burst.

Curtiss Vance, who issued the citation, was the first witness called by MSHA. In addition to being a Federal Coal Mine Inspector, he is a substitute MSHA investigator. He testified that investigators are assigned to go out to the mine sites where fatalities or accidents have occurred and "investigate them and come up with a conclusion as to the cause of the accident, and any violations that we may find of the law." He participated in the investigation of the coal burst accident and in the preparation of the MSHA accident investigation report which was admitted into evidence as Government's Ex. 2.

Asked as to the basis for his issuance of the citation, Vance read from the citation "The coal ribs were not controlled to protect persons from the hazards of a coal burst in the three rooms in the Second Left off of the Nine Right panel, an active working section where persons work and travel."

When questioned further on this point the witness testified, over objection by counsel for Respondent, that it was concluded by the investigator "that the operator had knowledge for a potential coal burst" especially when mining underneath high cover. He testified to better control the coal ribs so as to protect persons from the hazards of a coal burst in the area where the accident occurred, the operator did change his usual mining procedure. The operator "adjusted the mining of the rooms off the panels from five entries down to three entries" to try to better control the ribs, but these adjustments made by the operator were not sufficient to prevent the coal burst. (Tr. 45-46). This obvious conclusion was reached after the coal burst occurred. Vance also testified that the MSHA investigation revealed that Harlan was following the mines' MSHA approved roof-control plan at the time of the coal burst.

On cross-examination Mr. Vance conceded that "you want good caving" to take the weight of the overburden off the pillars that you're trying to extract so as to reduce the weight that will be transferred to the remaining pillars and that with good caving you typically hear popping and cracking of the roof during the shift and sometimes booming as the top falls. Such sounds indicates you're getting good caving.

Mr. George Karabin was MSHA's only other witness. Mr. Karabin is a supervisory civil engineer with MSHA's Pittsburgh Safety and Health Technology Center in the Roof Control Division. He has been working in the area of roof control at that center for 28 years. He is a registered professional engineer in the State of Pennsylvania. Since the early 1980's his main focus has been to look at mine design aspects that contribute to roof- or ground-control problems. (Tr. 66).

Mr. Karabin testified that "deep cover causes pressure on the pillar proportionate to the depth of the cover, and it causes ground control problems." (Tr. 133). He defined a coal burst or bump as "where a coal pillar from excess pressure suddenly and violently fails and expels coal material from the rib into the opening." (Tr. 60). He stated the coal burst results from "excess pressure. Vertical pressure squeezes the pillar to a point where it can no longer handle that pressure. The strength of the coal pillar is exceeded." He further stated "They [pillars] don't fail in a slow controlled manner. Rather they store energy, perform very little and then suddenly explode." (Tr. 62).

Mr. Karabin was of the opinion that the massive sandstone layer in the roof of the mine contributed to the pressure on the pillars in the mine and to the coal burst which occurred on November 20, 1996. He stated that because of the thickness of the sandstone layer it tended to bend rather than break and cave in. Consequently, the caving which would relieve the pressure on the pillars at the face occurred only in the shale, leaving the unbroken sandstone to continue to put pressure on the pillars in the active mining area. (Tr. 120-122). He explained the sandstone did not cave well because of its thickness.

Mr. Karabin also testified that areas of the underground mine adjacent to the fatal coal burst site included the property line representing the end of the coal seam in which Harlan had ownership rights. This included a "point" or "corner" along this property line where it formed a right angle, angling to within 240 feet of the face where the coal burst occurred. (Tr. 87-90). He testified "the property line itself controls or confines the geometry of the mined area" since Harlan can't mine outside that property line.

Mr. Karabin testified that the Accident Investigation Team found that the corner played a "role in the accident in the burst itself. Essentially, what it did was restricted cave-in directly adjacent to the last set of rooms that were developed." Mr. Karabin stated that by restricting the caving this "point" or "corner" shifted the overburden pressures to the pillars where the burst occurred.

Mr. Karabin testified that prior to the coal burst of November 1996, there had been four incidents, in different areas of the mine, where Harlan had a ground-control problem that would indicate that there was a potentiality of a coal burst in areas of deep cover. He stated that "deep cover" is generally an area that has a depth greater than 1,000 feet.

Mr. Karabin then briefly described the history of four ground-control incidents that occurred at the mine under deep cover during the six years prior to the November 20, 1996, coal burst. The first event was a non-injury coal burst on January 11, 1990. It occurred in the Second Right panel off the No. 2 East main. There was no damage to equipment and no injury to any person. The second event was a "squeeze" in July 1994 in the Right Eight section. This squeeze was later described by other mining experts as a floor squeeze. The third incident was a broad area of roof deterioration that occurred in May, June or July 1996 in the First Left off No. 3 East main that was resolved by Harlan, not mining the area and thus abandoning 29 pillars in the area. The fourth was a "squeeze" or "pressure point" in the First Left off Nine Right panel in September 1996. That area is about 1,000 feet from the area where the coal burst of November 20, 1996 occurred.

Without being specific, Mr. Karabin asserted that Harlan should have changed its mining method when retreat mining under deep cover. Mr. Karabin conceded, however, that in the Second Left off Nine Right panel, Harlan did make a change in its usual mining method from driving five entries into the barrier pillar to driving three. He indicated this change was a good thing that would increase stability but that it was insufficient. He testified:

> I believe had they mined five rooms, the burst would have occurred. It would probably have covered a broader area, since more rooms had been developed. But, the change from five rooms to three rooms would not produce a significant enough increase in stability to prevent the burst from occurring. (Tr. 165-166).

Mr. Karabin conceded that by the time Harlan got to Nine Right there were several mine plans floating around: Dr. Newman had a plan; Dr. Unrug had a plan; and Mr. Kaiser had a plan. There were "several things" offered to the company at that time insofar as to going forward. Harlan chose to go with Mr. Kaiser's plan which involved driving perpendicular off Nine Right. With hindsight it is now obvious that the plan "did not work out." A massive coal burst occurred on November 20th. At the hearing Dr. Karabin was asked if, in his opinion, one of the other mining plans had been selected, would Harlan have been able to successfully mine the area in question i.e. without a massive coal burst such as the one that occurred on November 20th. Dr. Karabin replied "Obviously, we have no way of knowing, they were not implemented." (Tr. 218 Lines 2, 3).

