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JUNE 2001

No case was filed in which Review was granted during the month of June

No case was filed in which Review was denied during the month of June

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 5, 2001

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. PENN 2001-85
 : A.C. No. 36-06990-03527
HARRIMAN COAL CORPORATION :

BEFORE: Jordan, Chairman; 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 March 2, 2001, the Commission received from Harriman Coal Corporation ("Harriman") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Secretary of Labor does not oppose Harriman's motion for relief.

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

In its motion, Harriman, through counsel, asserts that the late filing of its hearing request to contest the proposed penalty assessment associated with Order No. 7002182 was due to unfamiliarity with Commission rules and procedure. Mot. at 2, 4-5. Harriman contends that on August 26, 1999, MSHA issued Order No. 7002182, which was a follow-up order to Order No. 7000506.¹ *Id.* at 2. Harriman maintains that on May 18, 2000, it received the proposed penalty

¹ MSHA issued Order No. 7000506 to Harriman on July 15, 1999, and sent the associated proposed penalty assessment on May 4, 2000. *See* Ex. B. On August 7, after

assessment associated with Order No. 7002182. *Id.* at 1-2. It asserts that, like the proposed penalty assessment it received for Order No. 7000506, it understood that the proposed assessment became final after 30 days, but did not understand that the final order would be non-appealable. *Id.* at 2. Harriman contends that on the same date that the Commission issued its order reopening the proposed assessment for Order No. 7000506, it received a notice that MSHA would undertake collection actions for nonpayment of the proposed assessment for Order No. 7002182. *Id.* at 2-3. Harriman maintains that it understood that the filing of the Petition to Reopen the proposed assessment for the underlying order (Order No. 7000506) would temporarily suspend collection actions on any proposed assessments that flow directly from that order. *Id.* at 3. It claims that it wishes to challenge the merits of the underlying order and any order that is based upon the underlying order, including Order No. 7002182. *Id.* Harriman requests relief under Fed. R. Civ. P. 60(b)(1). *Id.* at 3-4.²

We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In reopening final orders, the Commission has found guidance in, and has applied “so far as practicable,” Fed. R. Civ. P. 60(b). *See* 29 C.F.R. § 2700.1(b) (“the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. In accordance with Rule 60(b)(1), we previously have afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Nat’l Lime & Stone Co., Inc.*, 20 FMSHRC 923, 925 (Sept. 1998); *Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997).

receiving notice that the penalty assessment had become a final Commission order due to Harriman’s failure to contest it, Harriman filed a petition to reopen that final order. Mot. at 2-3; *see* Ex. A. On February 12, 2001, the Commission issued an order granting Harriman’s request in Docket No. PENN 2000-203. 23 FMSHRC 153, 155 (Feb. 2001).

² Attached to its motion is a copy of its Petition to Reopen Penalty Assessment with attachments filed in Docket No. PENN 2000-203. Ex. A. Harriman also attached a copy of Order No. 7002182 (Ex. B); the proposed assessment for Order No. 7002182 (Ex. C); MSHA’s collection notice for nonpayment of the proposed assessment associated with Order No. 7002182 (Ex. D); the Commission’s February 12 order reopening the proposed assessment in Docket No. PENN 2000-203 (Ex. E); and a Notice of Contest for filing, in the event the Commission grants its request to reopen the proposed assessment associated with Order No. 7002182 (Ex. F).

On the basis of the present record, we are unable to evaluate the merits of Harriman's position. In the interest of justice, we remand the matter for assignment to a judge to determine whether relief from the final order is appropriate. *See Eclipse C Corp.*, 23 FMSHRC 134, 135 (Feb. 2001) (remanding to a judge where operator filed notice of contest in one proceeding and mistakenly believed that contest applied to other proceedings it received at the same time); *Upper Valley Materials*, 23 FMSHRC 130, 131 (Feb. 2001) (remanding to a judge where operator failed to file hearing request due to lack of familiarity with Commission procedure). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Mary Lu Jordan, Chairman



Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, concurring in result:

This is the second incident in which Harriman's counsel has filed a request to reopen on the basis that it misunderstood the Commission's Procedural Rules. The Commission's forbearance for such mistakes is not without limitation. Nevertheless, we would grant the operator's request for relief here because the Secretary does not oppose it, and because we find no other circumstances exist that would render such a grant problematic. However, in order to avoid the effect of an evenly divided decision, we join in remanding the case to allow the judge to consider whether the operator has met the criteria for relief under Rule 60(b). *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) (providing that the effect of a split Commission decision is to leave standing disposition from which appeal has been sought).


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 15, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 2000-421-M
	:	WEST 2000-422-M
	:	WEST 2000-423-M
	:	WEST 2000-424-M
	:	WEST 2000-425-M
CONTRACTORS SAND & GRAVEL	:	WEST 2000-426-M
INCORPORATED	:	WEST 2000-427-M

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

ORDER

BY: Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On June 5, 2000, the Commission received a request from Contractors Sand & Gravel, Inc. (“Contractors”) to reopen 11 proposed penalty assessments that have become final orders of the Commission. The Secretary of Labor opposes Contractors’ request for relief. For the reasons that follow, the Commission denies Contractors’ request as to

one of the proposed assessments,¹ and remands for further consideration the remaining ten proposed assessments.²

In its request, Contractors seeks to reopen 11 proposed penalty assessments, totaling \$2,073 for 24 alleged violations, which were originally issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") between July 6, 1993 and May 7, 1998. Six of the 11 proposed penalty assessments became final orders of the Commission, pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a), thirty days after Contractors failed to submit a hearing request ("green card") to contest the alleged violations.³ The Commission received Contractors' letter between two to six years after the six uncontested proposed assessments had become final orders of the Commission.

As to the remaining five proposed assessments, Contractors timely filed a green card, but failed to answer the Secretary's petitions for assessment of penalties.⁴ Former Chief

¹ The Commission's decision on this penalty assessment which has become a final order (A.C. No. 04-03404-05520 in Docket No. WEST 2000-427-M) is evenly divided. Chairman Jordan and Commissioner Beatty would deny the operator's request for relief and affirm the final order. Commissioners Riley and Verheggen would grant the operator's request and vacate the final order. The effect of the split decision is to leave standing the final Commission order. *See Pa. Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd*, 969 F.2d 1501 (3d Cir. 1992).

² Commissioners Riley and Verheggen would grant Contractors' request as to all 11 proposed penalty assessments. However, for the reasons set forth in their opinion, Commissioners Riley and Verheggen join Commissioner Beatty in remanding the ten proposed assessments. Chairman Jordan would deny Contractors' request as to all 11 proposed assessments.

³ These six proposed penalty assessments are as follows:

<u>Docket No.</u>	<u>A.C. No.</u>	<u>Assess. Date</u>	<u>Final Date</u>
WEST 2000-423-M	04-04679-05513	3/17/94	4/17/94
	04-04679-05515	6/12/96	7/12/96
WEST 2000-427-M	04-03404-05516	1/11/94	2/11/94
	04-03404-05517	7/15/94	8/15/94
	04-03404-05519	5/29/96	6/29/96
	04-03404-05520	5/7/98	6/7/98

⁴ These five proposed penalty assessments are as follows:

<u>Docket No.</u>	<u>A.C. No.</u>	<u>Assess. Date</u>	<u>Default Date</u>	<u>Final Date</u>
WEST 2000-421-M	04-04679-05511	7/7/93	2/16/94	3/28/94
WEST 2000-422-M	04-04679-05512	11/3/93	6/23/94	8/2/94

Administrative Law Judge Paul Merlin issued show cause orders directing Contractors to answer the Secretary's petitions within 30 days, and entered default against Contractors after it failed to respond to the judge's show cause orders. The judge's jurisdiction in these matters terminated when he issued his default orders between February 16 and June 23, 1994. 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). The judge's default orders regarding these five assessments became final between March 28 and August 2, 1994. The Commission received Contractors' letter approximately six years after the judge's five default orders had become final Commission orders.

Contractors asserts that it failed to contest the 11 proposed assessments because it believed that they were included in a decision after remand approving settlement issued by Administrative Law Judge August Cetti on May 28, 1996.⁵ Mot.; C. Reply. It contends that the government waited four to five years to raise the matter and that Contractors has no way of determining what the claims relate to other than their date and the section of the Secretary's regulations cited. Mot. Contractors requests that the Commission reopen these proposed assessments. *Id.* Attached to its request are various documents, including correspondence with

WEST 2000-424-M	04-03404-05513	7/6/93	2/16/94	3/28/94
WEST 2000-425-M	04-03404-05514	8/13/93	3/3/94	4/12/94
WEST 2000-426-M	04-03404-05515	10/18/93	6/7/94	7/17/94

⁵ Previously, the Commission granted Contractors' request to reopen nine unrelated civil penalty proceedings, which had been defaulted and become final orders, and remanded the proceedings to the judge to determine whether default was warranted. *Contractors Sand & Gravel, Inc.*, 16 FMSHRC 1645, 1646 (Aug. 1994). Of the nine proceedings remanded, Judge Cetti vacated the alleged violation in Docket No. WEST 94-409-M, and one alleged violation in Docket No. WEST 93-462-M, retaining jurisdiction of the remaining two citations in that proceeding. *Contractors Sand & Gravel, Inc.*, 18 FMSHRC 384, 389 (Mar. 1996) (ALJ). Judge Cetti subsequently approved the settlement of 27 violations, including the two remaining violations in Docket No. WEST 93-462-M, as well as the other eight dockets reopened by the Commission in its August 1994 decision. *Contractors Sand & Gravel, Inc.*, 18 FMSHRC 824, 825-26 (May 1996) (ALJ).

Consequently, Contractors filed a suit against the Secretary for attorney's fees and costs in Docket No. WEST 94-409-M, pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 et seq. (1994) ("EAJA"), and was ultimately successful. *Contractors Sand & Gravel, Inc.*, 18 FMSHRC 1820 (Oct. 1996) (ALJ), *rev'd* 20 FMSHRC 960 (Sept. 1998), *rev'd Contractors Sand & Gravel, Inc. v. FMSHRC*, 199 F.3d 1335, 1340-43 (D.C. Cir. 2000), *enforced*, 22 FMSHRC 367 (Mar. 2000) and 22 FMSHRC 561 (Apr. 2000) (ALJ).

the United States Department of Treasury, Judge Cetti's decisions in the underlying matters (*see* n.3 *supra*), the 11 proposed penalty assessments, the subject default orders, and MSHA reports. Attachs.

On June 14, 2000, the Commission received the Secretary's opposition to Contractors' request. The Secretary argues that the request should be denied because Contractors has failed to satisfy any of the requirements for obtaining relief under Fed. R. Civ. P. 60(b). S. Opp'n at 4-13. Specifically, the Secretary contends that if Contractors' request for relief falls under Rule 60(b)(1) through (3), its request is time-barred because it has been filed more than one year after its final date, and the Secretary asserts that Rule 60(b)(4) through (6) cannot be used to circumvent that bar. *Id.* at 6. The Secretary also asserts that Contractors could not have "honestly felt" that the 11 penalty assessments were included in the judge's May 28, 1996 settlement decision because three penalties were issued after that decision. *Id.* at 9. The Secretary argues that Contractors' request also fails under Rule 60(b)(6) because it was not made within a reasonable time; Contractors has not shown, by clear and convincing evidence, that it was faultless in the delay; and Contractors' mistaken belief that the settlement of the EAJA case included the 11 penalty assessments at issue is not a legally sufficient reason for failing to take action. *Id.* at 10-12. The Secretary also contends that Contractors' request must fail because it has not established a meritorious defense to the underlying action. *Id.* at 12.

In reply, Contractors clarifies that two of its non-metal surface mining operations, the Montague Plant and the Scott River Plant, have been closed for approximately one and three years, respectively. C. Reply.⁶ It claims that only one citation, not three as the Secretary contends, was issued after the judge's decision approving settlement. *Id.* Contractors contends that its failure to contest the penalty assessment was not deliberate, but that it was honestly led to believe by representations made by its attorney and the Solicitor's attorney that the settlement for \$1,960 included the penalties at issue. *Id.* Finally, Contractors asserts that it is entitled to relief under Rule 60(b) for surprise because the government waited more than five years to bring this matter to its attention. *Id.* Accordingly, Contractors requests that the Commission review this matter and "dismiss or amend it." *Id.*

The Commission has recognized that, in appropriate cases, it may grant various forms of relief from final Commission orders. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993) (citing *Johnson v. Lamar Mining Co.*, 10 FMSHRC 506, 508 (Apr. 1988)) ("*JWR*"); *M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1270-71 (Sept. 1986). In reopening final orders, the Commission has found guidance in, and has applied "so far as practicable," Fed. R. Civ. P. 60(b). *See* 29 C.F.R. 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. The Commission has also

⁶ On June 21, 2000, the Commission received from Contractors a request for an extension of time to file a reply to the Secretary's opposition. The Commission granted Contractors' request and accepted Contractors' reply for filing on July 12, 2000. Unpublished Order dated July 12, 2000.

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). Rule 60(b) provides that motions made pursuant to the section “shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.” This one-year time limitation is an outside time limit for motions requesting relief under subsections (1) through (3). *See* 12 James W. Moore et al., *Moore’s Federal Practice* ¶ 60.65 (3d ed. 2000) (“*Moore’s*”). It may not be circumvented by utilization of subsection 60(b)(6), which is subject only to a reasonable time limit, when the real reason for relief falls within subsections (1) through (3). *Id.*

Contractors’ claim that it believed that the 11 proposed penalty assessments had been settled along with other outstanding violations assessed against it while its EAJA proceeding was pending could be construed as allegations of mistake, inadvertence, or excusable neglect under Rule 60(b)(1). Due to multiple civil penalty proceedings, complicated EAJA proceedings, and a settlement agreement involving 27 violations, Contractors and its counsel may have been confused as to which violations, if any, remained outstanding. The Commission previously has vacated a final order and remanded the matter to the judge for further fact-finding where the operator claimed it failed to timely file a hearing request because it believed civil penalties were the subject of a settlement agreement; it was unfamiliar with Commission procedure; or it misunderstood representations made to it by its attorney, MSHA, or the Secretary. *See, e.g., DeAtley Co., Inc.*, 18 FMSHRC 491, 492 (Apr. 1996) (remanding where operator believed penalties had been settled); *Ogden Constructors, Inc.*, 22 FMSHRC 5, 7 (Jan. 2000) (remanding to a judge where the operator failed to timely submit a hearing request due to a mistaken belief that no action was necessary because the citation was the subject of an ongoing MSHA investigation); *Dean Heyward Addison*, 19 FMSHRC 681, 682-83 (Apr. 1997) (remanding to a judge where the movant failed to timely submit a hearing request due to unfamiliarity with Commission procedure and misunderstanding about information from the Secretary’s counsel and ALJ).

In addition, Contractors’ claim that its attorney and the Secretary’s attorney made representations during settlement negotiations that led it to believe that all pending proposed assessments were included in the settlement could be construed as an allegation of fraud, misrepresentation, or misconduct under Rule 60(b)(3). Relief under Rule 60(b)(3) has been provided in circumstances involving either intentional or unintentional conduct, which prevented the moving party from having a full opportunity to litigate its case fairly. *See, e.g., Lonsdorf v. Seefeldt*, 47 F.3d 893, 895 (7th Cir. 1995) (stating that Rule 60(b)(3) applies to both intentional and unintentional misrepresentations); *Bros., Inc. v. W. E. Grace Mfg. Co.*, 351 F.2d 208, 210-11 (5th Cir. 1965) (interpreting misconduct under Rule 60(b)(3) to incorporate accidental omissions); *see generally Moore’s*, § 60.43[1][b]-[c]. The Commission has noted that fraudulent conduct under Rule 60(b)(3) must be proven by clear and convincing evidence. *JWR*, 15 FMSHRC at 789; *Pena v. Eisenman Chem. Co.*, 11 FMSHRC 2166, 2167-68 (Nov. 1989) (denying miner’s request for relief because it was untimely and failed to provide “clear and

convincing evidence” of fraud or misconduct where miner alleged that operator defrauded him in the settlement of his discrimination suit); *Wadding v. Tunnelton Mining Co.*, 8 FMSHRC 1142, 1143 (Aug. 1986) (finding that miner’s request for relief pursuant to Rule 60(b)(3) was not filed within a reasonable period of time and that he failed to provide “clear and convincing evidence” of operator’s alleged fraud during hearing).

To the extent that Contractors’ request does not fall within Rule 60(b)(1) or (3), “extraordinary circumstances” pursuant to Rule 60(b)(6) could exist which may have arguably contributed to its lack of knowledge of the exclusion of the subject proposed penalty assessments from the judge’s decision approving settlement until it recently received notice from the Treasury Department. *See Lakeview Rock Prods., Inc.*, 19 FMSHRC 26, 28 (Jan. 1997) (providing that relief under Rule 60(b)(6) is granted only when the reasons for relief are other than those set out in the more specific clauses (1) through (5)); *see also Brian D. Forbes*, 20 FMSHRC 99, 101-03 (Feb. 1998) (remanding to judge to determine whether miner, who filed request for relief nearly four years after order became final, is entitled to relief where he did not receive notices of penalty assessment which were sent to his employer and returned to MSHA unclaimed); *Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615, 618-19 (Apr. 1990) (holding that reopening final Commission decision under Rule 60(b)(6) for supplemental proceedings in aid of compliance with final Commission decision is “appropriate to accomplish justice”). However, if Contractors received notice or was at fault for failing to receive notice, then such failure to timely respond may amount to mistake or inadvertence under Rule 60(b)(1), and cannot be claimed as “extraordinary circumstances” under Rule 60(b)(6). *Compare Klapprott v. United States*, 335 U.S. 601, 604-09, *as modified in*, 336 U.S. 942 (1949) *with Ackermann v. United States*, 340 U.S. 193, 195-97 (1950) (demonstrating that extraordinary circumstances justifying relief have been found where movant suffered undue hardship or injustice but not where movant was at fault); *see also Johnson*, 10 FMSHRC at 508 (reopening final order approving settlement upon showing that underlying settlement agreement approved by Commission had been breached or repudiated). Because Contractors was represented by counsel during the time of the settlement and EAJA proceeding, its actions are subject to a higher level of scrutiny and standard of diligence. *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 397 (1993) (examining the conduct of both respondent and counsel to determine whether failure to file proof of claim by bar date can constitute excusable neglect); *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962) (providing that client usually bears consequences of negligence of his or her attorney).