On cross-examination, Mr. Karabin stated that it was the four events described above, particularly the January 1960 non-injury coal burst that first put the operator on notice that the mine's Creech coal seam was capable of bursting when under deep cover. This non-injury, no-

property damage coal burst was almost a mile from the site of the coal burst of November 20, 1996. Mr. Karabin stated that was the first indication to the operator that the coal seam was capable of bursting. He went on to testify that because the operator was aware of this and of the increasing pressure under deeper cover, Harlan made adjustments in its mining procedure to better control the ground in the 005-0 section. He conceded that this modification of the mining procedure under deep cover was a good thing but was not effective in preventing that November 1996 coal burst. Without giving any specifics or details as to his reasoning, Mr. Karabin asserted that Harlan should have been able to determine that this modification would be inadequate.

Dr. Konstantine Unrug is a professor of mining engineering at the University of Kentucky. He has had the position for the last 20 years. During that time, his interest and research was focused on strata control of coal fields. At the university he is responsible for mine design, underground construction and rock mechanics. He has dealt with the presence of high pressure and high load conditions in deep mine-construction projects.

Dr. Unrug stated that pressure exists in all mines. In destressing to get pressure release, noises occur which are mainly thumping of different intensities. In stiffer material the sound can be stronger than in material which is soft. In trying to get caving you expect to hear popping, crackling and thumping. The absence of such noise is an indication that the coal pillar is storing energy. It is the absence of destressing noise rather than the existence of such noise that would be cause for concern. A coal burst occurs when the stored elastic energy in the coal is violently released by ejection of the coal matter to the surrounding space. (Tr. 297).

In 1994 when the "squeeze" incident occurred, Dr. Unrug was called to the mine as a consultant by Harlan's mine manager and the mine engineer. Dr. Unrug testified that his inspection and investigation indicated the 1994 incident was a "floor heave", that it was not a coal burst. The floor of the mine actually heaved up. Dr. Unrug explained: "A floor heave is a type of failure where the floor is the weakest element of the three components which are the mine roof, the pillar, and the floor." Dr. Unrug explained that the 1994 floor heave was caused by the failure of a small seam of coal which was about eight or nine inches below the surface of the floor. Dr. Unrug again emphasized that this 1994 incident was a "floor heave" and was not a "coal burst." He explained a "coal burst is an event in which the stored elastic energy in the coal is violently released by ejection of coal matter to the surrounding space." (Tr. 298). I credit Dr. Unrug's testimony and find this 1994 incident was not a "coal burst." It was a floor heave that was located approximately 2,000 feet from the area where the November 1996 coal burst occurred. (Tr. 296). Dr. Unrug testified that the occurrence of the 1994 floor heave was not an indication that a coal burst would occur at a later date. (Tr. 331).

It was Dr. Unrug's opinion that none of the ground control incidents described by Mr. Karabin were indicative of a future coal burst. Based on the testimony of Dr. Unrug, I find that the four prior incidents of ground control did not indicate that in the future it was likely there would be a coal burst such as the one that occurred on November 20, 1996 while Harlan was engaged in retreat mining.

It is undisputed that Harlan was following the approved mining procedure for pillar extraction set forth in the mine's roof-control plan. This mine plan under 30 C.F.R., MSHA § 75.223(d) requires the district manager to review the plan every six months. "The goal of this mine plan approval and adoption process is a mine specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord." Once the plan is approved and adopted, these provisions are enforceable at the mine as mandatory safety standards - cf *Jim Walter Resources, Inc.* 9 FMSHRC at 907.

Dr. David A. Newman, the second mining expert called by Harlan, is a registered professional engineer in Kentucky, West Virginia and Indiana and is a registered geologist in Kentucky. From 1984 to 1988 he was an Assistant Professor of Mining Engineering at the University of Kentucky during which time his focus was on yielding pillars. (Tr. 99). His area of expertise is rock mechanics, with particular concentration on underground stability. (Tr. 398). As a mine expert and consultant, Dr. Newman was contacted by Harlan to go underground and inspect the 2-C mine. He inspected the same area Dr. Unrug inspected which included the 1994 floor heave described by Dr. Unrug. He testified the floor heave "really has nothing to do with the coal burst of November 1996 and has everything to do with the weakness of the floor." (Tr. 406-407). Prior to the coal burst of November 1996, Dr. Newman was consulted on other mining problems by Harlan but states he was not consulted and made no recommendation with respect to the retreat mining of the Second Left off Nine Right. When he did visit the area after the coal burst and was told of Mr. Kaiser's recommendations to come off Nine Right and mine perpendicular to Nine Right, Dr. Newman had no problem with Mr. Kaiser's proposal.

With respect to the four ground-control incidents Harlan had in different areas of the mine during the past six years, Dr. Newman testified that each of those four incidents was unique to the area where they occurred and were not indicative that a coal burst such as the one that occurred on November 20, 1996, would happen. (Tr. 421-426, 432-434).

Dr. Newman testified that Harlan never refused any of the recommendations he made that would affect safety of the miners. He added that in one area where he made recommendations, Harlan chose to abandon (not mine) the area. (Tr. 481).

When Dr. Newman was asked if he agreed with the MSHA assumption that the operator should have known and have been aware of a likely coal burst such as occurred on November 20, 1996, he replied as follows:

> I disagree. The thing I would rely upon most heavily for that is the men who were in the mine, who had a better feel than I would for the typical noises on that section, for the typical behavior of the pillars, for the typical behavior of the roof, and who in other areas of the mine, did abandon areas that they found — where they did believe it to be unsafe. I would more rely upon their habitual feel for what the conditions would be as more of an indicator of a

potential for burst. I mean, they saw it every shift, every day, were familiar, as is born out in the sworn testimonies, familiar with the behavior of the key cut, familiar with the behavior and immediately after the key cut and familiar to the behavior of the typical pillar recovery. (Tr. 434-435).

FURTHER DISCUSSION, FINDINGS AND CONCLUSION

The Secretary argues that looking back almost six years from January 1990 to November 20, 1996, there were four incidents in different areas of the mine where Harlan encountered ground-control problems under deep cover exceeding 1,000 feet and Harlan, therefore, should have been aware of the potential for a coal burst such as occurred on November 20, 1996, in the Second Left off the Nine Right panel. Because of these four ground-control incidents under deep cover the MSHA now argues that Harlan should have changed its method of retreat mining the pillars in the Second Left MMU0050 off the Nine Right panel so as to prevent a potential coal burst such as the one that occurred November 20, 1996.

On evaluation of the expert testimony presented at the hearing, I credit the testimony of Dr. Unrug and David Alan Newman. Based on testimony of these experts, I find the only prior coal burst at the C-2 mine was the non-injury, no equipment damaged coal burst that occurred in January 1990. With respect to that incident Dr. Unrug testified a coal burst occurring in January 1990 with no coal burst in 1991 would not lead one to predict there would be another coal burst one mile away, six years later. The reason for this Dr. Newman explained is the "differences in geological composition" between different areas in the mine. He states that in the carboniferous strata of the mine "changes are rapid" in the geological composition. (Tr. 329).

Dr. Unrug stated the differences in geologic composition in a mine can be illustrated by the difference in geological composition that one sees as one drives through Kentucky viewing the difference in geological composition of strata along the roadway highwalls. (Tr. 329-330). Different coal strengths exist in different parts of the mine. (Tr. 336). This is why a coal burst occurring in 1990, with no coal bursts in 1991, would not lead one to predict that there would be another, one mile away, six years in the future. (Tr. 329).

Hindsight alone will not support the citation. Hindsight is improperly judging what should have been done in light of what ultimately happened, not in light of the circumstances at the time. The Commission has consistently held with respect to this broadly worded standard, 30 C.F.R. § 75.202(a) that "the adequacy of particular roof support or other control must be measured against the test of whether the support or control is what a reasonably prudent person, familiar with the mining industry and protective purpose of the standard, would have provided in order to meet the protection intended by the standard." *Canon Coal Co.*, 9 FMSHRC 667, 668 (Apr. 1987) (cited in *Helen Mining Co.*, 10 FMSHRC 1672, 1675 (Dec. 1988) and in *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1277 (Dec. 1998).

The Petitioner has the burden of proof. Harlan was mining the 005-0 section in compliance with its approved mine plan. Upon review, an evaluation of all the evidence, I find that a preponderance of the evidence of record fails to establish that Harlan did not provide what a reasonable, prudent person, familiar with the industry and the protective purpose of the standard, would have provided in light of the known facts and circumstances that existed prior to the November 20, 1996, coal burst. Consequently, the cited standard was not violated. The citation should therefore be vacated.

ORDER

Citation No. 4622390 is **VACATED** and the proposed $50,000.00 penalty is set aside.

August F. Cetti
Administrative Law Judge

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May 18, 2000

KYBER COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket Nos. KENT 94-574-R
	:	through KENT 94-797-R
	:	and KENT 94-862-R
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. KENT 95-272
	:	A. C. No. 15-16856-03536
v.	:	
KYBER COAL COMPANY, Respondent	:	Docket No. KENT 95-276
	:	A. C. No. 15-16856-03537
	:	Docket No. KENT 95-280
	:	A. C. No. 15-16856-03538
	:	Docket No. KENT 95-284
	:	A. C. No. 15-16856-03539
	:	Docket No. KENT 95-288
	:	A. C. No. 15-16856-03540
	:	Docket No. KENT 95-689
	:	A. C. No. 15-16856-03544
	:	Docket No. KENT 95-692
	:	A. C. No. 15-16856-03542
	:	Docket No. KENT 95-697
	:	A. C. No. 15-16856-03547

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	:	Docket No. KENT 95-701
	:	A. C. No. 15-16856-03545
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	:	Docket No. KENT 95-707
	:	A. C. No. 15-16856-03548
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	:	Docket No. KENT 95-713
	:	A. C. No. 15-16856-03543
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	:	Docket No. KENT 95-715
	:	A. C. No. 15-16856-03546
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	:	Docket No. KENT 95-776
	:	A. C. No. 15-16856-03549
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	:	Elmo No. 5 Mine
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 95-242
Petitioner	:	A. C. No. 15-16856-03536
	:	
v.	:	Docket No. KENT 95-243
A A & W COALS, INCORPORATED,	:	A. C. No. 15-16856-03537
Respondent	:	
	:	Docket No. KENT 95-244
	:	A. C. No. 15-16856-03538
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	:	Docket No. KENT 95-245
	:	A. C. No. 15-16856-03539
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	:	Docket No. KENT 95-246
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:	Docket No. KENT 95-657
:	A. C. No. 15-16856-03548
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:	Docket No. KENT 95-740
:	A. C. No. 15-16856-03549
:	
:	Elmo No. 5 Mine

DECISION APPROVING SETTLEMENT
ORDER TO PAY
ORDER TO VACATE
ORDER OF DISMISSAL

Appearances:

Before: Judge Barbour

In the civil penalty cases, the Secretary of Labor, on behalf of the Mine Safety and Health Administration, seeks the assessment of civil penalties against Kyber Coal Company (Kyber) and A &W Coal Company (A &W) for numerous alleged violations of mandatory safety standards for coal mines found in parts 48, 75 and 77 of Title 30 C.F.R. The citations and orders in which the violations are alleged were issued jointly to Berwind Natural Resources Corporation (Berwind), Kentucky Berwind Land Company (Kentucky Berwind), Jesse Branch Coal Company (Jesse Branch), Kyber and A &W. All of the companies, except A &W, contested the validity of the citations and orders on jurisdictional grounds. To resolve the questions of liability, I bifurcated the contest and civil penalty proceedings and first addressed the jurisdictional issues. In subsequent proceedings, I found that of the four contestants only Kyber was subject to Mine Act jurisdiction (Berwind Natural Resources Corporation, et al., 18 FMSHRC 202 (February 1996)).

My decision was appealed to the Commission. Although A &W did not contest jurisdiction, I stayed the civil penalty proceedings against A &W pending the Commission's decision. A &W and the other companies were charged with the same violations, and I agreed with A &W that it was necessary to know which party or parties were potentially responsible for the alleged violations before ruling on the merits of the violations and before assessing penalties

for those that were found to have occurred (Order Staying Proceedings (April 15, 1996)).