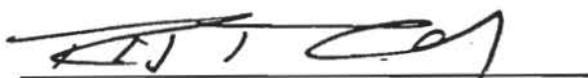
As to ten of the 11 proposed assessments,⁷ the record is insufficient to determine whether Contractors' claims should be treated as mistake, inadvertence, or excusable neglect under Rule 60(b)(1); whether the representations that Contractors claims were made by the Secretary could qualify as misrepresentations within the meaning of Rule 60(b)(3); or if not within the purview of Rule 60(b)(1) or (3), whether extraordinary circumstances exist under Rule 60(b)(6). It is unclear from the record what happened during the course of settlement negotiations, particularly given Contractors' failure to specify the statements made by its counsel and the Secretary's counsel which led it to believe that the proposed assessments were included in the settlement agreement. In addition, there may have been other grounds, not attributable to the fault of Contractors, that would have reasonably led it to believe that the decision approving settlement included all remaining citations issued by the date of the decision. The remaining proposed assessment (A.C. No. 04-03404-05520) and underlying citation were issued after the judge's decision approving settlement. Thus, even if Contractors' claim fell within Rule 60(b)(1), (3), or (6), relief would not be appropriate as to that proposed assessment because there is no reasonable basis for Contractors' claim that the settlement agreement included that proposed assessment or the underlying citation.

If Contractors' motion amounts to a request for relief under Rule 60(b)(1) or (3), Contractors' request must be denied as untimely. See *Hale employed by Damron Corp.*, 17 FMSHRC 1815, 1816-17 (Nov. 1995); *Ravenna Gravel*, 14 FMSHRC 738, 739 (May 1992); *Pena*, 11 FMSHRC at 2167. However, if Contractors' motion is rightfully brought pursuant to Rule 60(b)(6), the record is insufficient to determine whether it was filed within a reasonable time. There is not enough evidence in the record to determine whether Contractors had good reason for failing to take action sooner or whether the delay would cause prejudice to the Secretary.⁸ *Forbes*, 20 FMSHRC at 103 (remanding to judge to determine whether miner who filed request for relief four years after final order is entitled to relief); *Clarke v. Burkle*, 570 F.2d 824, 831 (8th Cir. 1978) (providing that prejudice to opposing party is a factor to consider when determining whether a motion for relief has been filed within a reasonable time under Rule 60(b)(6)); *McKinney v. Boyle*, 447 F.2d 1091, 1093 (9th Cir. 1971) (providing that another consideration is whether the moving party has good reason for failing to take action sooner).

⁷ I include in these ten proposed assessments the two penalty assessments (A.C. Nos. 04-04679-05515, 04-03404-05519) as to which the citations were issued before the judge's May 28, 1996 decision approving settlement, but the proposed penalties were issued after that decision. Although the proposed assessments had not yet been issued at the time of the settlement decision, Contractors may have believed that the settlement decision included all citations issued by the date of the decision. See *Contractors*, 18 FMSHRC at 825 (judge's decision approving settlement) ("the parties . . . filed an amended motion to approve a settlement agreement of *all* the remaining citations") (emphasis added).

⁸ It has been administratively determined that while the Commission and the Secretary no longer have the original files in these proceedings, MSHA has retained copies of the records in these matters. The availability of other evidence is not clear from the record.

For the foregoing reasons, Contractors' request for relief as to one of the proposed assessments, A.C. No. 04-03404-05520 in Docket No. WEST 2000-427-M, is denied. With regard to the remaining ten proposed assessments, on the basis of the present record, I am unable to evaluate the merits of Contractors' position. In the interest of justice, the Commission remands for further consideration the proposed assessments in Docket Nos. WEST 2000-421-M through 2000-426-M, and A.C. Nos. 04-03404-05516, 04-03404-05517, and 04-03404-05519 in Docket No. WEST 2000-427-M to the judge, who shall determine whether relief from final order is warranted. If the judge determines that relief is appropriate, the case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



Robert H. Beatty, Commissioner

Commissioners Riley and Verheggen, concurring in part and dissenting in part:

For the reasons set forth below, we would have vacated all eleven of the penalty assessments at issue in this default matter. But to avoid the effect of a divided decision, which would allow the default orders to stand, we join our colleague Commissioner Beatty in remanding ten of the eleven penalty assessments (Docket Nos. WEST 200-421-M through WEST 2000-426-M, and A.C. Nos. 04-03404-05516, -05517, and -05519 in Docket No. WEST 2000-427-M). We do not join our colleague, however, in denying Contractors' request for relief as to the penalty assessment set forth in A.C. No. 04-03404-05520 in Docket No. WEST 2000-427-M, which we would also vacate.

The eleven penalty assessments at issue in this default matter were based on a total of 24 citations and orders issued against Contractors Sand and Gravel, Inc. ("Contractors"), the majority of which (19) were issued between March and August 1993. Of the remaining five citations and orders, two were issued in 1994 and one each was issued in 1995, 1996, and 1997, respectively.¹ We find the dates of the violations underlying the penalties at issue, the majority of which were cited almost *eight years ago*, significant for a variety of reasons.

¹ The following is a summary of the default penalties at issue in this matter, arranged according to MSHA control number ("A.C. Number"). The number in parentheses following the date on which the underlying citations or orders were issued is the number of violations involved:

Uncontested Penalties

<u>A.C. No.</u>	<u>Date(s) Underlying Paper Issued</u>	<u>Date Assessed</u>
04-04679-05513	03/12/93 (1)	03/17/94
04-04679-05515	06/07/95 (1)	06/12/96
04-03404-05516	06/07/93 (1), 08/18/93 (2)	01/11/94
04-03404-05517	05/03/94 (2)	07/15/94
04-03404-05519	03/05/96 (1)	05/29/96
04-03404-05520	06/25/97 (1)	05/07/98

Contested Penalties

<u>A.C. No.</u>	<u>Date(s) Underlying Paper Issued</u>	<u>Date Assessed</u>	<u>Final Date of Default</u>
04-04679-05511	05/26/93 (1), 06/08/93 (2)	07/07/93	03/28/94
04-04679-05512	06/08/93 (1)	11/03/93	08/02/94
04-03404-05513	06/07/93 (5)	07/06/93	03/28/94
04-03404-05514	06/07/93 (1)	08/13/93	04/12/94
04-03404-05515	06/07/93 (2), 08/18/93 (3)	10/18/93	07/17/94

We believe that these penalties, and the violations on which they are based, must be viewed in the larger context of relations between the Secretary and Contractors during these years. On or around March 10, 1993, MSHA Inspector Ann Frederick visited Contractors Montague Plant to investigate a matter involving accident reports. Deposition of Eric Schoonmaker in *Contractors Sand & Gravel Supply, Inc.*, Docket No. WEST 93-462-M, at 56-57 (July 1995).² An argument ensued between Schoonmaker and Frederick when Schoonmaker challenged Frederick's attempt to go through certain files. *Id.* at 57. Schoonmaker testified that Frederick "stomped out of there [saying] 'You're going to see how tough I can be.'" *Id.* Schoonmaker further testified that Frederick subsequently issued 75 citations against Contractors. *Id.* at 59.

One of these citations led to a lengthy and contentious litigation. First, in a decision the Secretary did not appeal, Commission Administrative Law Judge August Cetti vacated one of the citations Frederick issued, along with a related section 110(c) charge against Schoonmaker, on cross motions for summary decision. *Contractors*, 18 FMSHRC at 389. When, pursuant to the Equal Access to Justice Act, 5 U.S.C. § 504 et seq. (1994) ("EAJA"), Contractors applied for the attorney's fees and costs it incurred in defending this case, Judge Cetti granted the company's application. *Contractors Sand and Gravel, Inc.*, 18 FMSHRC 1820 (Oct. 1996) (ALJ). On review, the Commission reversed the judge in a three to two vote, the majority concluding that the Secretary's position in the underlying Mine Act proceeding was substantially justified. *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 967-76 (Sept. 1998). The dissenting Commissioners held that the Secretary failed to establish that her position was substantially justified. *Id.* at 978-85 (Commissioners Riley and Verheggen).

Contractors appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit. The court reversed the Commission, concluding that the Secretary's position before the administrative law judge in the Mine Act proceeding lacked substantial justification because the Secretary's interpretation and application of the regulation at issue had no reasonable basis in law or fact. *Contractors Sand and Gravel, Inc. v. FMSHRC*, 199 F.3d 1335, 1340-42 (D.C. Cir. 2000). The court ordered that the award of fees and expenses granted by the administrative law judge be restored, and remanded the case to the Commission for further proceedings to determine the amount of an award to compensate Contractors for pursuing review before the court. *Id.* at 1343. Before its mandate issued, the court clarified that its decision was not intended to preclude Contractors from seeking "compensation for attorneys' fees and expenses incurred in defending the award of the [judge] before the . . . Commission." Order at 2 (Mar. 3, 2000).

After the Commission remanded the case to the judge (*Contractors Sand and Gravel, Inc.*, 22 FMSHRC 367 (Mar. 2000)), the parties entered into settlement discussions to resolve

² This deposition was entered into the record of the cited proceedings unchallenged by the Secretary. *Contractors Sand & Gravel Supply, Inc.*, 18 FMSHRC 384, 386-87 (Mar. 1996) (ALJ).

their longstanding dispute. *Contractors Sand and Gravel, Inc.*, 22 FMSHRC 561 (Apr. 2000) (ALJ). One would have expected the Secretary, during those negotiations, to at least acknowledge the pendency of the eleven additional penalties now before us. At any rate, on remand, the parties “agreed that a total amount of \$99,935.51 in fees and expenses” would be paid by the Secretary to Contractors. *Id.* Nothing in the judge’s decision approving the parties’ agreement alludes to the existence of other matters still in dispute.

All of the penalties at issue in this default proceeding are thus based on enforcement actions taken against Contractors either when a certain degree of acrimony apparently existed between MSHA and the company, especially during 1993, or during the pendency of the EAJA litigation. In our view, the Secretary has all the appearances of a sore loser, battered from her loss in the EAJA proceedings, seeking now as long as almost eight years after the fact to exact what appears to be a measure of revenge on Contractors.

The legislative history of the Mine Act sets forth the purpose of the Act’s civil penalty provision, section 110(i), 30 U.S.C. § 820(i), as follows:

The purpose of . . . civil penalties, of course, is not to raise revenues for the federal treasury. . . . [T]he purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.

S. Rep. No. 95-181, at 40-41 (1977) (also discussing “the objective of [inducing] effective and meaningful compliance”), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 628-29 (1978). *See also* *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1565 n.17 (Sept. 1996) (recognizing importance of deterrent function of civil penalties). The legislative history of section 110(i) makes clear that civil penalties are remedial in nature, not punitive, and are assessed to induce “effective and meaningful” compliance with safety and health standards. We find troubling that the effort to collect the eleven penalties in this case after so long a delay has the appearance of being punitive.

But appearances aside, the Secretary has advanced no good reason for having failed to prosecute these penalties and seek payment in a more timely fashion.³ Indeed, what we find most troubling here is the Secretary’s delay in attempting to enforce the penalties.

³ A Civil Penalty Collection Report dated March 4, 1999 contains all of the eleven penalties at issue. We also note that the Secretary has made no effort to recover the penalties at issue “in a civil action in the name of the United States . . . in the United States district court for the district where the violation[s] occurred or where the operator has its principal office.” 30 U.S.C. § 820(j).

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)), and to the Secretary the duty of proposing penalties (30 U.S.C. §§ 815(a) & 820(a)). Under this statutory scheme, the Secretary proposes penalties based on the section 110(i) penalty criteria, and the Commission ultimately assesses penalties either by operation of law,⁴ or by order. Ultimately, a penalty proposal made by the Secretary “should assist the Commission in efficiently exercising [its] authority [to assess penalties].” *Sec’y of Labor on behalf of Hannah v. Consolidation Coal Co.*, 20 FMSHRC 1293, 1300-01 (Dec. 1998). Here, we do not believe that the Secretary assisted the Commission at all. Instead, in the context of the numerous actions brought against Contractors in a relatively short time, the numerous settlements that were agreed to (*see slip op.* at 3 n.5), and the lengthy EAJA litigation, what we find in this record is a confused mess that could confound anyone, and certainly justify to some extent Contractors’ failure to pay the penalties. These loose ends ought to have been tied up much, much earlier. In fact, the delays in this case run directly counter to “the thrust of the penalty procedures under the Mine Act . . . to reach a final order of the Commission assessing a civil penalty for violations *without delay.*” *Sec’y of Labor on behalf of Bailey v. Ark.-Carbona Co.*, 5 FMSHRC 2042, 2046 (Dec. 1983) (emphasis added).⁵

⁴ When an operator, after receiving notice of a proposed penalty, elects not to challenge the proposal, the Commission plays no active role in the penalty determination. Instead, such a proposed penalty becomes a “final order of the Commission” by operation of law. 30 U.S.C. § 815(a).

⁵ The Chairman states that she sees “no reason why the Secretary would have needed to address the question of the timing of her collection efforts” because Contractors, as the moving party, bears the burden of persuasion here. *Slip op.* at 16. In light of the undisputed record, however, of just how long ago the penalties at issue were assessed, we believe the Secretary was duty-bound to offer a detailed explanation to “assist the Commission in efficiently exercising [its] authority [to ultimately assess penalties].” *Hannah*, 20 FMSHRC at 1301.

In light of the foregoing concerns, we would have vacated all eleven penalties under Rule 60(b)(6) of the Federal Rules of Civil Procedure in the interests of justice and because to not do so would be to make a mockery of the deterrent purposes underlying the Commission's authority to assess civil penalties under section 110(i) of the Mine Act. An eight year delay in attempting to collect a penalty robs any such penalty of any deterrent purpose. Unfortunately, however, we must join Commissioner Beatty in remanding these penalties to avoid having them stand as a sorry monument to administrative inefficiency.


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

Chairman Jordan, concurring in part and dissenting in part:

For Contractors Sand and Gravel, Inc. (“Contractors”) to obtain relief from the 11 final orders at issue here, it must, as a threshold matter, adequately explain why it failed to timely file a hearing request (or “green card”) for six proposed penalty assessments that became final orders of the Commission between February 1994 and June 1998. It must also explain why it failed to respond to both the Secretary’s petition for assessment of penalty and the judge’s show cause orders in five additional cases that became final orders of the Commission in 1994. Because it did not provide sufficient justification for missing these deadlines, I would deny its request.

Contractors’ sole claim is that it thought these matters were resolved as part of a settlement order issued by the judge on May 28, 1996. Mot. This could be construed as an allegation of mistake or inadvertence justifying relief under Fed. R. Civ. P. 60(b).¹ However, its assertion that it mistakenly thought these cases were part of a settlement in 1996 does not justify why it failed to act in 1993 and 1994, which is the relevant time period for eight of the proceedings.² For example, Contractors is seeking relief from a default order the judge issued in February 1994 (A.C. No. 04-04679-05511 in Docket No. WEST 2000-421-M) due to its failure

¹ As Commissioner Beatty notes, slip op. at 4, the Commission looks to Rule 60(b) for guidance in cases where a party requests that the Commission grant relief from a final order. See *Close Const. Co. Inc.*, 23 FMSHRC 378, 379 (Apr. 2001). It provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Fed. R. Civ. P. 60(b).

² The eight cases (A.C. Nos. 04-04679-05511 through 05513, and A.C. Nos. 04-03404-05513 through 05517) all became final in 1994.

to respond to the judge's show cause order issued in October 1993. Therefore, it must describe the events of October and November of 1993 that would excuse its failure to respond to the judge's show cause order. However, it offers no explanation at all.

Furthermore, a settlement that was approved on May 28, 1996 does not provide an excuse for failing to respond to a penalty assessment issued in the ninth case (A.C. 04-0304-05520) in Docket No. WEST 2000-427-M, almost two years later on May 7, 1998. Accordingly, I join Commission Beatty in denying relief as to that assessment.

There appears to be only two proceedings in which Contractors' duty to respond occurred close in time to the settlement agreement. Docket No. WEST 2000-427-M includes a penalty assessment that was issued on May 29, 1996 (A.C. No. 04-03404-05519), and Docket No. WEST 2000-423-M includes a penalty assessment (A.C. No. 04-04679-05515) issued on June 12, 1996. But even if Contractors could plausibly argue that it thought these penalty assessments had been incorporated into the settlement agreement, it should have offered some evidence to show that it made an effort to verify that they were included. Contractors was represented by an attorney in that May 1996 settlement. It would have been a simple matter for it to pick up the phone and call its attorney to clarify whether these two other assessments were part of that settlement. Its motion for relief, however, is silent on this question.

In any event, as Commissioner Beatty correctly points out, Contractors is not entitled to relief under Rule 60(b)(1) because of its one-year time bar. Slip op. at 7.³ Thus its claim that it mistakenly believed that these 11 cases were included in the settlement cannot prevail.

Relief is also not warranted under Rule 60(b)(6), which requires that a motion for relief be filed "within a reasonable time." Contractors provides no argument as to why its delay of two to six years in requesting relief should be considered "reasonable." Mot. Furthermore, for a party to prevail on a 60(b)(6) claim, it "must show 'extraordinary circumstances' suggesting that the party is faultless in the delay." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993). In most cases granting relief due to extraordinary circumstances, "the movant is completely without fault for his or her predicament; that is, the movant was almost unable to have taken any steps that would have resulted in preventing the judgment from which relief is sought." 12 James W. Moore et al., *Moore's Federal Practice*, § 60.48[3][b] (3d ed. 2000). Here, to the contrary, Contractors has offered absolutely no reason why it was not at fault for missing its deadlines in 1993 and 1994. Although Commissioner Beatty suggests that "there may have been other grounds, not attributable to the fault of Contractors, that would have

³ I do not agree with Commission Beatty that Contractors' allegation regarding statements by its attorney and the Secretary's attorney during settlement negotiations could even arguably constitute fraud, misrepresentation or misconduct presenting a claim for relief under Rule 60(b)(3). Slip op. at 5. In any event, like the Rule 60(b)(1) claim, any claim under Rule 60(b)(3) would also be barred due to the one year time limit for motions requesting relief under that section. Slip op. at 7.

reasonably led it to believe that the decision approving settlement included all remaining citations issued by the date of the decision” slip op. at 7 (emphasis added), Contractors has provided us with nothing that supports that assertion except a one-sentence declaration that it relied on the representations of its attorney and the Solicitor’s lawyer. C. Reply.

In any event, relief under Rule 60(b)(6) is justified only when the basis for relief is other than those set forth in the more specific clauses of 60(b)(1) through (5). *See Cotto v. United States*, 993 F.2d 274, 277-78 (1st Cir. 1993). As the Commission has made clear, the one-year time limit for motions requesting relief under subsections (1) through (3) may not be circumvented by using subsections (4) through (6). *Lakeview Rock Prods., Inc.* 19 FMSHRC 26, 28 (Jan. 1997). Here, Commissioner Beatty’s articulation of Contractors’ potential claim under Rule 60(b)(6) (“[E]xtraordinary circumstances’ pursuant to Rule 60(b)(6) could exist which may have arguably contributed to its [Contractors’] lack of knowledge of the exclusion of the subject proposed penalty assessments from the judge’s decision approving settlement. . . .”), slip op. at 6, is almost the mirror image of his characterization of Contractors’ claim under Rule 60(b)(1) (“[Contractors] believed that the 11 proposed penalty assessments had been settled along with other outstanding violations assessed against it. . . .”). Slip op. at 5. His characterization of both claims centers around the same mistaken belief or lack of knowledge regarding the status of the eleven penalty assessments vis a vis the May 1996 settlement. Consequently, relief under Rule 60(b)(6) is not appropriate.