On appeal, a majority of the Commission held that Berwind, Kentucky Berwind and Jesse Branch were not operators, but that Kyber was (Berwind Natural Resources Corporations, et al., 21 FMSHRC 1284 (December 1999)) and the Commission remanded the cases for further proceedings. Following the remand, I dissolved the stay in the A &W cases and ordered counsels for the Secretary, Kyber and A &W to confer regarding (1) all disputed issues of fact and law, (2) matters that could be the subject of stipulation, (3) the amount of the proposed penalties, and (4) possible settlement. In addition, I scheduled a prehearing conference of record for April 18, 2000, in order for counsels to report regarding their discussions and their preparations for trial.

Immediately prior to the start of the prehearing conference, counsel for the Secretary advised me that a settlement offer had been presented to counsels for Kyber and A & W (Tr. 9). Later that morning counsels advised me that a settlement had been agreed to for all of the violations, citations, and orders involved in the cases and that counsels were prepared to present the settlement on the record. I opened the record and counsel for the Secretary stated the terms of the settlement as well as bases for approving the settlement (Tr. 11-14). Counsels for Kyber and A & W stated that they concurred (Tr. 14-16). Counsel for the Secretary agreed to submit a written motion setting forth the terms of the settlement (Tr. 15-16). In addition, counsel for Kyber agreed that Kyber would withdraw its notices of contest and that the Secretary would make this representation in the settlement motion (Tr. 14-15). At the close of the conference, I advised the parties that I would approve the settlement, and that I would issue a decision approving the settlement upon receipt of the written settlement motion.

On May 10, 2000, the Secretary filed the written motion[1]. The proposed settlement is as follows:

Kyber Coal Company
Docket No. KENT 95-776

Citation/ Order No.	Date	30 C.F.R.	Assessment	Settlement
4010541	03/24/94	75.370(a)(1)	$50,000	$5,500
4010542	03/22/94	75.360(b)(1)	$40,000	$5,500
4010543	03/24/94	75.1702-1	$50,000	$5,500
4010544	03/22/94	75.403	$30,000	$3,500
4010545	03/24/94	75.321	$50,000	$5,500
4010546	03/22/94	75.360(b)(1)	$40,000	$5,500
4010547	03/24/94	75.364(b)(2)	$40,000	$4,000
4010582	03/22/94	75.364(a)(1)	$20,000	$2,500
4010583	03/24/94	75.442(a)(4)	$20,000	$2,500

[1] The written settlement motion is slightly different than the motion presented on the record. The parties orally advise that the written settlement represents their final agreement.

A A & W Coal Company
KENT 95-740

4010541	**03/24/94**	**75.370(a)(1)**	**$50,000**	**$10,000**
4010542	**03/22/94**	**75.360(b)(1)**	**$40,000**	**$10,000**
4010543	**03/24/94**	**75.1702-1**	**$50,000**	**$10,000**
4010544	**03/22/94**	**75.403**	**$30,000**	**$7,500**
4010545	**03/24/94**	**75.321**	**$50,000**	**$10,000**
4010546	**03/22/94**	**75.360(b)(1)**	**$40,000**	**$10,000**
4010547	**03/24/94**	**75.364(b)(2)**	**$40,000**	**$7,500**
4010582	**03/22/94**	**75.364(a)(1)**	**$20,000**	**$5,000**
4010583	**03/24/94**	**75.442(a)(4)**	**$20,000**	**$5,000**

With regard to the above-listed citations and orders which were issued in conjunction with an accident where a miner was fatally injured, the Secretary represents that reductions are warranted for Kyber Coal Company because Kyber was a small operator and has left the mining business. In addition, Kyber had no history of prior violation, and its contract mine operator, A A &W, had a good history of prior violations.

With respect to A A & W, the Secretary states that A A & W has suffered substantial adverse business losses when its mine was closed as a result of the accident that triggered the subject citations and orders and that A A & W's size is very small with only 20 miners employed at the mine. Finally, the Secretary states that A & W's negligence was less than originally thought.

With regard to the remaining violations for Kyber contained in Docket Nos. KENT 95-272, KENT 95-276, KENT 95-280, KENT 95-284, KENT 95-288, KENT 95-689, KENT 95-692, KENT 95-697, KENT 95-701, KENT 95-707, KENT 95-713, KENT 95-715, and for A A & W contained in Docket Nos. KENT 95-242, KENT 95-243, KENT 95-244, KENT 95-245, KENT 95-246, KENT 95-651, KENT 95-652, KENT 95-653, KENT 95-654, KENT 95-655, KENT 95-656, KENT 95-657, the Secretary advises that she is exercising her prosecutorial discretion by agreeing to vacate these violations and to withdraw the penalty petitions. The violations involved in these matters were issued and did not contribute to the fatality that resulted from the accident.

Finally, the Secretary states that the Kyber agrees to withdraw all of its notices of contest of citations and orders that it filed and which are contained in Docket Nos. KENT 94-574-R through KENT 94-797-R and KENT 94-862-R.

After review and consideration of the pleadings, arguments and submission in support of the settlement motion, I find the proposed settlement is reasonable and in the public interest. Pursuant to 29 C.F.R. § 2700.31, the motion is **GRANTED**, and the settlement is **APPROVED**.

ORDER

Kyber Coal Company **IS ORDERED** to pay a civil penalty of $40,000 in satisfaction of the violations contained in Docket No. KENT 95-776. Payment is to be made to MSHA within 45 days of the date of this proceeding. Also, within the same 45 days the Secretary **IS ORDERED** to vacate all the citations and orders contained in Docket Nos. KENT 95-272, KENT 95-276, KENT 95-280, KENT 95-284, KENT 95-288, KENT 95-689, KENT 95-692, KENT 95-697, KENT 95-701, KENT 95-707, KENT 95-713, KENT 95-715. Upon receipt of full payment and vacation of the citations and orders, these proceedings are **DISMISSED**.

A A & W Coals, Inc., **IS ORDERED** to pay a civil penalty of $75,000 in satisfaction of the violations contained in Docket No. KENT 95-740. Payment is to be made in three installments of $25,000 each on June 1, 2000, June 1, 2001 and June 1, 2002. Also, within 45 days the Secretary **IS ORDERED** to vacate all the citations and orders contained in Docket Nos. KENT 95-242, KENT 95-243, KENT 95-244, KENT 95-245, KENT 95-246, KENT 95-651, KENT 95-652, KENT 95-653, KENT 95-654, KENT 95-655, KENT 95-656, KENT 95-657. Upon receipt of full payment and vacation of the citations and orders, these proceedings are **DISMISSED**.