With all due respect, I also disagree with Commissioners Riley and Verheggen’s approach in this case, which would grant Contractors relief from all 11 of the default orders due to a presumed delay in the Secretary’s enforcement efforts and a presumption of retaliatory motive on her part. Slip op. at 11-12. I am frankly puzzled by their statement that what is “most troubling here is the Secretary’s delay in attempting to enforce the penalties,” slip op. at 11, when it is not clear from the record when collection attempts were made. While I would also find the allegedly lengthy time period between the defaults and the collection proceeding troubling, I do not view it as a rationale for granting Contractors relief under 60(b).

In their opinion, my two colleagues turn the burden of proof for a Rule 60(b) case on its head. They complain that “the Secretary has advanced no good reason for having failed to prosecute these penalties and seek payment in a more timely fashion.” Slip op. at 11. Given that Contractors is the moving party requesting relief here, I see no reason why the Secretary would have needed to address the question of the timing of her collection efforts. On the other hand, although it is Contractors which has asked for relief from the final orders, my colleagues’ opinion never discusses Contractors’ failure to litigate these 11 cases. They make no mention of, much less evaluate, the “reasonableness” of Contractors’ years-long delay in coming to us for relief. They are also completely silent about Contractors’ assertion that it believed all 11 citations were resolved in the May settlement. They thus would award “extraordinary relief” to a party without anywhere in their opinion alluding to or analyzing its role in this litigation. Such a one-sided approach to a request for equitable relief is unprecedented.

In sum, I would deny relief with regard to all of the final orders.



Mary Lu Jordan, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 28, 2001

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

v.

CONSOLIDATION COAL
COMPANY

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Docket No. WEVA 98-148

BEFORE: Jordan, Chairman; Riley and Verheggen, Commissioners¹

DECISION

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”) or (“Act”). At issue is whether Administrative Law Judge Jerold Feldman correctly determined that violations of 30 C.F.R. §§ 75.400² and 75.360(a)(1)³ (1997) were not a result of Consolidation Coal Company’s

¹ Commissioner Beatty recused himself in this matter and took no part in its consideration.

² Section 75.400, entitled “Accumulation of combustible materials,” provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein.

³ Section 75.360(a)(1), entitled “Preshift examination,” provides in part:

[A] certified person designated by the operator shall make a preshift examination within 3 hours preceding the beginning of any shift during which any person is scheduled to work or travel underground.

(“Consol”) unwarrantable failure to comply with the standards.⁴ 22 FMSHRC 455 (Mar. 2000) (ALJ). For the reasons that follow, we reverse, vacate and remand in part the judge’s determinations.

I.

Factual and Procedural Background

In May 1998, Consol operated the Loveridge No. 22 Mine, an underground coal mine in Marion County, West Virginia. The 9 South section of the mine was undergoing construction in preparation for the start-up of the new 1D section, which branched off of the 9 South. 22 FMSHRC at 456. The construction consisted of: trenching for the installation of a belt drive in the No. 5 entry; grading the floor in that belt entry; installing overcasts⁵ across the entries in the 9 South; and “bumping” corners of coal pillars to widen new haulage roadways.⁶ *Id.* at 456, 461. To cut the overcasts and trench, Consol used the common industry method of allowing material cut from the roof to build up on the mine floor in order to create a ramp. *Id.* at 457. The continuous miner then mounted the ramp to achieve a deeper cut into the mine roof as well as to allow the roof bolting machine to access the elevated roof in order to install permanent roof support. *Id.* Cutting the trenches and overcasts generated large quantities of dark gray dust. *Id.*

At the time, the 9 South housed its own mining equipment, located outby the construction, as well as the equipment for the new 1D section, located inby the tailpiece. *Id.* at 456. This equipment included three continuous miners, each equipped with 1000 feet of trailing cable, and two sets of mining equipment, a loading machine with 800 to 900 feet of trailing cable, shuttle cars and a roof drill. *Id.* at 456, 468-69. Trailing cables were placed along the ribs to keep the cables clear of the haulage roads. *Id.* at 456.

Because of the construction, mining had been periodic in the 9 South section since approximately mid-May 1998. *Id.* at 456-57. On May 20 at midnight, mining was idled, although miners remained on the section. *Id.* at 456.

On that same day at approximately 10:00 a.m., Department of Labor’s Mine Safety and Health Administration (“MSHA”) Inspector Kenneth Tenney arrived at the 9 South section for

⁴ The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation.

⁵ An “overcast” is a groove cut in a mine roof allowing one air current to pass over another. Tr. 63.

⁶ Bumping a corner, also described as cutting a turn, refers to cutting a corner of a coal pillar so as to widen a haulage way. 22 FMSHRC at 456; Tr. 478-79.

the purpose of continuing an ongoing regular inspection. *Id.* at 457. Danny Kuhn, Consol's Safety Inspector, accompanied Inspector Tenney. *Id.* at 457, 461. Inspector Tenney observed accumulations of coal spillage and pulverized rib sloughage throughout the No. 3 through the No. 7 entries, from the first crosscut in by the section tailpiece to the face, an area approximately 600 feet in length. *Id.* at 458. Tenney testified that the spillage and sloughage was in the haulageways, and that mobile equipment had run over the material grinding it into fine coal and dust. *Id.* at 458-59; Tr. 46-47, 65-67. He testified that most of the accumulations were powder dry. Tr. 47, 125. In addition, some of the cables had pulverized sloughage on top of them. 22 FMSHRC at 456; Tr. 69-70, 628.

As a result of his observations, Inspector Tenney issued Order No. 4889944 citing a significant and substantial ("S&S") and unwarrantable violation of section 75.400. Gov't Ex. 1. In addition to describing the general accumulation conditions of the 9 South section, the order cited the following specific areas of accumulations: (1) coal spillage that was 20 inches deep, 8 inches wide and 12 feet long from a bulldozed corner in the No. 7 crosscut between entry Nos. 6 and 7; (2) coal accumulations 10 inches deep in the center of the mine floor in the No. 5 crosscut between entry Nos. 2 and 3; and (3) ground-up coal from sloughage that was run over by mobile equipment 10 to 14 inches deep and 36 inches wide running along the full length of the No. 4 crosscut between entry Nos. 3 and 4. 22 FMSHRC at 458-59. The order also cited coal "wind rowed"⁷ along the sides of the entries up to 12 inches deep. *Id.* at 459.⁸

In entry Nos. 4 through 8, Inspector Tenney observed no visible rock dust at the base of the ribs or on the mine floor. *Id.* As a consequence, the inspector issued an order, alleging a rock dusting violation of 30 C.F.R. § 75.403. *Id.* at 460. Inspector Tenney also issued Order No. 4889946, alleging an S&S and unwarrantable violation of section 75.360(a)(1) for failure to conduct adequate preshift examinations. *Id.* at 461; Tr. 196-97, 203-06, 420-21; Gov't Ex. 4. The order stated that the accumulation and rock dusting conditions were "obvious to even the most casual observer," appeared to have existed for several shifts, and had not been reported in the preshift examination book. Gov't Ex. 4.

Consol utilized all of its crews to clean up and rock dust the conditions in the 9 South section. 22 FMSHRC at 468-69. After nearly three shifts and 20 hours of work, the

⁷ The inspector's notes explained that drags, or bars underneath shuttle cars, acted to "wind row" the coal spillage near each rib. Tr. 60-61; Gov't Ex. 5, at 8. A "wind row" is a "row heaped up by or as if by wind." Webster's Third New International Dictionary 2620 (1993).

⁸ Consistent with MSHA practice, the inspector did not include rib sloughage, that is, coal pieces or lumps that fell off the ribs, in his accumulation measurements. 22 FMSHRC at 456. The inspector, however, cited sloughage that was transformed from its lump form into fine coal and dust by being pulverized by mobile equipment. *Id.* at 458; Tr. 65-67. In addition, he did not consider ramp material cut from the roof and left on the ground as prohibited accumulations. Tr. 287.

accumulations cited in Order No. 4889944 were abated at 7:00 a.m. on May 21. *Id.* at 455, 468-69. Order No. 4889946 was terminated at the same time after all of the preshift examiners on the section had been re-instructed on the requirements of preshift examinations. Gov't Ex. 4.

Consol challenged the orders and a hearing was held. The judge concluded that Consol violated section 75.400. 22 FMSHRC at 464. He reasoned that "widespread accumulations" resulting from ground sloughage that was spread by shuttle cars existed for a "minimum of several shifts." *Id.* at 463. The judge found that the accumulations were "extensive" and that Consol had "subordinat[ed] its cleanup responsibility to its desire to complete construction." *Id.* at 464. The judge next determined that the violation was S&S because the "cited extensive accumulations" were a source of propagation in the event of a methane fire or explosion in any part of the mine and posed a specific fire or explosion hazard on the 9 South section due to the presence of several potential ignition sources. *Id.* at 465.⁹ He concluded that the accumulation violation was not a result of Consol's unwarrantable failure, however, largely because Consol was engaged in construction, not active mining, at the time of the inspection. *Id.* at 468-69. The judge found that Consol had an "obvious awareness" that it needed to promptly clean up accumulations, but was not persuaded that either Consol's notice of its cleanup responsibility or its past history of section 75.400 violations elevated Consol's behavior to aggravated conduct sufficient for unwarrantable failure. *Id.* at 469-70. He also stated that, while not dispositive, it was noteworthy that MSHA investigated the matter and decided not to pursue an action under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). *Id.* at 469.

In addition, the judge concluded that Consol's failure to note the hazardous accumulations in the preshift examination book in the three-hour period preceding the day shift on May 20, amounted to a violation of section 75.360. *Id.* at 467. He also determined that the violation was S&S because Consol's failure to note existing coal dust accumulations in the preshift examination book contributed to the continuing presence of a hazardous condition. *Id.* However, the judge stated that the failure to record the conditions was not attributable to Consol's unwarrantable failure because construction on the section was not yet complete. *Id.* at 470.¹⁰

The Secretary of Labor filed a petition for discretionary review challenging the judge's negative unwarrantable failure determinations, which the Commission granted.

⁹ Loveridge No. 22 Mine releases more than one million cubic feet of methane during a 24-hour period and is subject to a five-day examination under Mine Act section 103(i), 30 U.S.C. § 813(i). 22 FMSHRC at 465.

¹⁰ The judge vacated the order alleging a rock dusting violation of section 75.403 (22 FMSHRC at 467), and the Secretary has not appealed the ruling.

II.

Disposition

The Secretary argues that the judge's unwarrantable failure determinations were legally erroneous and not supported by substantial evidence. PDR at 8, 17.¹¹ As to the accumulation violation, she asserts that the judge erred in concluding that the construction and the consequent difficulty in cleaning up the 9 South section mitigated Consol's negligence. *Id.* at 9. The Secretary also challenges the judge's conclusion that notice to the operator and Consol's previous violations of section 75.400 were not factors supporting an unwarrantable failure finding. *Id.* at 12-15. She further contends that the judge erred by relying on the Secretary's decision not to pursue a section 110(c) action. *Id.* at 15. The Secretary argues that the preshift violation was caused by unwarrantable failure because, although Consol was on notice that it needed to make greater efforts to clean up accumulations, and the accumulations were extensive, obvious, dangerous and had been allowed to exist over at least several shifts, Consol failed to record the accumulations. *Id.* at 18. She also asserts that construction and difficulty in cleanup do not prevent an operator from recording conditions in a preshift log and therefore do not mitigate a preshift unwarrantable finding. *Id.* at 18-19.

Consol responds that the judge's negative unwarrantable failure determinations are correct and should be affirmed. Preliminarily, Consol argues that it did not violate sections 75.400 and 75.360 because the Secretary failed to establish that the accumulated materials were combustible as shown by the judge's vacation of the section 75.403 violation. C. Br. at 9-10. Consol submits that, if there were violations, they were not a result of unwarrantable failure because construction impaired cleanup of the section. *Id.* at 10-12. It submits that the decision to delay cleanup, as it had under a former MSHA field office, was not aggravated conduct because cleanup would have involved moving heavy machinery, which could have posed a safety risk to miners. *Id.* at 13 & n.4.

A. Violations

We reject Consol's argument that, because the judge concluded that the Secretary failed to prove that the accumulations were combustible under section 75.403, we should vacate the violations of sections 75.400 and 75.360(a)(1). *See* C. Br. at 9-10, 19. Under the Mine Act, review is limited to the questions raised sua sponte by the Commission, or in a petition for discretionary review filed by "[a]ny person adversely affected or aggrieved by a decision of an administrative law judge." 30 U.S.C. § 823(d)(2). Here, Consol did not file a petition for discretionary review challenging the judge's finding that the company violated sections 75.400 and 75.360(a)(1). The violations are thus not before us, and we accordingly decline to reach them.

¹¹ The Secretary designated her petition for discretionary review ("PDR") as her brief.

B. Unwarrantable Failure

In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test).

Whether conduct is “aggravated” in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the extent of the violative condition, the length of time that it has existed, the operator’s efforts in abating the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator’s knowledge of the existence of the violation, and whether the violation is obvious or poses a high degree of danger. *See Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev’d on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984). These factors need to be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 20, 2001). Nevertheless, all of the relevant facts and circumstances of each case must be examined to determine if an actor’s conduct is aggravated, or whether the level of the actor’s negligence should be mitigated. *Id.*

1. Order No. 4889944

With respect to the accumulation violation, the judge made findings on many of the factors relevant to whether an operator’s conduct amounts to unwarrantable failure. Regarding the extent of the violative condition, the judge stated that the accumulations in the 9 South were “extensive” and “widespread” in his discussion of violation. 22 FMSHRC at 463-64. More specifically, the judge found there was a coal accumulation from a bulldozed corner in the No. 6 entry at the No. 7 crosscut measuring 20 inches deep, 12 feet long, and 8 feet wide. *Id.* at 463. That finding was supported by the testimony of all witnesses. Tr. 56, 478-79, 604-05, 607; Gov’t Exs. 1, 5. In addition, the inspector testified that the section had accumulation areas that were six, eight, ten, or twelve inches deep and that most of the area had more than one inch of accumulation of coal dust. Tr. 47-60, 389-92; Gov’t Ex. 5. He also observed accumulation conditions in entry Nos. 3 through 7, an area approximately 600 feet in length. Tr. 46-60, 147-48, 387-88; Gov’t Exs. 1, 5. The inspector further stated in the order that “coal wind rowed along the sides of the entries up to 12 inches deep.” Gov’t Ex. 1; *see n.7 supra*. Thus, the

judge's finding that the accumulations were extensive is supported by substantial evidence.¹²

Regarding the length of time that the violative condition existed, the judge determined that it was undisputed that the accumulations existed for "several shifts." 22 FMSHRC at 468. The inspector testified that it would take many shifts for the cited accumulations to have amassed. Tr. 203. He based his opinion on the magnitude of the accumulations, his discussions with miners indicating that the section had been in this condition for several shifts, and his experience as a mine inspector for ten years. Tr. 37, 145-46, 203. Also supporting the judge's finding, the inspector's contemporaneous notes state that the "severity of the coal accumulation indicates that it has taken several shifts and days to get this bad." Gov't Ex. 5, at 11. As to one of the cited accumulations, the inspector and Consol witnesses testified that accumulations resulting from bumping work on the midnight shift of May 20 had not been cleaned up by the time of the inspection, approximately two hours into the day shift. 22 FMSHRC at 463; Tr. 56-58, 479, 604-09. On review, Consol has not provided any evidence disputing the judge's duration finding.

As to the operator's efforts to eliminate the violative condition, the judge found Consol "subordinated[ed] its cleanup responsibility to its desire to complete construction" by allowing the conditions to exist for several shifts. 22 FMSHRC at 464. The Commission has previously determined that an operator's decision to avoid or subordinate compliance responsibility in order to continue mining activities may be aggravated conduct. *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1770 (Nov. 1997) (providing that aggravated conduct shown when an operator decided to avoid compliance with the standard in order to continue production); *Consolidation Coal Co.*, 22 FMSHRC 328, 333 (Mar. 2000) (same).

We conclude that substantial evidence supports the judge's determination that Consol subordinated its cleanup responsibility to its interest in finishing construction. It is undisputed that when the inspector arrived at the section, no cleanup of the cited accumulations was underway. Tr. 58-59; *see* C. Br. at 13 (acknowledging that cleanup was not underway, but stating that delay was justified). The inspector testified that no instructions had been given to the miners even though it was approximately two hours into the shift. Tr. 58-59. The miners had been instructed to change the ventilation system so as to clean up one of the construction projects, rather than to clean up the cited accumulations. 22 FMSHRC at 457; Tr. 58. The inspector further testified that the miners on the section exhibited an indifferent attitude towards cleaning up the section, indicating that they did not feel the conditions were so bad; that this was a normal condition; and that their shift was the only shift to ever clean up the section. Tr. 58-59,

¹² 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)).

135-38. Although Consol Foreman Zapach testified that some cleanup work had been done on the midnight shift before the inspection, consisting of 30 minutes of cleaning gob with a scooter (Tr. 475-76; Gov't Ex. 6), Zapach did not know where the cleanup occurred, including whether any part of the cited area had been cleaned. Tr. 475-76. In any event, even if Consol had cleaned any of the cited area for 30 minutes, such evidence would not detract from the judge's finding that Consol had subordinated its cleanup responsibilities, particularly when termination of the violation required 20 hours of cleanup, with the afternoon shift alone loading 14 cars of material. 22 FMSHRC at 468-69; Gov't Ex. 6.¹³

There is also undisputed evidence Consol received actual notice that greater efforts were necessary to achieve compliance with section 75.400. The Commission has recognized that past discussions with MSHA about an accumulation problem serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard. *Enlow Fork Mining Co.*, 19 FMSHRC 5, 11-12 (Jan. 1997). Likewise, a high number of past violations of section 75.400 serve to put an operator on notice that it has a recurring safety problem in need of correction and the violation history may be relevant in determining the operator's degree of negligence. *Peabody*, 14 FMSHRC at 1263-64. *Cf. Deshetty employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1051 (May 1994) (providing that 45 citations in the prior year and prior discussion with MSHA about accumulation problem at mine "should have engendered . . . a heightened awareness of a serious accumulation problem"). Recent citations further serve to place an operator on notice of the need to increase its efforts to come into compliance. *Youghiogheny & Ohio Coal Co.*, 12 FMSHRC 2007, 2011 (Dec. 1987). Here, in January 1998, MSHA warned Consol that its cleanup and rock dusting efforts at the mine were "borderline to substandard" and needed to be improved. 22 FMSHRC at 457; Tr. 47-48, 300-01. During the previous two years, the operator received 88 citations alleging violations of section 75.400. 22 FMSHRC at 470; Gov't Ex. 15. MSHA issued four citations to the mine alleging section 75.400 violations two days before the subject order was issued. Tr. 339-41; Gov't Ex. 15; Resp. Ex. 1.