It is further **ORDERED** that the Kyber's motion to withdraw its notices of contest filed in Docket Nos. KENT 94-574-R through KENT 94-797-R and KENT 94-862-R is **GRANTED** and that these cases are **DISMISSED**.

David F. Barbour
Chief Administrative Law Judge

Distribution: (Certified Mail)

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/wd

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 18, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 94-23
Petitioner	:	A. C. No. 36-05466-03980
v.	:	
	:	Docket No. PENN 94-166
CYPRUS EMERALD RESOURCES,	:	A.C. No. 36-05466-03990
Respondent	:	
	:	Emerald No. 1 Mine

DECISION APPROVING SETTLEMENT ON REMAND

Before: Judge Hodgdon

This case is before me on remand from the Commission to assess a penalty for the only citation remaining in the case. *Cyprus Emerald Resources Corp.*, 22 FMSHRC 285 (March 2000). The Secretary, by counsel, has filed a motion to approve a settlement agreement. A reduction in penalty from $3,000.00 to $1,000.00 is proposed.

Having considered the representations and documentation submitted, I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i). Accordingly, the motion for approval of settlement is **GRANTED** and the Respondent is **ORDERED TO PAY** a penalty of **$1,000.00** within 30 days of the date of this order.

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

May 24,2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 99-222
Petitioner	:	A. C. No. 36-00958-04218
v.	:	
	:	Docket No. PENN 99-232
EIGHTY-FOUR MINING COMPANY,	:	A. C. No. 36-00958-04220
Respondent	:	
	:	Mine No. 84

DECISION

Appearances: Linda M. Henry, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania for Petitioner;
Elizabeth S. Chamberlin, Esq., CONSOL Inc., Pittsburgh, Pennsylvania for Respondent.

Before: Judge Weisberger

Statement of the Case

These cases are before me upon Petitions for Assessment of Civil Penalty, filed by the Secretary of Labor (Secretary) seeking the imposition of a civil penalties against Eighty-Four Mining Company ("Eighty-Four") based upon citations and orders issued to Eighty-Four alleging violations of various mandatory standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice, the cases were heard in Pittsburgh, Pennsylvania on January 25 through 27, 2000. On March 27, 2000, the secretary filed a post-hearing argument and proposed findings of fact. On March 29, 2000, Respondent filed a post-hearing brief and findings of fact.[1]

I. The Secretary's Evidence

On March 10, 1999, Inspector James Dickey inspected the Eighty-Four Mine's 6 North

[1]At the conclusion of the hearing, the parties were informed by the undersigned that, subsequent to the filing of proposed findings of fact, the parties shall file responses to other sides' proposed findings of fact. To date, neither party filed any response.

Section. Eighty-Four used a continuous miner and a three entry system to mine coal from the Pittsburgh seam in the section. The section was mining coal during Dickey's inspection, and the had produced coal on the previous shift.

Dickey walked through all entries and crosscuts of the 6 North section during his inspection. He observed "fine, dry and coarse coal accumulations over the entire section." (Tr. I. 77)[2] In this connection he testified that "[I']ve been inspecting for a number of years and this is probably some of the worst accumulations I've ever observed on a mine section." (Tr. I. 160) Miner walkaround and Eighty-Four employee Dan Clark also observed coal accumulations in all three entries.

Dickey measured the accumulations with a ruler and tape measure. He indicated that the accumulations in the No.1 entry were 1 to 3 ½ inches deep for a distance in excess of 120 feet in length. The accumulations covered an area of the mine floor 12 feet wide.

Dickey also observed fine and coarse coal along both ribs of the crosscut from No. 1 to No. 2 entries. He observed a pile of coal at the No. 1 entry side of this crosscut. He measured the pile as 5 to 6 inches deep, and 24 inches wide by 16 feet in length.

The accumulations along the inby rib measured 14 to 20 inches deep by 24 inches wide by 46 feet in length. Dickey also measured accumulations of coal along the outby rib. They measured 3 ½ inches deep and 8 to 11 inches wide for a distance of 27 feet. After that point, the coal measured 15 inches deep by 8 inches wide for a distance of 22 feet.

Dickey observed a pile of coal 20 inches deep, 35 inches wide, and 5 feet in length where the No. 64 ½ crosscut had holed through to the No. 2 entry. He observed another pile of coal 20 inches deep, 5 feet wide, and 6 ½ feet long at the outby corner of a 12 foot deep notch mined into the rib of the No. 2 entry.

Dickey observed a notch in this area that had coal along both ribs measuring 24 inches deep by 35 inches wide. Also, coal measuring 4 to 6 inches deep covered the entire floor of this notch.

In the No. 2 entry, Dickey observed an accumulation of coal which measured 3 to 14 inches deep along the left rib for a distance of 140 feet. He also observed accumulations along the right rib which he measured as 14 inches deep by 20 inches wide, and 8 to 20 inches deep by 12 inches wide for the entire length of the entry. This coal was dry to the touch. He also observed a pile of coal which he measured as 24 inches deep, 5 feet wide, and 16 feet in length at the mouth of the No. 2 entry. The coal was dry to the touch.

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[2]Tr. I. refers to the transcript of the hearing held January 25; Tr. II. to the transcript of the hearing held January 26, and Tr. III. to the transcript of the hearing held January 27, 2000.

Outby the crosscut in the No. 2 entry, Dickey observed accumulations which measured 4 to 6 inches deep, 6 inches wide, and 38 feet in length. Accumulations measured 15 inches deep, 15 inches wide, and 6 feet in length along the left rib, and 8 to 10 inches deep, and 12 inches wide along the right rib. They extended for a distance of over 100 feet. This coal was dry to the touch.

Dickey observed coal along the inby rib of the crosscut from No. 2 to No. 3 entry. He measured this coal as 14 inches deep by 20 inches wide for a distance of 7 feet, and 10 to 12 inches deep for a distance of 20 feet. He observed coal for a distance of 20 feet along the outby rib that was 10 to 12 inches deep and 20 inches wide. This coal was both damp and dry.

Along the left rib of the No. 3 entry, Dickey observed coal which measured 3 to 8 inches deep, and 12 inches wide for a distance of 92 feet. In a notch along this rib, he measured coal 18 to 20 inches deep, 15 inches wide, and 6 feet in length. This coal was damp by observation and touch.

Along the inby rib of the No. 64 crosscut, Dickey observed coal measuring 8 inches deep, 12 inches wide, for a distance of 46 feet in length. The fan was located in this crosscut. The coal was dry.

Eighty-Four mine foreman Dan Jones confirmed that he saw coal in the No. 3 entry. He acknowledged that regarding one pile of coal located in the No. 64 crosscut between the No. 2 to No. 3 entry, "...we should have cleaned." (Tr. II. 290) Jones acknowledged that the loader operators weren't doing "a hundred percent job" on cleaning against the rib area. (Tr. III. 14)

Dickey testified that he was concerned about the equipment in the 6 North Section causing an ignition of the accumulations. Dickey observed that the shuttle car cables in the 6 North section wound and rewound constantly on the mine floor. Dickey testified that in the normal course of mining, due to this constant movement, shuttle car cables are "very likely" to be damaged. (Tr. I. 166) He testified that the "shuttle car cable...[could cause] a dust ignition in this case when it's located around deposits of fine dry coal." (Tr. I. 165)

Dickey opined, in essence, that the accumulations were hazardous due to the extent of dry accumulations, and the presence of ignition sources. In this connection, he testified that continuous miners could ignite coal accumulations. He stated that in the normal course of mining, continuous miners such as those at the Eighty-Four Mine used drill bits which generate sparks. Dickey stated that during mining, continuous miners strike rock on the mine floor, and also strike sulphur balls. According to Dickey, this happens "all the time" in the normal course of mining. (Tr. I. 164, 165) Dickey based this observation on his experience inspecting, and running a miner in the Pittsburgh seam for eight years.

Dickey testified that Eighty-Four Mine had five ignitions that he knew about prior to this inspection. Three ignitions occurred in the two years prior to this inspection. Two ignitions

occurred during the operations of continuous miners, and one during the operation of a roof bolter.

In the time period January to March 1999, Eighty-Four Mine liberated six and a half million cubic feet of methane in a 24 hour period. It liberated 4,500 cubic feet a minute. Dickey measured 0.3 percent of methane at the face of No. 3 entry, 0.2 percent methane at the face of the No.2 entry, and 0.2 percent methane at the face of the No. 1 entry.

Seven persons were working in the No. 1 entry. They were all working in intake air. Dickey testified that the accumulations in the 6 North Section were reasonably likely to result in an explosion or mine fire. He testified the explosion would result in lost workdays, and possibly even fatal injuries.

According to Dickey and walkaround Dan Clark, they did not see anyone cleaning accumulations at the time that Dickey issued the order.

Nineteen citations or orders were issued to Eighty-Four mine for violations of § 75. 400 for the period from September 1998 to March 5, 1999.

Dickey had previously issued seven citations at this mine for accumulations in the 6 North section of coal and coal dust on the mine floor two months prior to the March 10, 1999 inspection. Dickey had also issued citations in July and August 1998 for accumulations on the mine floor.

Dickey discussed the importance of monitoring coal accumulations with the operator's management personnel after the issuance of each of those citations issued in January to March 1999, and July to August, 1998. In addition, Dickey spent four hours with managers Brad DeBusk and Michael Sinovich on January 29, 1999 discussing accumulations. Dickey told mine management that they must clean during the mining cycle. He told them that they would be issued citations if they did not clean up as mining progressed, "and advised them of the possibility of getting unwarrantable citations." (Tr. I. 120)

Dickey had these conversations with "just about every official at the coal mine." (Tr. I 160) According to Dickey, Safety Manager Brad DeBusk indicated to him that he understood the requirements, and would tell the supervisors at the mine about them.

Dickey testified that mine foreman Jones told him, referring to his foreman, that "they knew they were supposed to clean up as they mined." (sic) (Tr. I. 110) As a result of his inspection, Dickey issued a number of orders and citations.

II. Discussion

A. Order No. 7075382 (Docket No. PENN 99-232)

1. Violation of 30 C.F.R. § 75.400

Order No. 7075382 issued by Dickey alleges a violation of 30 C.F.R. 400 which, as pertinent, provides that "coal dust, ... loose coal and other combustible material, shall be cleaned up and not be permitted to accumulate in active working, ...". Dickey's testimony, corroborated in essential parts by Clark, set forth, based upon his observations and measurements, detailed dimensions and locations of coal and coal dust in cited areas. Further, according to Dickey, at various locations he touched the accumulated material, and it was dry. On the other hand, Steven M. Strange, a mine inspector for the Commonwealth of Pennsylvania, inspected the 6 North section on March 8, between 9:00 a.m. to 12:00 p.m. He indicated that mining was in progress at the time, and he described the area as being in very good condition. He indicated that his notes only set forth some spillage on the ribs. However, his testimony is not accorded sufficient weight to rebut or impeach Dickey's testimony regarding the conditions observed by him, inasmuch as Dickey's observations were made prior to the time the order he issued at issue, i.e. 9:10 a.m. In contrast, Strange indicated generally that his inspection was between the hours of 9:00 a.m. and 12:00 p.m. but did not specifically testify that any observations that he made were prior to the abatement of the cited conditions.

Daniel Jones, the Eighty-Four mine foreman who was on the section at issue at approximately 10:00 a.m., on March 10, observed that the No. 3 entry was "cleaned petty good" (Tr. II. 281), that in "intermittent areas" (Tr. II. 281) there was loose coal 3 inches by 3 inches by 6 inches where the rib meets the floor, that there was no float coal dust, and that the conditions at the No. 3 entry were normal in the cutting sequence. He also described damp chunks of coal on the floor of the 64 crosscut between the second and third entries, and maintained that these were not hazardous. He opined that no cleaning was necessary in the No. 3, entry or the 64 crosscut. He also opined that although there were accumulations near the fan, the material was only damp fine coal dust that did not present any hazard. He described conditions in the No. 2 entry at the 64 ½ crosscut as containing "intermittent" areas of coal 3 inches by 3 inches by 6 feet. However, he did not specifically contradict Dickey's testimony regarding the specific accumulations he observed and measured. Similarly, neither Paul Havrilesko, a mechanic who worked the midnight to 8:00 a.m. shift on March 10, nor John Jakubic, the 6 North section foreman who also was present on the morning of March 8, adduced testimony of sufficient specificity to contradict Dickey's testimony regarding the conditions observed and measured by him at specific locations in the area at issue. Neither have Harvilesko nor Jakubic nor any other of Respondent's witnesses presented a different version of measured accumulations from that testified to by Dickey. Nor did any of Respondent's witnesses contradict Dickey's testimony regarding the specifics of the accumulations observed by him at the locations cited, at the time of his observations and measurements. Accordingly I find that Dickey's testimony in these regards has not been contradicted or impeached. Thus, based upon Dickey's testimony I find that as of the