Although the judge correctly concluded that Consol had an "awareness . . . that operators are responsible for promptly cleaning dust accumulations" (22 FMSHRC at 469), the judge misstated Commission precedent when he distinguished Consol's previous violations on the basis that they were not also caused by unwarrantable failure or sufficiently similar to the subject violation. *Id.* at 470. In evaluating an operator's history of violations for unwarrantable failure purposes, the Commission does not require past violations to also be caused by unwarrantable failure and has declined to limit "the circumstances under which past violations may be considered by a judge in determining whether an operator's conduct demonstrated aggravated conduct." *Peabody*, 14 FMSHRC at 1263 (rejecting contention that only past violation involving

¹³ Although Consol witnesses testified that Consol planned to clean up the section once construction was finished (Tr. 479, 605-06, 674), the Commission has recognized that such intentions generally do not demonstrate the vigilance required to detract from an unwarrantable failure finding. *See Consolidation Coal*, 22 FMSHRC at 332 (providing that future intention is insufficient to shield an operator from unwarrantable failure determination).

the same area may be considered for unwarrantable determination); *Enlow Fork*, 19 FMSHRC at 11 (providing that “[i]n evaluating evidence of prior warnings as part of the unwarrantable failure analysis, the Commission has not required the previous condition to involve materials identical to those involved in the condition at issue”). The case on which the judge relies, *Greenwich Collieries*, 12 FMSHRC 940, 945 (May 1990), to support his theory that to be relevant for unwarrantable analysis previous violations must also be unwarrantable, is inapposite. That case involved the Mine Act’s graduated enforcement scheme where a section 104(d) order may be issued only after a second unwarrantable violation occurs in 90 days, and did not discuss the notice factor included in the evaluation of unwarrantable failure.

In addition, under the circumstances of this case, we conclude that the judge erred in determining that Consol’s construction activities precluded an unwarrantable failure determination.¹⁴ The Commission has explained that “when an operator believed in good faith that the cited conduct was the safest method of *compliance* with applicable regulations, even if they are in error, such conduct does not amount to aggravated conduct exceeding ordinary negligence.” *Utah Power & Light Co.*, 12 FMSHRC 965, 972 (May 1990) (emphasis in original). Here, Consol was not attempting to comply with section 75.400. No cleanup was underway of the cited accumulations. Nor did Consol introduce evidence that it had taken actions to increase its cleanup efforts in response to MSHA’s January admonition, such as a special assignment of miners to cleanup, or an initiation of a regular cleanup program. See Tr. 82-83; compare *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997) (reasoning that assigning one miner to cleanup was insufficient to address accumulation problem) with *Peabody Coal Co.*, 18 FMSHRC 494, 498-99 (April 1996) (providing that extensive remedial efforts may militate against unwarrantable failure). Furthermore, Consol made no effort to minimize the effects of construction on its cleanup of accumulations. A significant portion of the cited accumulations were in places other than inby the tailpiece and outby the construction activities, where heavy equipment was located. See 22 FMSHRC at 456; Gov’t Ex. 7. Although removal of such accumulations would not have required moving equipment, Consol made no effort to remove even the most accessible accumulations. Moreover, in areas where equipment would have interfered with cleanup efforts, Consol failed to show that the equipment could not be moved to other locales in the mine, which would have allowed cleanup of the entire cited area.¹⁵

¹⁴ To the extent the judge relied upon the Secretary’s decision not to pursue an action under section 110(c) of the Mine Act as an additional mitigating factor in his unwarrantable failure analysis, he erred. The Secretary’s decision to not bring a section 110(c) case is not subject to review by this Commission and its judges. *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985). Moreover, the Secretary may decide not to bring a section 110(c) action for numerous reasons (including tactical and logistical concerns) not related to the level of negligence of the operator. Accordingly, it is not appropriate to draw any inferences from the Secretary’s decision not to pursue a 110(c) case.

¹⁵ We are not persuaded by Consol’s assertion that its conduct was not aggravated because it was following a cleanup procedure that was done in the past “apparently” with the

In sum, substantial evidence supports the judge's findings that the accumulations were extensive and that Consol subordinated its cleanup responsibilities to its desire to complete construction. In addition, undisputed testimony reveals that the accumulations existed for several shifts and that Consol had actual knowledge that it needed to increase its efforts to comply with section 75.400. Given these findings and our conclusion that Consol's construction activities in this case cannot be viewed as a mitigating factor, we conclude that the record supports only the determination that Consol's accumulation violation was caused by its unwarrantable failure. *Am. Mine Serv., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (holding that remand unnecessary when evidence could justify only one conclusion). Accordingly, we reverse the judge's determination that Consol's violation of section 75.400 was not unwarrantable and remand for the reassessment of a civil penalty. In his reassessment of a civil penalty, we instruct the judge to set forth his findings and conclusions on the six penalty factors set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

2. Order No. 4889946

At the conclusion of his unwarrantable failure analysis of the accumulation violation, the judge stated, without further explanation, that Consol's failure to record the cited accumulations was not a result of unwarrantable failure because of the construction occurring on the section. 22 FMSHRC at 470. We conclude that the judge erred in failing to separately consider the alleged unwarrantability of Consol's violations of sections 75.400 and 75.360, which require separate and distinct duties of an operator. Section 75.400 prohibits the accumulation of combustible materials, while section 75.360 sets forth requirements for preshift examinations. The analyses for whether Consol's violations of these sections were caused by unwarrantable failure are not interchangeable, although such analyses may rely upon some of the same factual findings. The judge failed to set forth sufficient findings of fact, conclusions of law, and the bases for them, relevant to the consideration of whether Consol's violation of section 75.360 was aggravated. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222 (June 1994). We also reject the judge's conclusion that Consol's construction activities served as a mitigating factor in his determination that Consol's preshift violation was not caused by unwarrantable failure. Even if we were to assume that the difficulty imposed by construction prevented Consol from cleaning up accumulations, such difficulty would not prevent Consol from recording the accumulations in a preshift examination log. Accordingly, we vacate the judge's conclusion that Consol's violation of section 75.360 was not unwarrantable, and remand for further analysis and

acquiescence of another MSHA district. C. Br. at 13 n.4. Consol introduced no evidence that the prior MSHA office was aware of, or approved of, its procedure of delaying cleanup of accumulations while construction was underway. Likewise, Consol failed to introduce any record evidence supporting its argument that cleaning up before construction was complete would have posed a danger to miners. *Id.* at 13. Contrary to that assertion, the judge found that the accumulation violation was S&S, i.e., that it significantly and substantially contributed to a hazard (22 FMSHRC at 465), a finding which Consol did not appeal.

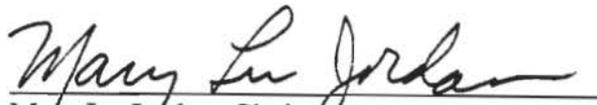
reassessment of civil penalty.

On remand, in analyzing the unwarrantable failure issue, we instruct the judge to consider the inspector's undisputed testimony that there were no notations of the accumulation conditions for the preceding seven shifts before the inspection, and that all preshift examiners of the subject area were foremen. Tr. 413-16, 420-21; Gov't Ex. 16. *See Midwest Material Co.*, 19 FMSHRC at 35 (in evaluating unwarrantable failure, foremen are subject to a high standard of care). All findings concerning the facts and circumstances surrounding the unwarrantability of Consol's violation of section 75.400 that we have affirmed become law of the case. We direct the judge to consider these facts and circumstances, insofar as they may be relevant, in considering whether Consol's violation of section 75.360(a)(1) was unwarrantable. Finally, in his reassessment of a civil penalty, we instruct the judge to consider the penalty factors set forth in section 110(i) of the Mine Act, as they separately relate to the preshift violation, and to set forth his findings and conclusions.

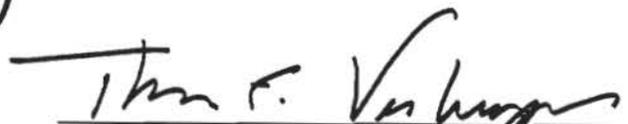
III.

Conclusion

For the foregoing reasons, we reverse the judge's determination that Consol's violation of section 75.400 was not caused by its unwarrantable failure, reinstate Order No. 4889944 under section 104(d)(2) of the Mine Act, and remand for reassessment of an appropriate penalty. As to Order No. 4889946, we vacate the judge's negative unwarrantable failure determination and remand for an analysis consistent with this decision and for the reassessment of an appropriate civil penalty.


Mary Lu Jordan, Chairman


James C. Riley, Commissioner


Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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June 29, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. KENT 99-171-R
ADMINISTRATION (MSHA)	:	KENT 99-172-R
	:	KENT 99-173-R
v.	:	
	:	
EXCEL MINING, LLC	:	

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

DECISION

BY: Riley and Verheggen, Commissioners

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), Excel Mining, LLC (“Excel”) contested three citations issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”), which alleged violations of the Secretary of Labor’s respirable dust regulation, 30 C.F.R. § 70.100(a). Administrative Law Judge Gary Melick granted Excel’s motion for summary decision and vacated the citations. 21 FMSHRC 1401 (Dec. 1999) (ALJ).

The Secretary filed a petition for discretionary review challenging the judge’s decision, which the Commission granted. Subsequently, the Commission granted motions to participate as amicus curiae from the International Chemical Workers Union Council (“CWU”); United Mine Workers of America, International Union (“UMWA”); National Mining Association, Alabama Coal Association, Coal Operators & Associates, Illinois Coal Association, Indiana Coal Council, Inc., Kentucky Coal Association, Ohio Mining and Reclamation Association, Pennsylvania Coal Association, The Virginia Coal Association, West Virginia Coal Association, and West Virginia Mining and Reclamation Association (collectively referred to as the “Associations”); and Bledsoe Coal Corp., Genwal Resources, Inc., and ANDALEX Resources, Inc. (collectively referred to as the “Operators”). For the reasons that follow, we affirm the judge’s decision to vacate the citations.

I.

Factual and Procedural Background

On March 1, 1999, MSHA issued a citation to Excel based on an average dust concentration of 2.4858 milligrams per cubic meter of air (“mg/m³”), which was calculated by averaging the air samples from five different occupations on a mechanized mining unit (“MMU”) during a single shift. Jt. Stip. 5(a). On March 10, MSHA issued a second citation based on an average dust concentration of 2.885 mg/m³, which was calculated by averaging the air samples from four different occupations on an MMU during a single shift. Jt. Stip. 5(b). Also on March 10, MSHA issued a third citation based on an average dust concentration of 3.1505 mg/m³, which was calculated by averaging the air samples from four different occupations on an MMU during a single shift. Jt. Stip. 5(c). In each citation, Excel was charged with violating 30 C.F.R. § 70.100(a) because the average level of coal dust exceeded 2 mg/m³.¹ 21 FMSHRC 1401.

The cited standard, which follows the language of section 202(b)(2) of the Act, 30 U.S.C. § 842(b)(2), provides in relevant part:

Each operator shall continuously maintain the *average concentration* of respirable dust in the mine atmosphere during each shift to which each miner in the active workings . . . is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air

30 C.F.R. § 70.100(a) (emphasis added).

Section 202(f) of the Act, in turn, defines “average concentration” as follows:

For the purpose of this [title], the term “average concentration” means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed (1) as measured, during the 18 month period following [the date of enactment of this Act], over a number of continuous production shifts to be determined by the Secretary and the Secretary of Health, Education, and Welfare, and (2) as measured thereafter, over a single shift only, unless the Secretary and the Secretary of Health, Education, and Welfare find, in accordance with the provisions of section [101] of this [Act], that such single shift measurement will not, after applying valid

¹ With regard to the average sample taken on March 1, pursuant to 30 C.F.R. § 70.101, an adjustment was made to the permissible coal dust level because the atmosphere contained more than 5 percent quartz. Statement of Uncontested Facts 5.

statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift.

30 U.S.C. § 842(f). Section 202(f) of the Mine Act is identical to section 202(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 842(f) (1976) (“Coal Act”).²

Pursuant to section 202(f) of the Coal Act, the Secretaries of the Interior and Health, Education, and Welfare jointly published in the Federal Register the proposed Notice of Finding That Single Shift Measurements of Respirable Dust Will Not Accurately Represent Atmospheric Conditions During Such Shift (hereafter “1971 Finding”). 36 Fed. Reg. 13286 (July 17, 1971). The 1971 Finding provided, in pertinent part:

Notice is hereby given that, in accordance with section 101 of the [Coal] Act, and based on the data summarized below, the Secretary of the Interior and the Secretary of Health, Education, and Welfare find that single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is continuously exposed.

Id. at 13286. On February 23, 1972, the Secretaries of Interior and Health, Education, and Welfare jointly published a final notice in the Federal Register in which they adopted the proposed notice without change. 37 Fed. Reg. 3833, 3834.

Beginning in 1975, MSHA adopted a sampling procedure to collect respirable dust during one full shift from miners assigned to specified occupations on the same MMU. Statement of Uncontested Facts 2. MSHA determines whether an operator is in compliance with the dust standard based on an average of measurements from up to five occupations on an MMU during the same shift. *Id.*

In this proceeding, Excel filed notices of contest in which it challenged the three citations issued by MSHA. 21 FMSHRC at 1401. In lieu of a hearing, the parties submitted Joint Stipulations and Statement of Uncontested Facts. Then the Secretary and Excel each submitted a motion for summary decision. *Id.* The judge concluded that summary decision was warranted because there was no genuine issue as to any material fact and Excel was entitled to summary decision as a matter of law. *Id.*

The judge held that the regulations and statute require that the average concentration of respirable dust be at or below 2.0 mg/m³. *Id.* The judge further noted that section 202(f) of the Mine Act, 30 U.S.C. § 842(f), defined “average concentration” as that determination which

² Under the Coal Act, “Secretary” referred to the Secretary of the Interior. 30 U.S.C. § 802(a) (1976).

accurately represents respirable dust levels. *Id.* at 1402. The judge observed that, under section 202(f), the average concentration was initially to be measured over continuous shifts, but subsequently was to be measured over a single shift unless a finding was made that single shift measurement would not accurately reflect atmospheric conditions. *Id.* The judge noted that the Secretaries of Interior and Health, Education, and Welfare had made the finding that single shift sampling would not accurately represent the atmospheric conditions to which the miner was continuously exposed. *Id.* Because the citations were based on respirable dust samples taken over a single shift, the judge concluded that the citations must be vacated. *Id.* at 1402-03.

The judge further reviewed the Commission's holding in *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (Jan. 1994), and noted that the Commission had rejected the use of single shift samples by MSHA for enforcement purposes because MSHA had attempted to rescind the 1971 Finding without employing notice and comment rulemaking. 21 FMSHRC at 1403. The judge rejected the Secretary's argument that, because the citations issued to Excel involved multiple samples averaged over a single shift, they were outside the ambit of the 1971 Finding and the *Keystone* decision. *Id.* The judge concluded that the 1971 Finding "clearly and unambiguously prohibits single shift sampling whether such sampling takes the form of a single full-shift sample or an average of multiple samples taken over a single shift," and that *Keystone* reaffirmed that interpretation. *Id.* Therefore, the judge concluded that there was no need to consider deference to the Secretary's interpretation of the 1971 Finding. *Id.*

II.

Disposition

The issue in this proceeding is whether the Secretary can issue a citation for violation of the respirable dust standard in an underground coal mine based on an average of multiple samples taken during a single shift. The Secretary and Excel agree that disposition of that issue is determined by the meaning and application of the Secretary's 1971 Finding.

The Secretary argues that the 1971 Finding is ambiguous and that her interpretation is entitled to deference. S. Br. at 6-8 & n.4. The Secretary asserts that, if the 1971 Finding applied to multiple samples on a single shift, the term "measurement" would have been in the plural, rather than in the singular. *Id.* at 9-10, 15-16. The Secretary further argues that she has consistently interpreted the 1971 Finding to allow multiple samples over a single shift for compliance purposes. *Id.* at 12-13. The Secretary asserts that the use of multiple samples over a single shift is consistent with the purpose of section 202(f) of the Mine Act and the legislative history of the predecessor provision of the Coal Act. *Id.* at 14-20 & n.6. The Secretary contends that, because section 202(f) applies only to a single full-shift sample, the 1971 Finding necessarily referred only to compliance determinations based on a single full-shift sample. *Id.* at 20. Finally, the Secretary asserts that the *Keystone* decision, upon which the judge relied, is not determinative of the citations in this proceeding because that case did not involve multiple

samples taken over a single shift. *Id.* at 20-23. The Secretary requests that the Commission not reach arguments in the amici briefs that went beyond those raised by Excel. S. Resp. Br. at 2-4.

Excel responds that the 1971 Finding prohibits single shift sampling regardless of whether it involves a single full-shift sample or multiple samples taken over a single shift. Ex. Br. at 1, 3-5. Excel argues that the use of the singular form, rather than the plural, in referring to “measurement” in section 202(f) and the 1971 Finding does not limit those provisions to a single full-shift sample and therefore the 1971 Finding excludes multiple samples taken over a single shift. *Id.* at 5-7. Excel asserts that the 1971 Finding does not distinguish between types of single shift sampling, and that the legislative history of the Coal Act distinguishes only between single and multiple-shift sampling. *Id.* at 8-9; E. Resp. Br. at 4-5. Further, Excel contends that the *Keystone* decision applies to both single shift sampling and to the average of multiple samples taken over a single shift. Ex. Br. at 11-12. Finally, Excel argues that the Secretary is not entitled to deference because the 1971 Finding is clear in prohibiting all single shift sampling. *Id.* at 13-16. In response to the CWU, Excel disputes its position that the passage of the Mine Act invalidated the 1971 Finding. E. Resp. Br. at 2-4.

Amicus CWU argues that the Commission should overturn its decision in *Keystone*. CWU Br. at 2, 7. The CWU contends that section 202(f) of the Mine Act has been misapplied and misinterpreted since the passage of the Act in 1977 and that the Act required the Secretary to use single shift sampling unless the Secretary of Labor and the Secretary of Health, Education, and Welfare issue a notice that single shift sampling will not accurately represent atmospheric conditions. The CWU asserts that the Secretaries failed to issue a new notice following the passage of the Mine Act; therefore, the statutory preference for single shift sampling continues in effect and has never been reversed by a new notice. *Id.* at 3-5. The CWU further asserts that the 1971 Finding became void upon enactment of the Mine Act. *Id.* at 6-7.

Amicus UMWA contends that the Joint Finding did not address the accuracy of multiple samples taken over a single shift. UMWA Br. at 3, 5. The UMWA further argues that the Commission’s *Keystone* decision is not dispositive of this proceeding because the citations in *Keystone* only dealt with a single sample taken during a single shift. *Id.* at 4-5. The UMWA also argues that the legislative history of the Mine Act is silent as to whether Congress intended the 1971 Finding to continue after the passage of the Act. *Id.* at 5-6. The UMWA asserts that Excel errs when it argues that the averaging of several samples from a single shift is not permissible in the absence of a revised joint notice from the Secretaries. *Id.* at 6. Therefore, the UMWA concludes that the judge’s decision should be reversed. *Id.*

Amicus Associations assert that the citations at issue were based on single shift samples and that the 1971 Finding is still in effect. A. Br. at 2-3. The Associations note that in the Coal Act, Congress distinguished between two categories of sampling, single shift samples and multiple shift samples, and that, therefore, the Secretary’s argument that the 1971 Finding applies to a single shift sample but not to multiple samples taken on the same shift and averaged together is unavailing. *Id.* at 3-4. The Associations contend that the Secretary’s argument that MSHA’s

single shift sampling has continued since 1975 is not dispositive because *Keystone* effectively invalidated sampling similar to that here. *Id.* at 5-6, 9. Further, the Associations argue that the Secretary's attempt to equate multiple shift samples taken over a single shift with "true" multiple shift samples is contrary to caselaw. *Id.* at 8. The Associations continue that the legislative history of the Coal Act and more recent regulations and court and Commission cases support multiple shift sampling as the only means of compliance with the dust standard. *Id.* at 10-15.

Amicus Operators argue that the practice of issuing a citation based on averaging multiple samples over a single shift is prohibited by the 1971 Finding. O. Br. at 2-3. The Operators further argue that single shift sampling falls far short of accurately representing the mine atmosphere to which a miner is exposed. *Id.* at 4. The Operators note that the 1971 Finding indicated that a major concern with single shift sampling was that it did not accurately represent the atmospheric conditions to which a miner was continuously exposed. *Id.* at 5. The Operators assert that single shift averaging ignores measuring dust samples by designated occupations, as required under the Secretary's regulations. *Id.* at 6. Finally, the Operators contend that, under the Secretary's interpretation, operators would be required to perform multiple shift sampling, in compliance with the regulations, while the Secretary would be allowed to use single shift averaging. *Id.* at 6-7.

Section 70.100(a), which tracks the language of section 202(b)(2) of the Mine Act, requires mine operators to continuously maintain the average concentration of respirable dust at or below 2 mg/m³. Pursuant to section 202(f) of the Mine Act, which is identical to Section 202(f) of the Coal Act, average concentration was to be measured initially for 18 months (after the passage of the Coal Act) by multiple shift sampling, and thereafter by single shift sampling unless the Secretaries of Interior and Health, Education, and Welfare issued a notice stating that single shift sampling would not accurately represent the level of dust during that shift. Pursuant to section 202(f) of the Coal Act, the Secretaries issued the 1971 Finding, in which they concluded that a single shift measurement "will not . . . accurately represent the atmospheric conditions to which the miner is continuously exposed."³ Under section 202(f), the only permissible alternative to single shift sampling is multiple shift sampling.

The judge concluded that the 1971 Finding prohibited single shift sampling without regard to whether sampling takes the form of a single full-shift sample or an average of multiple samples taken over a single shift. We agree. There is no basis for the Secretary's argument that the 1971 Finding does not reach single shift sampling that is based on averaging multiple samples over that shift. Section 202(f) envisions but two methods of respirable dust sampling — single shift measurements and measurements derived from samples taken over a number of continuous production shifts. Moreover, section 202(f) makes no distinction between types of

³ CWU's argument that the 1971 Finding became void with the enactment of section 202(f) of the Mine Act is at odds with the position of the Secretary and was not raised before the judge below. Therefore, we do not consider it.

single shift sampling. The 1971 Finding implementing section 202(f) similarly makes no such distinction, and thus, on its face, reaches *all* single shift sampling.⁴

The Secretary vigorously argues that, because section 202(f) is written in the singular, rather than in the plural form, the section cannot apply to averaging multiple measurements during a single shift. However, the Commission has recognized that, under rules of statutory construction, terms written in the singular generally include the plural. *Cleveland Cliffs Iron Co.*, 3 FMSHRC 291, 293-94 (Feb. 1981). Moreover, because averaging several measurements over a single shift yields but one result, it does not logically follow that the drafters of section 202(f) would have referred to “measurements” (in the plural), if they had contemplated the use of averaging samples over a single shift.

In addition to the clear language of the 1971 Finding, it is apparent from the legislative history of section 202(f) of the Coal Act that the concern was not the number of samples taken during a shift, but rather the number of shifts during which samples were taken. The Senate version of the Coal Act did not allow multiple shift averaging of respirable dust levels. S. Rep. No. 91-411, at 20 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 146 (1975) (hereafter “*Legis. Hist.*”). On the other hand, the House of Representatives version of the Coal Act mandated multi-shift sampling. H.R. Rep. No. 91-563, at 40-41 (1969), *Legis. Hist.* at 1070-71. The final version of the Coal Act, which contained section 202(f), included compromise language allowing multi-shift sampling for the 18-month period following the passage of the legislation, and thereafter by single shift sampling unless the Secretaries concluded that a single shift measurement would not accurately represent the atmospheric levels to which miners were exposed. *See* Jt. Conf. Rep. No. 91-761, at 75 (1969), *reprinted in Legis. Hist.* at 1519.

The Commission’s decision in *Keystone* also supports vacating the citations in this proceeding. At issue in *Keystone* was the validity of citations that were issued pursuant to the Secretary’s “spot inspection program,” in which a citation was based on a single shift sample rather than on multiple-shift sampling. 16 FMSHRC at 6-9. As the judge in this proceeding noted (21 FMSHRC at 1403), the Commission rejected the Secretary’s argument that the 1971 Finding applied only to samples taken by operators but not to samples taken by MSHA inspectors. 16 FMSHRC at 10-11. The Secretary’s argument that *Keystone* does not reach the use of multiple samples taken during a single shift is not well taken. While the Secretary is

⁴ The “language of a regulation . . . is the starting point for its interpretation.” *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989).

correct that the single shift sample at issue in *Keystone* did not involve averaging multiple samples, that does not appear to be a ground upon which the Commission's holding can be distinguished. Rather, the Commission's concern was that the 1971 Finding and its requirement that "average concentration" of respirable dust be based on multiple shift samples was never properly rescinded. *Id.* at 10-16. That holding appears to apply with equal force to all single shift sampling, whether based on a single sample or an average derived from multiple samples.

The dissent argues in essence that the 1971 Finding is invalid and "does not permit the Secretary to deviate from the statutory requirement that respirable dust concentrations be determined on the basis of a miner's average exposure as measured over a single shift." Slip op. at 16. As a threshold matter, we find that the issue raised by the dissent — whether the 1971 Finding is valid — is simply not before the Commission. The Secretary did not attack the underlying validity of the 1971 Finding in her petition for discretionary review. 30 U.S.C. § 823(d)(2)(iii) ("If granted, review shall be limited to the questions raised by the petition."). This comes as no surprise since she would be hard pressed to justify within the parameters of this litigation such a radical departure from the 30 year enforcement history that has always involved multiple sampling. *See* 65 Fed. Reg. 42068, 42072-73 (July 7, 2000). Indeed, the dissent charts out a position *contrary* to that taken by the Secretary. *See* S. Br. at 9-10.

If the validity of the 1971 Finding were before us, we would disagree with the dissent's efforts to interpret it. The dissent states that the 1971 Finding "concerns the accuracy of assessing a miner's continuous exposure over *numerous shifts*." Slip op. at 17 (emphasis in original). The dissent goes on to argue that the 1971 Finding "did not even address, much less discredit, the reliability of the single shift sample as a means of making [the] determination" of "the average exposure of the miner during [a] particular shift." Slip op. at 18 n.4.

The dissent is simply mistaken on this point. The focus of the 1971 Finding is on the *reliability* of discrete single shift measurements. By comparing the results of many such single shift samples, the Secretaries determined the statistical reliability of any given sample, and found that, statistically speaking, any given single shift sample was *not reliable*.⁵ In other words, in 1971, the Secretaries determined that any sample from a single shift was not statistically reliable, and that more data were needed to establish the reliability of respirable dust sampling. It is, after all, a fundamental and axiomatic principle of scientific investigation that a conclusion based on a single datum is not as reliable as a conclusion based on the average of multiple data. As one author has noted: "If your sample is large enough and selected properly, it will represent the whole well enough for most purposes. If it is not, it may be less accurate than an intelligent

⁵ That the 1971 Finding applied this determination more broadly to "the atmospheric conditions to which the miner is continuously exposed" (36 Fed. Reg. at 13286), we find consistent with section 202(b)(2) of the Mine Act, which requires operators to "*continuously* maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner . . . is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air." 30 U.S.C. § 842(b)(2) (emphasis added).

guess and have nothing to recommend it but a spurious air of scientific precision.” D. Huff, *How to Lie with Statistics* 13 (1954).

We have other problems with the dissent’s approach. Even the dissent acknowledges that the Secretary’s single shift sampling in this case was very problematic, and could potentially mask a high dust level received by an individual on a particular shift. Slip op. at 20-21. Regardless of how one interprets the 1971 Finding or section 202(f) of the Mine Act, no such interpretation can be sanctioned when it leads to as absurd and potentially unsafe a result as this. *Consolidation Coal Co.*, 15 FMSHRC at 1557 (rejecting construction of standard that led to absurd, unsafe result). Notably, in another context, even the Secretary has questioned the type of sampling used in this case. 65 Fed. Reg. at 42073 (“The process of averaging [several samples taken during a single shift] dilutes a high measurement made at one location with lower measurements made elsewhere.”).

Yet the dissent upholds the Secretary’s approach. Assuming *arguendo* that the 1971 Finding is, as the dissent maintains, invalid, it is clear to us that the Secretary’s sampling in this case would not comply with the alternative requirement of section 202(f) of the Mine Act that the average concentration of respirable dust to which “*each miner*” is exposed be measured “over a single shift only.” 30 U.S.C. § 842(f) (emphasis added). The problem with the Secretary’s sampling, as the dissent recognizes, is that it focuses not on “*each miner*” as the Act requires, but on an average of many miners at many different positions with potentially varying levels of respirable dust exposure, including some miners whose high exposure could be masked by other, lower respirable dust levels used in computing the sampling results. In a tortured twist of illogic, the dissent thus upholds enforcement actions that are at odds with the very statutory scheme for which it argues.

The dissent turns a blind eye to the Secretary’s ill-advised sampling method and finds new violations, stating “it is undisputed that in this proceeding 11 miners each recorded an exposure level, over a single shift, that was greater than the 2.0 mg/m³ Congress deemed permissible on each shift.” Slip op. 21. In other words, the dissent finds as violative each of the eleven single shift sample results greater than the 2.0 mg/m³ and not the averaged results on which the Secretary based her charges. The dissent most certainly does not, as it asserts, “uphold the citations as they were issued.” Slip op. at 21 n.8.⁶ The dissent is not free, however, to depart from the Secretary’s charges, which were based on averaged sample results, and invent its own charges based on the individual samples that served as the basis for the Secretary’s averaged results. The Commission must not usurp the Secretary’s enforcement role under the Mine Act and prosecute a violation on a basis independent from the Secretary’s charges — which is precisely what the dissent would do. The power to enforce the provisions of the Mine Act is explicitly reserved to the Secretary in section 104 of the Act. 30 U.S.C. § 814; *Mechanicsville*

⁶ Notably, a finding of eleven separate violations based on this record would be consistent with the dissent’s position that the 1971 Finding is not valid and that respirable dust sampling must be done using single shift sampling.

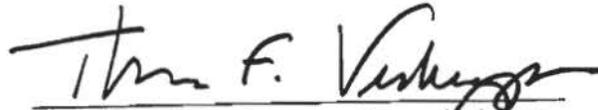
Concrete, Inc., 18 FMSHRC 877, 879-80 (June 1996); *see also Mettiki Coal Corp.*, 13 FMSHRC 760, 764 (May 1991) (Commission judges do not have authority to charge an operator with violations of section 104 of the Mine Act). Congress charged the Commission, on the other hand, “with the responsibility . . . for reviewing the enforcement activities of the Secretary.” *Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm’n Before the Senate Comm. on Human Res.*, 95th Cong., 1 (1978). The dissent’s radical departure from the Mine Act’s enforcement scheme would also pose a serious problem because, if the dissent’s view prevailed, the operator would have had no notice that it was to be held liable for respirable dust violations on the basis of individual single shift samples, contrary to the mandate of the 1971 Finding.

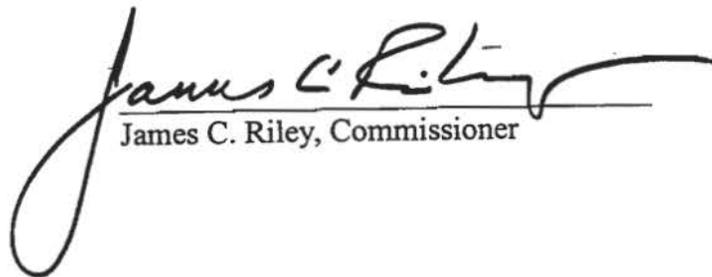
Finally, we also are troubled that the dissent would have us ignore the Commission’s *Keystone* decision because its holding is based on the 1971 Finding. The dissent would resurrect the Secretary’s single shift sampling program that was at issue in that case — and thrown out by the Commission. 16 FMSHRC at 10-16. Even had we not concluded that the 1971 Finding prohibited the averaging of single shift samples at issue here, we would not so blithely ignore Commission precedent. We also note that the Secretary has announced a proposed rule that would rescind the 1971 Finding and mandate single shift sampling. 65 Fed. Reg. 42068. We find it clearly inappropriate for the Commission to potentially short circuit this process.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision to vacate the citations.⁷


Theodore F. Verheggen, Commissioner


James C. Riley, Commissioner

⁷ The Secretary moved to strike references in the Associations's brief to letters from Congressman Erlenborn and Director of Mines O'Leary because their letters were not part of the record in this proceeding. S. Resp. Br. at 7. In light of our disposition, we need not consider the letters and therefore do not reach to the Secretary's motion to strike, since the motion is moot as a result of the disposition. *Black Diamond Constr., Inc.*, 21 FMSHRC 1188, 1193 (Nov. 1999).

Commissioner Beatty, concurring:

While I concur in the decision of Commissioners Riley and Verheggen to affirm the judge's determination to vacate the citations in this case, I reach that result in a slightly different fashion. I write separately to state why I believe the Secretary's interpretation of the Proposed Notice of Finding published in the Federal Register at 36 Fed. Reg. 13286 (July 7, 1971) ("1971 Finding") cannot form the basis upon which a violation of the respirable dust standard can be upheld.

As a threshold matter, I respectfully disagree with the judge in this case, and Commissioners Riley's and Verheggen's position, that the language of the 1971 Finding is clear and unambiguous. To the contrary, on this limited issue, I agree with the Secretary inasmuch as I find the language of the 1971 Finding ambiguous concerning whether or not the Secretary has the ability to base an enforcement action for violation of the respirable dust standard on multiple dust samples collected during a single shift. As I explain more fully below, however, I disagree with the Secretary that her interpretation of the 1971 Finding is reasonable and thus entitled to deference.

To begin with, as the Secretary notes, the 1971 Finding expressly states that "[a] single shift *measurement* of respirable dust will not . . . accurately represent the atmospheric conditions to which the miner is continuously exposed." 36 Fed. Reg. at 13286 (emphasis added). The singular term "measurement" was also used in the text of the final finding issued by the Secretaries of Interior and of Health, Education, and Welfare in February 1972. 37 Fed. Reg. 3833, 3834 (1972).¹ It is important to note, however, that the title of the 1971 notice is couched in the plural form, stating it is a "Notice of Finding That Single Shift *Measurements* of Respirable Dust Will Not Accurately Represent Atmospheric Conditions During Such Shift." 36 Fed. Reg. at 13286 (emphasis added). Clearly, an inconsistency does exist between the singular use of the word *measurement* in the text of the 1971 Finding and the final Finding issued in February 1972, and its plural form in the title of the 1971 Finding. This inconsistency, in my view, creates enough of an ambiguity to call into question the validity of reviewing the

¹ The February 1972 final notice stated:

The proposed finding, as set forth at 36 FR 13286, that a *measurement* of respirable dust over a single shift only, will not . . . accurately represent the atmospheric conditions to which the miner under consideration is continuously exposed, is hereby adopted without change.

Id. (emphasis added).

applicability of the Finding under the microscope of a plain meaning analysis as advocated by the judge and Commissioners Riley and Verheggen.

A plain meaning interpretation of the 1971 Finding becomes more problematic in light of an additional inconsistency in its language identified by Chairman Jordan. In her dissenting opinion, Chairman Jordan notes (slip op. at 17-19) that section 202(f) of the Mine Act, and its legislative history, states that, to be operative, the finding must be based on a determination that a single shift measurement will not provide an accurate representation of atmospheric conditions during that particular shift. The 1971 Finding, however, makes a completely different determination — that “single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is *continuously exposed*.” 36 Fed. Reg. at 13,286 (emphasis added).

While I disagree with Chairman Jordan that this inconsistency somehow invalidates the 1971 Finding, I do believe that this disconnect between the language of 202(f) of the Mine Act and the 1971 Finding casts further doubt on the Secretary’s position that the 1971 Finding can be properly interpreted to allow compliance with the respirable dust standard based on the averaging of multiple respirable dust samples taken over a single shift.

I therefore conclude that the language of the 1971 Finding is ambiguous on this question. The next step in regulatory interpretation is to determine whether the Secretary’s interpretation of the 1971 Finding, permitting the use of multiple dust samples taken over a single shift to determine compliance, is reasonable. It is well established that deference is owed to the Secretary’s reasonable interpretation of her regulation. *See Energy W. Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994); *accord Sec’y of Labor v. W. Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (“agency’s interpretation of its own regulation is ‘of controlling weight unless it is plainly erroneous or inconsistent with the regulation’” (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)) (other citations omitted). The Secretary’s interpretation of a regulation is reasonable where it is “logically consistent with the language of the regulation[s] and . . . serves a permissible regulatory function.” *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (alteration in original) (citations omitted).

In the instant case, the Secretary asked that we grant deference to an interpretation of the 1971 Finding that permits MSHA to make compliance determinations based on the average of multiple respirable dust samples taken over a single shift. In support of her position, the Secretary argues that her interpretation is reasonable. To the contrary, I find the Secretary’s interpretation to be both unreasonable and inconsistent with the protective intent of section 202(f) of the Mine Act.

I begin by noting that the parties to this litigation, and the courts,² have spoken on the validity of the Secretary's current method of respirable dust collection and its effect on the health of the nation's underground miners. Most notable, however, is the Secretary's admission that average dust concentrations obtained from several full-shift samples (eight hours or less in duration) can "mask significant single-shift overexposures by diluting a measurement of high dust exposure with one of lower dust concentrations." *'Cornerstone' of Changes Designed to End Black Lung, FEDERAL AGENCY ISSUES PROPOSALS ON COAL MINE DUST MONITORING*, MSHA News Release USDL 2000-0706 (July 6, 2000).