date and time cited, there were extensive areas of accumulated coal dust in various locations in the cited areas. Some of these accumulations were dry. Further, based on Dickey's testimony, that was not impeached, contradicted or rebutted, I find that the cited areas contained ignition sources. Hence, I find within the context of this record, that the accumulations were hazardous. I thus find that Eighty-Four was in violation in Section 75.400 *supra*.

2. Significant and Substantial

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

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

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

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

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

As noted above, the record establishes a violation of a mandatory safety standard. Further, due to the extensiveness of the accumulations, and considering the fact that some of the accumulated coal dust was dry and constituted a combustible material, I find that the second element set forth in *Mathies supra* has been met.

Clete Stephan, an expert in the area of fire and explosion hazards, testified that, in general, in order for an explosion to occur five elements are necessary. He listed these as fuel, heat, oxygen, suspension of fuel, and confinement. The fact that men were working in the area without any oxygen supplement indicates that oxygen existed in sufficient quantities to sustain life. According to Stephan's uncontradicted testimony, this amount oxygen was sufficient to support combustion of methane or coal dust. Further, it is not contradicted that confinement was present as the underground mine presents a confined environment. Moreover, Eighty-Four did not rebut or contradict the testimony of Dickey regarding the significant liberation of methane at the mine, in the time period January through March 1999. Nor did Eighty-Four rebut, impeach, or contradict Dickey's testimony that shuttle car cables are "very likely" to be damaged and can cause a dust ignition when they are located around deposits of fine dry coal, and that the drill bits of the continuous miner, in normal operations, generate sparks. I thus find that the record establishes the existence of several ignition sources. Further, I find, based on Dickey's testimony, which was not impeached or contradicted, that he had observed dust in suspension. I thus find that all the necessary elements for an explosion to occur, as testified to by Stephan and not impeached or contradicted, were present. Hence, I find, taking into account the extensiveness of the accumulations, as well as the existence of all the elements necessary for combustion or explosion, the existence of a confluence of factors present which establish the third element of *Mathies supra*, i.e. a reasonable likelihood that the hazard contributed to i.e. a fire or an explosion, would result in an injury. (See *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (1988). Due to the nature of a fire or explosion and confined space, and given the presence of miners in the section, I find that there was a reasonable likelihood that a resultant injury would be of a reasonably serious nature. Thus, taking into account all the above I find that, within the framework of this evidence, it has been established that the violation was significant and substantial.

3. Unwarrantable Failure

In order to sustain a finding of a unwarrantable failure, it most be established by the Secretary that the violation resulted from Eighty-Four's "aggravated conduct". (*Emery Mining Corp.* 9 FMSHRC 1997 (1987). Eighty-Four, in asserting that the Secretary has not met this burden, refers to the testimony of Jones that the accumulations were being removed "in an established systematic fashion". Eighty-Four refers also to the testimony of Jones that it had instituted a requirement for crews to clean up as they mined rather than waiting for the scraper crew as was the previous practice. Also, that the crews' foremen received training in this regard. Additionally, Eighty-Four refers to the testimony of Strange that, the condition of the section in question had been improving that the section was heading "big time, in the right direction since the mine had been sold." (Tr. II. 196).

I note that Jones indicated that the conditions in the No. 3 entry were normal in the cutting sequence, and that in his preshift examination he did not see any hazards to be reported. I also take cognizance of Jakubic's testimony that he had observed the loader cleaning in the No. 1 entry shoveling both ribs in the 64 ½ crosscut. He also explained the difficulty in additional

shoveling due to the confined area that existed in normal operations.

On the other hand, Eighty-Four did not contradict or rebut Dickey's testimony regarding the warning that he gave Eighty-Four's management on occasions prior to the date in question regarding accumulations. Further, importantly, I note the extensiveness of the accumulations, and according to the testimony of Dickey their obviousness. Within this context, and especially noting the previous warnings given to Eighty-Four, I find that it has been established that the violation herein was as the result of Eighty-Four's unwarrantable failure.

4. Penalty

For the reasons set forth above, (II. A (2)) *infra*, I find that the gravity of the violation was high. Also, for the reason set forth above (II. A (3)) *infra*, I find that the level of Eighty-Four's negligence was more than moderate. Taking into account the additional factors set forth in Section 110(i) of the Act as stipulated to the parties, I find that a penalty of $3,500 is appropriate for this violation.

C. Order No. 7075384 (Docket No. PENN 99-232)

1. Violation of 30 C.F.R. § 360(b)

Order No. 7075384 alleges a violation of 30 C.F.R. § 75.360(b), which requires a person conducting a preshift examination, to: "...examine for hazardous conditions, ...". For the reasons set forth above, (II. A (3) *infra*,)) I have concluded that the record establishes that there existed hazardous accumulations when cited by Dickey. There is no evidence in the record that the full extent of these conditions was noted in the preshift report. Accordingly, I find that it has been established that Eighty-Four did violate Section 75.360(b) *supra*.

2. Significant and Substantial

All the factors discussed above, II A(2) *infra*, that provided a basis for the findings that the cited accumulations was a significant and substantial violation, apply with equal force to provide a basis for that a finding that the failure to preshift these conditions was similarly significant and substantial. Hence, essentially for the reasons set forth above, II (A)(2), *infra*, I conclude that the violation was significant and substantial.

3. Unwarrantable Failure

All the factors discussed above, II. A(2) *infra*, that provided a basis for the finding that the cited accumulations were the result of Eighty-Four's unwarrantable failure, apply with equal force to provide a basis for that a finding that the failure to preshift these conditions was similarly an unwarrantable failure. Hence, essentially, for the reasons set forth above II. A(3) *infra*, I find the violation herein of Section 360(b) *supra,* was as a result of Eighty Four's unwarrantable failure.