The reasonableness of the Secretary's interpretation of the 1971 Finding can best be gauged by examining the overall effectiveness of her sampling program over the past 26 years³ in measuring the underground miners' prolonged exposure to respirable dust as a means of reducing the effects of such prolonged exposure on miners. On this point, a review of the Secretary's own literature calls into question both the reliability and accuracy of her time-honored respirable dust sampling scheme. In October of 1999, MSHA implemented a pilot program entitled "Miners' Choice Health Screening" whereby both underground and surface coal miners would receive confidential chest x-rays designed to provide early detection of pneumoconiosis. *First Year Results of MSHA's "Miners' Choice Health Screening"*, MSHA (Dec. 18, 2000), available at <http://www.msha.gov/S&HINFO/BLUNG/XRAY/2000results.HTM>. The results of the agency's first year of screening are troubling, and in my opinion calls into question the reasonableness of the Secretary's interpretation of the 1971 Finding and the effectiveness of the sampling program derived from that interpretation.

The program summary indicates that of the 11,970 miners who completed the health screening process, 300 miners showed evidence of pneumoconiosis from breathing excessive amounts of coal dust. *Id.* Of particular significance is the fact that 11 percent of the miners affected were 30 to 40 years of age. *Id.* This is particularly important information that must be factored into the deference analysis because this group of miners began working in the mining industry *after* the enactment of the Mine Act in 1977. Therefore, these individuals, who have worked their entire careers in the industry regulated under the Secretary's current respirable dust sampling scheme, continue to show significant levels of black lung disease. Commenting on the results of this screening program, Davitt McAteer, former Assistant Secretary of Labor for Mine Health and Safety, stated: "What the numbers suggest is that there continues to be a problem of black lung among active miners. While the number of people contracting the disease has

² See *Am. Mining Congress v. Marshall*, 671 F.2d 1251, 1259 (10th Cir. 1982) (recognizing the variability associated with the result of several samples taken on a single shift); cf. *Nat'l Mining Ass'n v. Sec'y of Labor*, 153 F.3d 1264, 1267 (11th Cir. 1998) (noting that "accuracy of single-shift sampling is hotly debated by the parties").

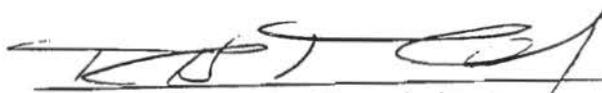
³ The Secretary states that the current method of respirable dust collection began in 1975, two years before the enactment of the Mine Act. S. Br. at 13 n.5.

diminished over the years, it continues to be a problem.” *MSHA Study: One in 50 Coal Miners Show Evidence of Black Lung Disease*, 8 Mine Safety & Health News, Jan. 5, 2001, at 4.

An argument can be made that the effectiveness of the Secretary’s 30-year enforcement scheme based upon respirable dust sampling is only one factor to consider in the continuing trend of miners contracting pneumoconiosis. The mining industry, particularly in recent years, has been deluged by accusations of operator fraud in the collection of respirable dust samples. In fact, these allegations appear to be the driving force behind MSHA’s recent movement to propose a new rule that scraps the current dust sampling scheme in favor of a single shift/single sample system administered by MSHA itself.⁴ See 65 Fed. Reg. 42,068 (July 7, 2000).

It is certainly not necessary, in the context of the instant case, to evaluate the effectiveness of the operators’ respirable dust sampling techniques over the past 30 years. But the position taken by MSHA in response to the allegations of fraud in the sampling process does beg an important question. If operator fraud in the collection of respirable dust samples is a key factor in miners continuing to contract pneumoconiosis, why has MSHA decided to go beyond simply taking over the future administration of the sampling process, and taken the further step of replacing the preexisting sampling procedure? Clearly, MSHA’s decision to re-construct the process of respirable dust sampling that has been in effect for over 25 years is another indication of the unreasonableness of its interpretation of the 1971 Finding.

The practical effect of deferring to MSHA’s interpretation of the 1971 Finding, or upholding the citations under a plain meaning approach, would be to grant the Secretary unfettered authority to continue administering a respirable dust sampling program that has failed to provide miners’ protection from the harmful effects of respirable dust. Accordingly, I concur in the decision of Commissioners Riley and Verheggen to affirm the judge’s determination to vacate the citations in this case.


Robert H. Beatty, Jr., Commissioner

⁴ Former Assistant Secretary of Labor for Mine Health and Safety Davitt McAteer has stated that the results of the first year of MSHA’s Miners’ Choice Health Screening initiative show that the longstanding procedure of allowing mine operators to take dust samples in mines is not adequate. *MSHA Study: One in 50 Coal Miners Show Evidence of Black Lung Disease*, 8 Mine Safety & Health News, Jan. 5, 2001, at 4.

Chairman Jordan, dissenting:

I would reverse the judge and uphold the citations at issue, based on the plain language of the Mine Act and the proposed Notice of Finding regarding single shift measurements of respirable dust published in the Federal Register at 36 Fed. Reg. 13286 (July 17, 1971) (hereafter "1971 Finding").¹ Congress has directly addressed the question of single shift sampling, and the 1971 Finding does not permit the Secretary to deviate from the statutory requirement that respirable dust concentrations be determined on the basis of a miner's average exposure as measured over a single shift.

An underground coal miner's exposure to respirable dust is governed by section 202(b)(2) of the Mine Act, which provides that "each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere *during each shift* to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air." 30 U.S.C. § 842 (b)(2) (emphasis added). The Congressional mandate contained in this statutory provision could not be clearer: *any* miner should be able to safely assume that the average concentration of respirable dust that he or she will inhale during *any* shift will not exceed 2.0 milligrams per cubic meter of air ("mg/m³").

Although section 202(b)(2) explicitly requires that the average concentration of respirable dust be maintained at or below 2.0 mg/m³ "during each shift," section 202(f) provided an 18-month period of time in which an operator would not be penalized for exceeding the statutory ceiling on respirable dust during any particular shift as long as the average concentration, as measured over several shifts, remained at or below the 2.0 mg/m³ limit.² Section 202(f) goes on

¹ As the majority has noted, the Secretaries of Interior and Health, Education, and Welfare jointly published on February 23, 1972, a final notice in the Federal Register adopting the proposed notice without change or comment. Slip op. at 3, citing 37 Fed. Reg. 3833, 3834 (Feb. 23, 1972).

² Section 202(f) states:

For the purpose of this title, the term 'average concentration' means a determination which accurately represents the atmospheric conditions with regard to respirable dust to which each miner in the active workings of a mine is exposed (1) as measured, during the 18 month period following the date of enactment of this Act, over a number of continuous production shifts to be determined by the Secretary and the Secretary of Health, Education and Welfare, and (2) as measured thereafter, over a single shift only, unless the Secretary of the Interior and the Secretary of Health, Education, and Welfare find, in accordance with the provisions of section 101 of this Act, that such single shift

to provide, however, that after 18 months the average concentration of respirable dust will be determined by measurements taken “over a single shift only, unless the Secretar[ies] find . . . that such single shift measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions *during such shift*.” 30 U.S.C. § 842(f) (emphasis added).

My colleagues Commissioners Riley and Verheggen consider the 1971 Finding to constitute the requisite determination, referred to in section 202(f). Consequently, they have concluded that, having found single shift samples inaccurate, the Secretary cannot rely on them to support enforcement actions. Therefore, they reason, enforcement decisions can only be based on multi-shift averaging of dust levels. Slip op. at 6-7.

I disagree with their view that the 1971 Finding contained the conclusion that was necessary to permit the Secretary’s continued use of multi-shift averaging after the 18-month grace period. The 1971 Finding concerns the accuracy of assessing a miner’s continuous exposure over *numerous shifts*. As discussed below, however, according to the plain meaning of section 202(f) and its legislative history, to be operative, the finding had to ascertain the ability to accurately assess a miner’s continuous exposure *over a single shift*.

The plain language of section 202(f) of the Mine Act prohibited multi-shift averaging after 18 months unless the Secretary found that sampling respirable dust over only a single shift does not accurately represent atmospheric conditions “*during such shift*.”³ In other words, a necessary predicate for the Secretary’s continued enforcement of the respirable dust standard using multi-shift averaging, rather than single shift sampling, is a finding that a measurement taken over a single shift is not an accurate indication of the atmospheric conditions during the shift that is being measured.

The 1971 Finding fails to make this determination. It concludes, instead, that “single shift measurement of respirable dust will not, after applying valid statistical techniques to such measurement, accurately represent the atmospheric conditions to which the miner is *continuously exposed*.” 36 Fed. Reg. at 13286 (emphasis added). Thus, the 1971 Finding determined that measuring respirable dust over a single shift is not an accurate indication of a miner’s average exposure over numerous continuous shifts. This is a very different conclusion from the one

measurement will not, after applying valid statistical techniques to such measurement, accurately represent such atmospheric conditions during such shift.

30 U.S.C. § 842(f).

³ If a statute is clear and unambiguous, effect must be given to its language. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984).

Congress required in order to justify continued departure from the statutory mandate that the 2.0 mg/m³ standard be “continuously maintain[ed] . . . during each shift.” 30 U.S.C. § 842(b)(2).⁴

That the 1971 Finding is about the variation in dust levels from shift to shift rather than the ability to accurately measure exposure during a single shift is underscored by the methodology the Secretary used to reach her conclusion. The 1971 Finding informs us that the Secretary relied on the basic dust samples that operators had submitted in accordance with the procedures set forth in the version of Title 30, Part 70, Subchapter O, Chapter I in effect at that time. 36 Fed. Reg. at 13286. These samples were taken from designated occupations over ten consecutive shifts. The Secretary explains that an average was obtained for the ten shifts. This number was then compared to the average of the two most recent samples, then to the average of the three most recent samples, etc. The 1971 Finding notes that the average of the two most recent samples was statistically equivalent to the average concentration of all ten basic samples for each working section in only 9.6 percent of the comparisons. *Id.* Thus, the Secretaries concluded that single shift sampling would not “accurately represent the atmospheric conditions to which the miner is continuously exposed.” *Id.*⁵

⁴ My colleagues urge a broader reading of the 1971 Finding, one that indicates that single shift sampling is “statistically speaking . . . not reliable.” Slip op. at 8. However, to support this position they direct us, not to any language in the 1971 Finding, but to a general treatise on statistics and the author’s observation that “[i]f your sample is large enough and selected properly, it will represent the whole well enough for most purposes.” *Id.* (quoting *D. Huff, How to Lie with Statistics* 13 (1954)).

Paraphrasing section 202(b), my colleagues imply that the “whole” which samples in this case are supposed to represent, is a miner’s exposure to respirable dust “during all shifts,” *id.*, instead of “during each shift” as the statute states. 30 U.S.C. § 842 (b)(2). If enforcement of the 2.0 mg/m³ standard had to be based on a miner’s average exposure over several shifts, my colleagues would be on more solid ground in asserting that sampling the atmosphere for a single shift does not provide reliable support for a citation. Indeed this is what the 1971 Finding concluded. However, if as I maintain, section 202(b) requires the Secretary to take enforcement action on the basis of a miner’s exposure during even one shift, then the single shift sampling need only represent the average exposure of the miner during that particular shift. The 1971 Finding did not even address, much less discredit, the reliability of the single shift sample as a means of making that determination.

⁵ Commissioners Verheggen and Riley suggest my opinion raises issues “simply not before the Commission.” Slip op. at 8. This dissent, however, addresses the scope of the Secretary’s 1971 Finding, which is the issue the parties and my colleagues concede is central to the resolution of this case. Slip op. at 4.

The legislative history of section 202(f) also supports the position that the 1971 Finding does not provide the necessary basis for allowing compliance to be based on multi-shift averaging of respirable dust measurements. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 & n.12 (1987) (legislative history provides “compelling support” for court’s analysis based on plain language of statute); *Ohio v. U.S. Dept. of Interior*, 880 F.2d 432, 441 (D.C. Cir. 1989) (reviewing court must use traditional tools of statutory construction, including, when appropriate, legislative history, to determine Congressional intent). As my colleagues have noted, section 202(f) of the Mine Act is identical to section 202(f) of the Coal Act. Slip op. at 6. During enactment of the Coal Act, the House version required multiple-shift sampling. See H. R. Rep. No. 91-563, at 41 (1969), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Part I, *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1031 (1975) (hereafter “Legis. Hist.”). The Senate version prohibited it. See S. Rep. No. 91-411, at 20 (1969), reprinted in *Legis. Hist.* at 146. The conference report referred to this discrepancy and then explained that the final version required multiple-shift averaging of respirable dust levels for 18 months and thereafter requires dust concentration to be determined on the basis of single shift sampling unless the Secretary makes a finding “that single shift measurements will not accurately represent the atmospheric conditions *during the measured shift* to which the miner is continuously exposed.” See Jt. Conf. Rep. No 91-761, at 75 (1969), reprinted in *Legis. Hist.* at 1519 (emphasis added).

My colleagues rely on *Keystone Coal Mining Corp.*, 16 FMSHRC 6 (Jan. 1994), wherein the Commission held that the 1971 Finding precluded the Secretary from citing an operator on the basis of a single shift sample. Seeking to distinguish the Commission’s decision in *Keystone*, the Secretary and amicus UMWA contend that that decision involved enforcement actions based on a single sample taken over a single shift. S. Br. at 22; UMWA Br. at 4. Because the instant case involves citations based on the average of multiple samples taken over a single shift, they claim that *Keystone* is not controlling precedent in this enforcement proceeding. S. Br. at 22-23, UMWA Br. at 5. Regardless of whether it can be distinguished on the basis of the facts before us, the Commission’s *Keystone* decision flows from the assumption that the 1971 Finding actually contained the determination regarding single shift sampling that was specified in section 202(f). 16 FMSHRC at 7. Since I disagree with this underlying premise, upon which the *Keystone* ruling was based, I decline to follow it.

In upholding the citations in this case, I do not mean to imply agreement with the enforcement policy that resulted in their issuance. The Secretary maintains that since 1975, she has issued citations based on single shift samples when the average respirable dust exposure of the 4 or 5 miners in a particular working section exceeds the 2.0 mg/m³ standard.⁶ S. Br. at 2-3. As I indicated earlier, however, section 202(b)(2) of the Act requires that the average

⁶ For a period of time, the Secretary took enforcement actions on the basis of an individual miner’s exposure during a single shift. 16 FMSHRC at 8. This spot inspection program was rejected by the Commission in *Keystone*. *Id.* at 16.

concentration of respirable dust in the mine atmosphere to which “*each miner* in the active workings is exposed” not exceed the 2.0 mg/m³ standard (emphasis added).

In light of this statutory mandate, it is difficult to see how the Secretary could justify permitting one miner to work for a shift in an atmosphere containing an average concentration of respirable dust greater than 2.0 mg/m³ simply because that miner’s co-worker was exposed to a significantly lower concentration of respirable dust during the same shift. An enforcement policy which is based on the average exposure of a group of workers means that there will be occasions when one or two miners in a working section are exposed to concentrations that exceed the 2.0 mg/m³ limit on a particular shift, but no citation is issued because the exposure of the other workers on the section results in an average below the 2.0 mg/m³ limit. It also appears to mean that, even when the average exposure for the group exceeds 2.0 mg/m³, only one citation is issued, regardless of the number of miners in the section that were exposed to the impermissible level of respirable dust. The instant case, involving three citations, illustrates this aspect of the policy. Citation No. 7348723 is based on five samples taken over a single shift on March 1, 1999. Jt. Stip. 2. Three of the five occupations sampled show dust concentrations in excess of 2.0 mg/m³:

Continuous Miner Operator	2.764 mg/m ³
Bolter, Intake	2.854 mg/m ³
Bolter, Return	3.154 mg/m ³

Id.

Citation No. 7348724 is based on four samples taken over a single shift on March 10, 1999. All four reveal dust concentrations in excess of the statutory limit:

Continuous Miner Operator	2.730 mg/m ³
Shuttle Car Operator (right)	2.968 mg/m ³
Scoop Operator	2.495 mg/m ³
Shuttle Car Operator (left)	2.347 mg/m ³

Id.

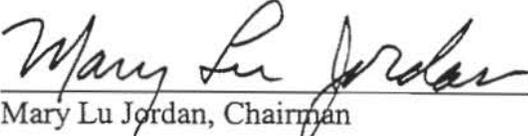
Citation No. 7348725 is based on four samples taken over a single shift in March 10, 1999. All four reveal dust concentrations in excess of the statutory limit:

Continuous Miner Operator	2.435 mg/m ³
Repairman	2.582.0 mg/m ³
Shuttle Car Operator	3.748 mg/m ³
Shuttle Car Operator	3.837 mg/m ³

Id.

As a result of the Secretary's averaging approach, these eleven impermissibly high samples resulted in only 3 citations, one for each working section. Moreover, as my colleagues point out, the averaging approach under review has recently been questioned by the Secretary herself since it "dilutes a high measurement made at one location with lower measurements made elsewhere." Slip op. at 9 (quoting Determination of Concentration of Respirable Coal Mine Dust, 65 Fed. Reg. 42068, 42073 (July 7, 2000)).⁷ Whatever questions might be raised about the underlying enforcement policy, however, it is undisputed that in this proceeding 11 miners each recorded an exposure level, over a single shift, that was greater than the 2.0 mg/m³ Congress deemed permissible on each shift. Consequently, I would uphold the three citations that were issued, despite my disagreement with the Secretary's rationale for issuing them, and would remand this proceeding for assessment of an appropriate penalty.⁸

For the foregoing reasons, I would reverse the judge's decision, uphold these citations, and remand this proceeding for assessment of an appropriate penalty.


Mary Lu Jordan, Chairman

⁷ The Secretary also stated her belief, therein, that "the statistical analysis referenced in the 1971/1972 proposed and final findings simply did not address the accuracy of a single, full-shift measurement in representing atmospheric conditions during the shift on which it was taken." 65 Fed. Reg. at 42071.

⁸ I fail to see how a decision that would uphold the citations as they were issued, without additional findings or modifications, on the basis of the plain language of the cited regulation, either deprives the operator of notice or "finds new violations." Slip op. at 9. The cases relied on by my colleagues are inapposite. In *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996), the judge modified the citation to include a finding that the violation was "significant and substantial." In *Mettiki Coal Corp.*, 13 FMSHRC 760, 764-65 (May 1991), the judge modified the section 107(a) imminent danger order to a withdrawal order under section 104(b). More relevant, perhaps, is the Commission's comment in *Black Mesa Pipeline, Inc.*, 22 FMSHRC 708, 716 (June 2000) that "there are cases where it would be appropriate to find a violation based on the plain meaning of a standard even if such a rationale was not a part of the Secretary's theory of violation."

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 5, 2001

ASARCO INCORPORATED,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2000-603-RM
	:	Citation No. 7945733; 8/07/2000
v.	:	
	:	Docket No. WEST 2000-604-RM
	:	Citation No. 7945734; 8/07/2000
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 2000-605-RM
MINE SAFETY AND HEALTH	:	Citation No. 7945735; 8/07/2000
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 2000-613-RM
	:	Citation No. 7945743; 8/08/2000
	:	
	:	Docket No. WEST 2001-44-RM
	:	Citation No. 7945587; 9/25/2000
	:	
	:	Mission Mine Underground
	:	Mine ID. No. 02-02626

DECISION

Before: Judge Manning

These proceedings are before me on notices of contest filed by Asarco Incorporated (“Asarco”) against the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Mine Act”). The Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued five citations against Asarco alleging violations of the Secretary’s safety standard at 30 C.F.R. § 57.14131 at the underground mine at its Mission Mine Complex in Pima County, Arizona.

The parties agreed to waive their right to a hearing and submitted joint stipulations of fact. Each party filed a motion for summary decision and responded to the other party’s motion for summary decision. These cases present the issue of whether section 57.15131 applies to haulage equipment that is designed for underground use but which is brought to the surface on a regular basis to dump ore. The Secretary contends that the standard applies to the cited haulage trucks because they are used on the surface. Asarco maintains that the standard does not apply to the cited trucks because they are not “surface haulage trucks.”

The safety standard at issue provides, in pertinent part:

§ 57.14131 Seat belts for surface haulage trucks.

(a) Seat belts shall be provided and worn in haulage trucks.

....

(c) Seat belts required under this section shall meet the requirements of SAE J386, "Operator Restraint Systems for Off-Road Work Machines," 1985, which is incorporated by reference in accordance with 5 U.S.C. § 552(a).

Five section 104(a) citations are at issue in these cases. Citation No. 7945733 states that the operator of a Toro 40D Haul Truck ("Toro truck" or haulage truck") was not wearing a seat belt while driving on the surface at the mine, in violation of 57.14131(a). Citation No. 7945734 states that the operator of another Toro truck was not wearing a seat belt while driving on the surface at the mine, in violation of 57.14131(a). Citation No. 7945735 states that the seat belt installed in a Toro truck did not meet the requirements of SAE J386, in violation of 57.14131(c). Citation No. 7945743 states that the seat belt installed in another Toro truck did not meet the requirements of SAE J386, in violation of 57.14131(c). Citation No. 7945587 states that seat belt installed in still another Toro truck did not meet the requirements of SAE J386, in violation of 57.14131(c). Four of these citations were issued in August 2000 and the other one was issued in September 2000.

I. JOINT STIPULATIONS

The key factual stipulations entered into by the parties are as follows:

8. The Asarco Mission Complex is made up of the Mission Underground Mine, the Mission Open Pit Mine, and two mills.
9. The portals of the Mission Underground Mine are located near the bottom of the Mission Open Pit.
10. In August 2000, the Mission Mine operated three eight-hour production shifts per day. It changed to two ten-hour shifts per day on October 23, 2000.
11. Asarco Mission Underground mine had three portals to the surface: the north portal, the south portal, and the Pima portal.
12. The south portal is no longer in use. Therefore, the only two portals currently operational are the north portal and the Pima portal. All three portals were

operational in August 2000.

13. Copper ore is hauled from the underground to two ore dumps on the surface.
14. Haul trucks are used to haul ore from the underground to the ore dumps. The trucks haul from 3,000 to 4,000 tons of ore per day.
15. The haul trucks that are used to haul ore from the underground to the ore dumps at the Mission Underground are manufactured by Toro, Inc., and known as Toro 40D haul trucks. Each Toro 40 D haul truck is diesel engine powered mobile equipment and transports an average of 29 tons per load. . . .
16. Toro 40D haul trucks also haul waste material inside the underground area of the mine.
17. Waste material is only moved inside the underground by the Toro 40D haul trucks. Except where trucks are unable to dump underground due to mechanical problems, waste material is not brought to the outside area of the mine.
18. Toro 40D haul trucks are not used to transport anything out of the underground except for ore.
19. There is currently a fleet of seven Toro 40D haul trucks. Since October 23, 2000, an average of four to five trucks operate each shift.
20. At the time the citations were issued, each Toro 40D haul truck made an average of approximately six to seven truck runs per shift carrying ore to the ore dumps.
21. Established routes, or haulage roads, exist by which Toro 40D haul trucks travel from the mine portals to the ore dumps and return to the underground.
22. The distance from the north portal to the north ore dump is approximately 362 feet from the centerline of the dump, with a range of 75 feet to 400 feet. The road between the north portal and the north ore dump has a grade of 0%.
23. The distance from the Pima portal to the Pima ore dump is approximately 360 feet from the centerline of the dump with a range of 75 to 400 feet. The road between the Pima portal and the Pima ore dump had a grade of approximately 5.5%. . . .
24. In August 2000, a road running outside of the underground portion of the mine linked the north portal and the south portal. That road was known as the "goat trail" because it was very narrow. The "goat trail" was approximately one-half mile in length. The Toro 40D haulage trucks also used this road in August 2000. The goat trail was too narrow to be used by the haul trucks from the Open Pit . . .

that are regularly used to transport ore exclusively on the surface.

25. The distance from the Pima portal to the south portal is approximately 1500 feet.
26. The goat trail was specifically designed to be used by underground haul trucks.
27. In approximately November 2000 the goat trail went out of use when the Mission Open Pit started to cut into that area.
28. The method of mining, the use of the haul trucks, and the location of the north ore dump have been relatively unchanged since the mine opened in 1994. The Pima ore dump was not constructed until March 1999.
29. In the course of their regular operations, the Toro 40D haul trucks leave the underground to go to the ore dumps and once the ore has been off-loaded, they immediately return to the underground.
30. At the end of each shift, each of the Toro 40D haul trucks is driven out of the underground to the shop where it is fueled for the next shift. The shop is approximately 400 feet from the north portal.
31. After being fueled, the Toro 40D haul trucks are driven from the shop and parked on a "ready line" where they are lubricated for use on the next shift. The ready line is located about 200 feet outside the north portal. At the beginning of each shift, each of the haul trucks is driven off the ready line and back underground.
32. The Toro 40D haul trucks also leave the underground area of the mine to go to the shop for maintenance or repairs, but for no other purpose. On rare occasions, the Toro 40D trucks travel on the main haulage roads for the Pit between the north and Pima portals.
33. Therefore, the only time that the haul trucks leave the underground portion of the mine is when they are driven to and from the ready line, when they dump ore at the dump, and when they are taken to the shop for repairs.
34. There is sometimes other traffic such as tractors and other types of surface equipment as well as other Toro 40D trucks on the haulage roads near the portals and dump areas.
35. Underground haul trucks have design features unique to that type of vehicle.
36. Underground haul trucks are designed with low ground clearance to fit inside a confined space where there is a limitation on vehicle height.

37. Underground haul trucks are specifically designed to be loaded from a low profile, within the restricted limits of the underground work space.
38. Because of the restricted space in which they primarily operate, underground haul trucks have a load capacity that is smaller than haul trucks that operate on the surface.
39. The Toro 40D haul trucks which were cited in these proceedings are equipped with seat belts.
40. The title of 30 C.F.R. § 57.14131 is "Seat belts for surface haulage trucks."
41. There is no definition of "surface haulage trucks" in Title 30 of the Code of Federal Regulations.
42. 30 C.F.R. § 57.14131 does not explicitly state that it applies to underground haul trucks that are used on the surface at an underground mine.
43. 30 C.F.R. § 57.14131 requires, among other things, that seat belts for surface haulage trucks meet the requirements of the 1985 version of a publication of the Society of Automotive Engineers designated as SAE J386, "Operator Restraint Systems for Off-Road Work Machines."
44. The Society of Automotive Engineers has published new guidelines on Operator Restraint Systems for Off-Road Work Machines since 1985.
45. At the time the citations were issued, the seat belt assemblies in the Toro 40D haul trucks did not comply with SAE J386 (1985).
46. There is no definition of "surface haulage trucks" in MSHA's Program Policy Manual.
47. There is no definition of "surface haulage trucks" in MSHA's Program Policy Letters.
48. MSHA has issued no written guidelines as to the definition of "surface haulage truck."
49. The Program Policy Letters do not state whether 30 C.F.R. § 57.14131 applies to underground haul trucks brought to the surface areas of an underground mine.
50. There is no definition of "surface haulage trucks" in MSHA's Program Information Bulletins.

II. SUMMARY OF THE PARTIES' ARGUMENTS

A. Secretary of Labor

The Secretary maintains that the Toro trucks are required to comply with section 57.14131 when they are operated on the surface area of the underground mine. She contends that any haulage trucks operating on the surface must comply with the safety standard. She reasons that "haulage trucks are haulage trucks regardless of design, manufacturer, labels, or names." (S. Motion 10). If haulage trucks are operated on the surface areas of underground mines, then the trucks are required to comply with the seat-belt requirements of the standard.

The Secretary argues that the words "surface haulage trucks" in the title of the safety standard refers to the location of the trucks not the type of truck that is covered by the standard. A haulage truck that is used on the surface of an underground mine is a "surface haulage truck," whether it is used exclusively on the surface or underground and on the surface. She states that the stipulated facts establish that the haulage trucks routinely travel to the surface areas of the mine to dump mined ore as part of the ongoing mining operations.

In support of her position, the Secretary relies upon the regulatory history of section 57.14130, as well as the cited standard. In addition, she maintains that her interpretation is reasonable, is consistent with the language and purpose of the standard, and should be accorded deference. The Secretary believes that she provided fair notice of her interpretation of the safety standard and that there is no evidence of inconsistent enforcement. The Secretary contends that the alleged violation described in each citation has been established.¹

B. Asarco

Asarco maintains that the plain language of the safety standard excludes the cited haulage trucks from its scope as a matter of law. The plain language of the safety standard limits its application to "surface haulage trucks." The trucks cited by MSHA are not surface haulage trucks. Asarco argues that anyone familiar with mining equipment will instantly identify the Toro trucks as "vehicles designed and intended for use underground." (C. Motion 7). As a consequence, these trucks are not surface haulage trucks, which are an entirely different type of vehicle. Asarco contends that all the citations must be vacated because the cited trucks are not subject to the requirements of section 57.14131.

In support of its position, Asarco relies upon the plain language of the safety standard, the reasonably prudent person test, the deposition testimony of MSHA officials, and the fact that there can be no dispute that the cited vehicles are underground haulage trucks. Asarco also argues that, even if the safety standard can be said to include the cited vehicles, SAE J386 does

¹ The Secretary's objection, filed by letter dated February 23, 2001, to the declaration of Peter Graham filed by Asarco is **DENIED**.

not apply to them. Finally, it contends that even if SAE J386 is applicable, the seat-belt assembly on the haulage trucks met the requirements of that provision. Asarco maintains that all five citations must be vacated in these cases.²

III. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Interpretation of the Safety Standard

This case appears to present an issue of first impression before the Commission. The issue boils down to what is meant by the phrase “Seat belts for surface haulage trucks” in the title for section 57.14131. Asarco contends that the title defines the scope of the safety standard. The title tells the world that the safety standard only applies to “surface haulage trucks” and to no other type of truck. Part 57 of the Secretary’s regulations contains the safety and health standards for underground metal and nonmetal mines. Section 57.1 explains that “part 57 sets forth mandatory safety and health standards for each underground metal or nonmetal mine, including related surface operations” The provisions of sections 57.14000 through 57.14219 (subpart M of part 57) contain safety standards for machinery and equipment. Most of the standards in subpart M do not contain language that limits their application to particular areas of the mine. Asarco maintains that the fact that section 57.14131 contains such limiting language demonstrates that the standard was intended to apply only to surface haulage trucks.

The Secretary takes the position that all haulage trucks that travel on the surface at underground mines are surface haulage trucks. She contends that the title to the standard identifies the area in which the standard applies rather than to the design of the truck. She believes that the fact that the Toro trucks were designed for underground use is irrelevant because the trucks were, in fact, used on the surface. Any haulage truck used on the surface is a “surface haulage truck” no matter what the manufacturer’s intent was when designing the truck.

The first inquiry is whether the language of the safety standard is clear on its face. It is significant that the body of the safety standard does not include any limiting language. It simply states that “[s]eat belts shall be provided and worn in haulage trucks.” The limiting language is provided only in the title. Nevertheless, the title of a safety standard provides notice of the scope of the regulation to mine operators. I find that the title of the safety standard is somewhat ambiguous. “Ambiguity exists when a [regulation] is capable of being understood by reasonably well-informed persons in two or more different senses.” *Island Creek Coal Co.*, 20 FMSHRC 14, 19 (Jan. 1998) (citation omitted). I believe that a reasonably informed person might interpret the title to section 57.14131 to mean that its scope is limited to trucks designed and used exclusively as surface haulage trucks. There can be no dispute that the cited haulage trucks were designed for underground use.

² For good cause shown, Asarco’s motion objecting to certain photographs and the captions for other photographs that were submitted by the Secretary is **GRANTED**.

Because the phrase “surface haulage trucks” is ambiguous, I must determine whether the Secretary’s interpretation of this phrase is reasonable. The Commission recently summarized the appropriate analysis in *Island Creek*, 20 FMSHRC at 18-19, as follows:

If ... a standard is ambiguous, courts have deferred to the Secretary’s reasonable interpretation of the regulation. *See Energy West Mining Co. V. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994). *Accord Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 321 (D.C. Cir. 1990) (“agency’s interpretation . . . is ‘of controlling weight unless it is plainly erroneous or inconsistent with the regulation’”) [citation omitted]. The Secretary’s interpretation of a regulation is reasonable where it is “logically consistent with the language of the regulation[] and . . . serves a permissible regulatory function.” *General Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citation omitted). The Commission’s review, like the courts’, involves an examination of whether the Secretary’s interpretation is reasonable. . . .

The issue is whether the Secretary’s interpretation is reasonable, not whether Asarco’s interpretation is more reasonable. The Secretary’s interpretation of a safety standard may be reasonable even if it diverges from what a “first-time reader of the regulation[] might conclude was the ‘best’ interpretation of [the] language.” *General Elec. Co.* at 1327.

I find that the Secretary’s interpretation that the title of the safety standard identifies the area in which the standard applies is reasonable. First, this interpretation is “consistent with the protective purposes of the Mine Act.” *Rock of Ages Corp. v. SOL*, 170 F.3d 148, 155 (2d Cir. 1999). The purpose of the safety standard is to protect persons driving haulage trucks on surface areas at underground mines. Including all haulage trucks that operate on the surface furthers this protective purpose. If, for example, a mine operator purchases used underground haulage trucks at a good price for use on the surface, the operator would be required to comply with section 57.14131, despite the fact that the trucks were designed for underground use. The hazards associated with driving haulage trucks on the surface are not mitigated by the fact that the trucks were designed for underground use.

Second, the Secretary has not taken conflicting positions with respect to her interpretation of the standard. She has previously maintained that haulage trucks and other equipment are subject to the provisions of sections 57.14131 or 57.14130 if they are used on the surface. In their depositions, MSHA Inspectors Ronald S. Goldade and Tyrone Goodspeed testified that they have issued similar citations in the past. (Goldade Depo. 33, 53; Goodspeed Depo. 54-56). In *Au Mining, Inc.*, 22 FMSHRC 771 (June 2000)(ALJ), the Secretary alleged a violation of section 57.14130(a) because a loader was not equipped with a roll-over protective structure (“ROPS”) or a seat belt. The loader brought ore out of an underground mine, dumped the ore on the surface, and then returned underground for another load. 22 FMSHRC at 776. It made up to 20 trips per

day. The mine operator argued that the loader was not “surface equipment,” as that term is used in the standard. The Secretary successfully argued that her interpretation was reasonable because the loader was used on the surface. Thus, the Secretary’s position in the present case does not present “the sort of “*post hoc* rationalization[.]” to which the courts will not defer.” *Azco Nobel Salt v. FMSHRC*, 212 F.3d 1301, 1305 (D.C. Cir. 2000) (citation omitted).

Third, the regulatory history of the safety standard supports the Secretary’s position. Section 57.14131 was promulgated in 1988 along with section 56.14131, which is the identical standard for surface mines that is entitled “Seat belts for haulage trucks.” 53 Fed. Reg. 32496 (August 25, 1988). As applied to underground mines, the preamble states that the “new standard requires that seat belts be provided and worn in haulage trucks at . . . surface areas of underground mines.” 53 Fed. Reg. at 32512-13. Before this standard was promulgated, seat belts were required only for surface equipment that was required to have ROPS. Because haulage trucks were not required to be equipped with ROPS, seat belts were not required. Although the preamble does not discuss haulage trucks that are used underground and on the surface, the clear implication is that any haulage trucks used on the surface at underground mines are required to comply with section 57.14131. This language envisions a use test not an equipment design test for coverage under the safety standard. Nothing in the preamble suggests that haulage trucks designed for underground use are not required to comply with the safety standard when they are used on the surface.

In sum, I find that the Secretary’s interpretation of the phrase “surface haulage trucks” to be reasonable. It effectuates the purpose of the safety standard by ensuring that drivers of haulage trucks are protected by seat belts. Although Asarco has taken steps to make sure that the Toro haulage trucks are segregated from the much larger haulage trucks used in the open pit, other conditions are present that create potential hazards to the drivers of the Toro trucks. Seat belts would help protect these drivers from injury. I limit my decision to the facts presented in this case. My holding on this issue and the notice fair issue, discussed below, might be different if the Toro haulage trucks were brought to the surface solely for repair and maintenance.

B. Fair Notice of the Secretary’s Interpretation

The Secretary is required to provide fair notice of the requirements of her safety and health standards. The Commission recently summarized this requirement *Island Creek*, 20 FMSHRC at 24, as follows:

Where an agency imposes a fine based on its interpretation, a separate inquiry may arise concerning whether the respondent has received “fair notice” of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313,1317-18 (Aug. 1995). “[D]ue process . . . prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.” *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). An agency’s

interpretation may be “permissible” but nevertheless fail to provide notice required under this principle of administrative law to support imposition of a civil sanction. *General Elec.*, 53 F.3d at 1333-34. The Commission [does not require] that the operator receive actual notice of the Secretary’s interpretation. Instead, the Commission uses an objective test, i.e., “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990).

Asarco maintains that the Secretary did not make any public statements, either in the form of recommendations or requirements, that would put operators on notice that she intends to apply section 57.14131 to underground haul trucks that operate on the surface. It points to the depositions of MSHA Supervisory Inspector Goldade and MSHA Inspector Horning in support of its position. These individuals testified that MSHA did not issue any policy statements to provide guidance to mine operators. Inspector Horning agreed that the title of the safety standard is confusing and suggested that mine operators “ask around” to find out if it applies to underground haulage trucks that operate on the surface. MSHA Inspector Eubanks stated that an operator could contact the local MSHA office for guidance. Inspector Eubanks stated that he was taught at an MSHA training class in 1992 that “whenever a haul truck is used on the surface it becomes a surface haul truck.” He further testified that he knows of no written material that contains such an interpretation. Asarco contends that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized that the Toro haulage trucks were covered by the safety standard taking into consideration the design of the trucks and the fact that they were primarily used underground.

The Secretary contends that the language of the standard provides adequate notice of its coverage. In addition, she argues that the language in the preamble for the standard provided notice to mine operators that any haulage truck used at surface areas of underground mines was covered by the safety standard. The Secretary states that her placement of the standard in both parts 56 and 57 provides notice that she intended the standard to apply to specified geographic locations rather than to particular truck designs. The Secretary also maintains that she is “not required to promulgate interpretations through rulemaking or the issuance of policy guidance, but may instead do so through litigation or enforcement.” (S. Reply 3 citing *National Wildlife Fed’n. v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997)). She states that her enforcement history provides notice of her consistent interpretation of the standard.