4. Penalty

For the reasons set forth above, II. A(4) *infra*, I find that the gravity of the violation was relatively high, and the negligence was more than moderate. Taking into account the remaining statutory factors stipulated to by the parties, I conclude that a penalty of $3,500 is proper for this violation.

D. Order No. 7075383 (Docket No. PENN 99-222)

1. Violation of 30 C.F.R. § 403

Additionally, Dickey issued an order alleging a violation of 30 C.F.R.§ 75.403 which requires, as pertinent, as follows: "...where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, ...".

Dickey's unimpeached and uncontradicted testimony establishes that he took rock dust samples from two locations. A dust sampling lab report for the two samples taken by Dickey indicates that the incombustible content of the samples to have been 45.3 and 41.5 respectively. I find no merit in Eighty-Four's argument that these result should be invalidated because Dickey did not obtain representative band samples. Section 75.403, *supra* does not require such samples, nor has Eighty-Four cited any binding legal authority that requires this method of sampling to be performed in order to sustain a violation. I thus find, based upon Dickey's testimony and the laboratory test results, that it has been established that Eighty-Four violated Section 75.403 *supra*.

2. Significant and Substantial

All the factors discussed above II. A (2) *infra* , that provided the basis for the finding that the cited accumulations was a significant and substantial violation, apply with equal force to provide a basis for a finding that the violation at issue was significant and substantial. Hence for the reasons set forth above, II. A (2) *infra* I find that the violation was significant and substantial.

3. Unwarrantable failure

There is no evidence in the record that Eighty-Four had received any warnings specifically regarding the incombustible content of rock dust. Nor is there evidence that it had been recently cited for this condition. There is no evidence in the record as to how long a period prior to Dickey's inspection the incombustible content in the cited area had been not in compliance with Section 403, *supra*. Further, the record does not establish that Eighty-Four knew of this condition. Nor does it convincingly establish that Eighty-Four should reasonably have known of this condition. Dickey testified that the accumulations that he observed "...appeared not to have an incombustibility content of at least 65 percent". He did not explain the basis for this opinion or

conclusion. Hence the record is devoid of sufficient evidence to predicate a finding that the objective conditions of the dust were such that a reasonably prudent experienced miner would have concluded that the rock dust incombustibility content was not within the regulatory parameters. Within this context, I find that it has not been established that the violation was as a result of Eighty-Four's unwarrantable failure.

4. Penalty

For the reasons set forth above II. D (2), *infra* I find that the gravity of the violation was relatively high. Also, for the reason set forth above II. D(3), *infra* I find that the level of negligence was more than low. Considering these factors as well as remaining factors in Section 110(i) of the Act as stipulated by the parties, I find that a penalty of $800 is appropriate.

E. Citation 7075381 (Docket No. PENN 99-222)

1. Violation of 30 C.F.R. § 75.370(a)(1)

Dickey testified that in his inspection he observed dust accumulations that were dry and dusty in the No. 1 entry that extended about 275 feet from the belt tail inby to the loader. He noted that dust went into the air when he walked in the area. Clark essentially corroborated Dickey's testimony in these regards. Dickey issued a citation alleging a violation of 30 C.F.R. § 75.370(a)(1) which requires the operator to follow its approved ventilation plan. Part 75.371(u) of the plan provides, as pertinent, that "section haulages are hosed down with water as needed."

Havrilesko testified that in the shift prior to Dickey's inspection, he watered the No. 1 entry commencing at the crusher and continuing inby for 125 feet. I find this testimony insufficient to contradict the testimony of Dickey, regarding his observations at the time he issued his citations. Further, although Harvilesko might have watered over a 125 foot distance Dickey observed dry conditions for 275 feet. Similarly, Jakubic testified that in his preshift examination of the No. 1 entry he noted that it was still damp. He also testified that he did not observe any dust in the air from shuttle car movement. This testimony is not sufficient to rebut the testimony of Dickey, as corroborated by Clark, regarding the conditions observed by him at the time that he made his observations. Accordingly, I accept Dickey's testimony, and based upon his testimony I find that Eighty-Four was in violation of its plan, and hence was in violation of Section 75.370(a)(1) *supra*.

2. Significant and Substantial

According to Dickey the dust that he cited was recognized by him be drill dust i.e., dust that came from the roof in the bolting process. According to Dickey, the rock in the immediate roof at the mine in question contains silica which is known to cause severe lung diseases. He also indicated that the cited area where he observed the dust in suspension was in an entry ventilated by the intake air which would eventually makes its way inby to the face, affecting all seven

persons working at the face during the shift. None of this testimony was effectively impeached or contradicted by any of Respondent's witnesses who were present at the time Dickey made his observations. Thus, I find that within the framework of this evidence adduced by Dickey, as well as for the reasons set forth above, II A(2) *infra*, that the violation was significant and substantial (see *Mathies, supra)*.

3. Penalty

Inasmuch as the violative condition was reasonably likely to have led to severe lung disease, I conclude that gravity of the violation was relatively high. The level of Eighty-Four's negligence should be mitigated to some degree based upon the fact that the Eighty-Four's management made some efforts by assigning Harvilesko to water the area in the midnight shift prior to the time cited by Dickey. Indeed, Harvilesko testified that he watered approximately 125 feet in the entry at issue rib to rib for two hours during the midnight shift. Taking these factors into account as well as the remaining statutory factors as discussed above, I find that a penalty of $450 is appropriate.

F. Citation Nos. 7059549, 7059552, 7059556, and 7076858 (Docket No. PENN 99-222)

Petitioner has filed a motion to approve a settlement agreement pertaining to these citations. A reduction in penalty from $832.00 to $165 is proposed. It also is proposed to vacate Citation No. 7076848. I have considered the representations and documentation submitted, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act, and find that the penalties proposed for these citations are appropriate.

ORDER

It is **ORDERED** that Order No. 7075383 shall be reduced to a section 104(a) citation that is not significant and substantial. It is further **ORDERED** that Citation No. 7076848 be **VACATED**. It is further **ORDERED** that within 30 days of this decision, Eighty-Four shall pay a total civil penalty of $8,415.

Avram Weisberger
Administrative Law Judge

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