I find that the Secretary provided fair notice of the requirements of the standard as applied to the facts in these cases. The phrase “surface haulage trucks” appears only in the title of section 57.14131. But for the presence of this phrase, all haulage trucks at underground mines would be required to be equipped with the type of seat belts specified at SAE J386. A reasonably prudent person would first look to see if the phrase “surface haulage truck” is defined by the Secretary in 30 C.F.R. Part 57, in her program policy manual, or in any other policy statements. If the Secretary were using the phrase as a technical term of art to refer to a particular type of

haulage truck, one would expect to see a definition. The absence of a definition indicates to a reasonably prudent person that the Secretary did not intend the phrase to have a technical meaning. One would not expect to see the phrase defined if the Secretary intended it to mean a haulage truck that is used on the surface.

The preamble to the safety standard also provides a clue that the title does not have a technical meaning. It states that seat belts are required to be “provided and worn in haulage trucks at . . . surface areas of underground mines.” 53 Fed. Reg. at 32512-13. This language clearly suggests that the limitation in the title is geographic in scope. It does not impart any sense that the safety standard is limited to a particular type of haulage truck used on the surface. Reading that language, a reasonably prudent person would conclude that haulage trucks used on the surface are covered by the safety standard.

Asarco relies on the deposition transcripts of four MSHA inspectors to support its position. These inspectors acknowledge that the title of the safety standard is somewhat ambiguous. They agree that the Toro trucks contain features, such as roof fall protection devices, that clearly indicate that they are designed for underground use. This testimony does not establish that a reasonable prudent person would conclude that the Toro trucks are not covered by the section 57.14131. The reasonably prudent person test does not imply that the person would have recognized the specific requirement of the standard on his “first reading.” In some instances the reasonably prudent person may be required to put some thought to the matter. The large haul trucks that Asarco contends are covered by the standard are generally not used at underground mines. Section 56.14131 is applicable to large off-road haul trucks that are used at quarries and open pit mines. Asarco’s interpretation of section 57.14131 would significantly narrow its scope to the point that it would be applicable to very few haul trucks. The only haul trucks covered would be those designed for surface use that transport material from one point to another on the surface at an underground mine and those that are designed for surface use that are nevertheless used underground.

All of the inspectors testified that MSHA has consistently interpreted section 57.14131 to cover haul trucks that are used to haul material on the surface from the underground. MSHA looks at how the haul truck is used not the design of the truck to determine whether it must be equipped with an SAE seat belt. This interpretation is the most logical construction of the safety standard and would be understood by a reasonable prudent person. As Inspector Horning stated, a “reasonable operator should assume that if the truck is used on the surface, the [the safety standard] would apply.” (Horning Dep. 57). MSHA has issued similar citations at other underground mines that have apparently not been contested by mine operators.

Although this issue has not arisen with great frequency, the Secretary has been consistent in her application. Inspectors Goldade and Goodspeed testified that they have issued similar citations in the past. The judge’s decision in *Au Mining, Inc.*, provides notice of the Secretary’s interpretation of section 57.14130, a similar provision. Asarco argues that section 57.14130 helps its case because that provision lists types of equipment covered by the standard. Asarco states that it was reasonable for it to believe that the Secretary intended the phrase “surface

haulage trucks” to refer to a particular type of haulage truck. Its argument is not convincing. Section 57.14130(a) serves notice that certain types of equipment operating on the surface are required to have ROPS. Likewise, under section 57.14131, haulage trucks operating on the surface are required to have off-road seat belts.

This case does not present a situation in which the Secretary is offering a *post hoc* rationalization for MSHA’s actions. Inspector Eubanks stated that his 1992 training class included instruction on this safety standard that was consistent with the Secretary’s position here. Thus, the Secretary’s position reflects the “agency’s fair and considered judgment on the matter.” *Auer v. Robbins*, 117 S.Ct. 905, 912 (1997). The Secretary is not required to have a written document interpreting every safety and health standard she has promulgated. She is simply required to provide fair notice of the requirement of each standard. Although there is some ambiguity in the title for the standard, as discussed above, I find that a reasonably prudent person, after due consideration, would understand that haulage trucks used to transport material on the surface at an underground mine are required to meet the requirements of the safety standard, even when the truck is loaded underground and was designed to meet the conditions of an underground environment. Asarco’s contrary interpretation is overly technical and illogical.

C. The Application of SAE J386 to Asarco’s Toro Trucks.

Asarco argues that by its own terms, SAE J386 does not apply to the Toro trucks. SAE J386 states that it applies to “off-road, self-propelled work machines commonly used in construction, logging and, mining as referred to in SAE J1040c” (A. Motion at 25). That provision lists categories of work machines that are recommended for coverage under SAE J386. There is no question that the Toro trucks do not fall in any of these categories. Asarco argues that, for this reason, its Toro trucks were not required to comply with the requirements of section 57.14131. Asarco also argues that it was reasonable for it to rely on the language in SAE J1040c for guidance in the interpretation of the safety standard.

The Secretary argues that the plain language of section 57.14131(c) makes clear that the reference to SAE J386 is solely for the purpose of indicating the type of seat belt that must be installed in haulage trucks. The safety standard does not refer to any provision of the SAE guidelines for the purpose of establishing what types of equipment are covered by the standard.

I agree with the Secretary. The reference to SAE J386 in section 57.14131(c) is clear and unambiguous. Mine operators are directed to SAE J386 for the sole purpose of obtaining information about the type of seat belt that is required to be installed in haulage trucks. Section 57.14131(c) provides that “[s]eat belts required under this section shall meet the requirements of SAE J386. . . .” It was unreasonable for Asarco to assume that the SAE guidelines also delineate the types of off-road work machines to which the Secretary’s safety standard applies.

Finally, Asarco argues that Citation Nos. 7945743 and 7945735, alleging that there were no tethers connecting the seat belts to the floor of two trucks, must be vacated. It states that the use of tethers is permissive under SAE J386, Part III 5.1.2. (A. Motion at 30). It relies, in part,

on the decision of Chief Judge Barbour in *Daanen & Janssen, Inc.*, 18 FMSHRC 1796, 1802 (Oct. 1996). The parties stipulated, however, that “[a]t the time the citations were issued, the seat-belt assemblies in the Toro 40D haul trucks did not comply with SAE J386 (1985).” (Stip. ¶ 45). Consequently, this argument is not well taken and I therefore reject it.

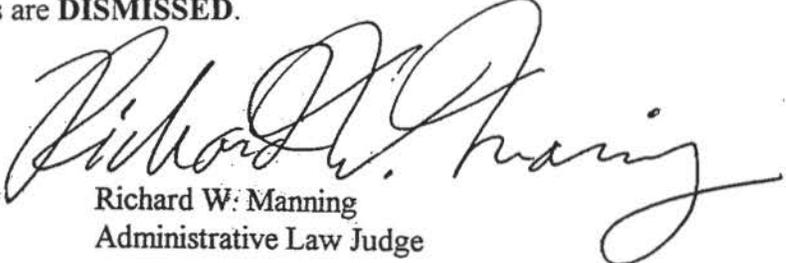
D. The Penalty Criteria of Gravity and Negligence.

The parties did not enter into stipulations concerning the inspectors’ evaluation of gravity and negligence. In section 104(a) citations, gravity, including the significant and substantial determination, and negligence are only considered when assessing a civil penalty under section 110(i) of the Mine Act. The Secretary submitted a two-page affidavit of Inspector Goldade, dated February 21, 2001, containing some evidence to support the inspectors’ determinations with respect to gravity and negligence. Asarco did not offer any specific evidence or argument on the gravity and negligence criteria, although many of the facts and arguments it presented on the merits would be equally applicable to these penalty criteria. In her reply to contestant’s motion for summary decision, the Secretary argues that I should credit her evidence and affirm the inspectors’ evaluation of the penalty criteria because Asarco did not offer any other evidence.

I reject the Secretary’s position because entering findings with respect to two of the six penalty criteria is beyond the scope of the motions for summary decision in these pre-penalty contest proceedings. I cannot assess civil penalties in these cases. Penalties assessed by Commission judges must “reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purposes of the Act.” *Hubb Corp.*, 22 FMSHRC 606, 611 (May 2000) (citations omitted). Inspector Goldade’s affidavit does not provide sufficient information for me to enter findings with respect to gravity and negligence. Consequently, I decline to do so. Once penalties are proposed for these citations and the penalty cases are assigned to me or another judge, the parties can consider how they wish to proceed with respect to the six criteria in section 110(i) and MSHA’s proposed penalties.

IV. ORDER

For the reasons set forth above, the notices of contest filed by Asarco Incorporated in these cases are **DENIED**. The Secretary established that Asarco violated 30 C.F.R. § 57.14131 as set forth in each citation, as modified. Citation Nos. 7945733, 7945734, 7945735, 7945743, and 7945587 are **AFFIRMED**. Because I did not make any findings with respect to the inspectors’ evaluation of the gravity and negligence criteria, this order does not apply to Section II, Parts 10 and 11, of the citations. Those issues can be resolved in the subsequent civil penalty case. Accordingly, these proceedings are **DISMISSED**.


Richard W. Manning
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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Telephone No.: 202-653-5454

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June 7, 2001

LUE A. WILSON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. CENT 2000-87-DM
	:	A. C. No. SC MD 99-15
v.	:	
	:	
SIDCO MINERALS,	:	
Respondent.	:	Mine: Sidco Mine

ORDER OF DISMISSAL

Before: Judge Barbour

On March 16, 2001, I issued an Order Lifting Stay, Order of Assignment, and Order to Show Cause why the above captioned case should not be dismissed. This case had been stayed pending the Commission's inquiry into the Complainant's allegations of misconduct against Mr. Bryce Denny, attorney for the operator. The Commission issued an order on November 2, 2000, terminating Mr. Lue Wilson's complaint against Mr. Denny (22 FMSHRC 1289), which led to the subsequent Order Lifting Stay in the present case.

The Complainant appears to allege that he was unlawfully terminated from his job in 1992. The Complainant did not file his complaint of discrimination with the Secretary until July 1999. This was long after the 60-day time limit required by the Act. The Commission has ruled that a late filing may be excused on the basis of "justifiable circumstance." *See Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21 (January 1984); *Herman v. IMCO Serv.*, 4 FMSHRC 2135 (December 1982). In light of these cases, I ordered the parties to show cause why this case should not be dismissed as untimely.

I have not received a response to my March 16, 2001 order. Therefore, I find the record contains no explanation why this case was late-filed and there being no justifiable circumstances apparent for the late filing, it is **ORDERED** that this case is **DISMISSED**.


David F. Barbour
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 11, 2001

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

DECISION ON REMAND

Before: Judge Feldman

This matter has been remanded for re-analysis of whether the working conditions faced by Bryce Dolan at F&E Erection Company (F&E) at the time of his April 16, 1996, resignation constituted a constructive discharge. 23 FMSHRC 235 (March 2001) (“*Dolan II*”). In resolving this issue the Commission has directed me to apply a two-step inquiry concerning whether “Dolan had engaged in a protected work refusal *and* whether [Dolan] faced ‘intolerable working conditions.’” *Id.* at 240-41 (emphasis in original). In its prior remand decision the Commission concluded that substantial evidence supported the conclusion that Dolan’s work refusal was protected. 22 FMSHRC 171, 177-78, 180 (February 2000) (“*Dolan I*”). Consequently, the remaining issue is “whether intolerable conditions existed such that a reasonable miner would have felt compelled to resign.” *Id.* at 176. For the reasons set forth below, I conclude that, although Dolan’s work refusal was protected, his discrimination complaint must be denied because his working conditions were not objectively intolerable at the time of his resignation.

My initial remand decision determined that Dolan’s working conditions were intolerable because Dolan was forced to choose between continuing to work in the face of a reasonably held perceived hazard, *i.e.*, lead exposure, or to quit his job. 22 FMSHRC 554, 558-59, (April 2000) (ALJ). The linchpin of my constructive discharge finding was Dolan’s reasonably held fears cultivated by F&E’s failure to provide personal protective equipment from late 1994 until March 1996. As the Commission noted, “Dolan’s initial fears in March 1996, at a time when F&E had provided no personal protective gear to Dolan’s crew, were reasonable . . . [and] F&E conceded as much at the hearing.” 22 FMSHRC at 177.

F&E knew Dolan and his crew were removing lead based paint from November 1994 through March 1996 without protective equipment or periodic air sampling. 20 FMSHRC 591, 595 (June 1998) (ALJ). F&E's failure to provide personal protective equipment created an atmosphere of cynicism and mistrust.¹ It was this atmosphere of suspicion that provided a reasonable basis for Dolan's belief that the protective equipment belatedly provided by F&E, as well as its offer of reassignment to non-lead abatement work, were inadequate and insincere. Under such circumstances, my initial remand decision determined that Dolan's working conditions were so intolerable that a reasonable person, similarly exposed to Dolan's history of unsafe working conditions, would have felt compelled to resign.² 22 FMSHRC at 177-78 ("*Dolan I*") (applying the "reasonable miner in Dolan's position" test). Consequently, the initial remand decision reinstated the grant of Dolan's discrimination complaint. 22 FMSHRC at 560.

In its current remand, the Commission rejected my findings of a constructive discharge based on Dolan's reasonably held fears. The Commission concluded my response to its initial remand was a restatement of the doctrine of a protected work refusal that ignored the constructive discharge question. 23 FMSHRC at 241. Consequently, the Commission again vacated my finding of discrimination and specifically directed me to determine whether "Dolan faced intolerable working conditions as of the date of his [April 16, 1996] resignation." *Id.* at 242 citing 22 FMSHRC at 177. In so doing, the Commission also directed that I "consider anew the impact of F&E's offer to reassign Dolan and other crew members to non-lead jobs." 23 FMSHRC at 241. In resolving the constructive discharge issue, consistent with the Commission's instructions, I have applied a "purely objective standard" to view the allegedly objectionable working conditions from the perspective of a reasonable employee familiar with lead abatement procedures who had not experienced Dolan's history of hazardous working conditions. 22 FMSHRC at 177, n.7.

¹ F&E's failure to provide personal protective equipment is disturbing particularly in view of the lead abatement training that it had provided for its employees that emphasized the hazards of lead poisoning and the need for personal protection. (*See Comp. Ex. 1*).

² Having previously ignored Dolan's potential lead exposure, it was incumbent on F&E to regain Dolan's confidence. For example, F&E could have provided Dolan with the opportunity to speak to Health and Safety Management, Inc. (HSM), F&E's environmental consulting firm, to assure Dolan that the personal protection equipment provided was adequate. In addition, F&E could have provided Dolan with an air supplied full-face respirator and/or heavy woven fire resistant overalls, even though the filtered full-face respirator and Tyvek suits may have been adequate. It was F&E's "take it or leave it" attitude in the face of its past failures that provides the basis for concluding that F&E failed to alleviate Dolan's reasonable fears. Had F&E taken the reasonable steps necessary to dissipate Dolan's fears, Dolan's continuing refusal to work would have become unreasonable and unprotected. *Secretary of Labor o/b/o Bush v. Union Carbide Corp.*, 5 FMSHRC 993, 998-99 (June 1983).

The Commission explained its concern regarding collapsing the protective work refusal question and the intolerable working conditions question into a single inquiry. The Commission stated:

[O]nce a miner engages in a protected work refusal based on his or her good faith, reasonable belief in the existence of a hazard, the operator must take steps to reasonably quell the miner's concerns. A situation could arise, however, where an operator has taken such measures, but the miner clings to his or her belief in the existence of a hazard and quits. In this situation, resorting to the largely subjective standard applied to work refusals would almost certainly turn the miner's quitting into a constructive discharge --- and this is essentially what our dissenting colleagues do in this case. In other words, a miner's continuing belief in a hazard would establish a constructive discharge even where the operator took reasonable steps to address the miner's concern.³ At its worst under this approach, a miner could prove a constructive discharge even **where the hazard in which he or she believed was illusory** and where the operator could not address his or her concerns because the hazard did not exist.

22 FMSHRC at 180 ("*Dolan I*") (emphasis added).

Thus, the Commission has directed me to determine whether Dolan's fears were illusory, or, whether his fears were based on objectively intolerable working conditions. In essence, the Commission has directed that I determine if an actual hazard in fact existed at the time of Dolan's April 16, 1996, resignation.

As discussed below, the evidence fails to establish that Dolan suffers from an identifiable physical impairment that is related to his lead abatement employment at F&E. The evidence also fails to demonstrate that the personal protection measures taken by F&E when Dolan resigned on April 16, 1996, were inadequate, or, that the working conditions faced by Dolan otherwise were objectively intolerable.

³ Unlike the Commission's hypothetical, the Commission has concluded that F&E failed to address Dolan's concerns in a way that should have alleviated Dolan's fears. 22 FMSHRC at 177-78 ("*Dolan I*"); 23 FMSHRC at 238 ("*Dolan II*"); *Gilbert v. FMSHRC*, 866 F.2d 1433, 1441 (D.C. Cir. 1989).

Discussion

I. Dolan's Medical Condition

As a threshold matter, while Dolan's failure to develop lead poisoning would not be dispositive of whether his working conditions were intolerable, a confirmed diagnosis of lead poisoning, supported by blood chemistry or other objective clinical findings, would render Dolan's working conditions intolerable *per se*. As the Commission noted, "the judge did not enter any findings concerning the nature or cause of Dolan's disability." 23 FMSHRC at 244 ("*Dolan II*"). To ensure that the record is complete, on April 20, 2001, following a telephone conference with the parties, I issued an Order requesting Dolan to provide all pertinent medical records from April 16, 1996, to the present, including physical examination findings, diagnoses, and any objective clinical studies and laboratory results, including but not limited to blood chemistry findings, to support such diagnoses. The Order also requested Dolan to provide copies of pertinent Texas Workers' Compensation Commission decisions concerning his claim for workers' compensation benefits. The Order established a filing schedule for Dolan's submission and F&E's reply.⁴

In a decision dated June 11, 1999, a Hearing Officer of the Texas Workers' Compensation Commission determined that Dolan's work history included exposure to toxic chemicals. After considering the relevant medical evidence, the hearing officer concluded Dolan's chemical exposure resulted in a "compensable injury in the form of an occupational disease on March 27, 1996." (*Dolan's Resp.* at 143).⁵ The workers' compensation decision determined Dolan was disabled from August 14, 1996, and continuing through July 24, 1997. (*Id.* at 143-44). Significantly, the workers' compensation decision does not identify any specific occupational disease.

Dolan's Workers' Compensation decision was affirmed by a Texas Workers' Compensation Commission Appeals Panel on August 18, 1999. (*Id.* at 145). In affirming the decision, the appeals panel, noting conflicting medical opinions, concluded the hearing officer has broad discretion with respect to the weight and credibility to be accorded to evidence.

⁴ Although the medical records and Texas Workers' Compensation Commission decisions submitted by the parties have not been formally admitted into evidence inasmuch as they have been provided during this remand process, there have been no objections to their authenticity and they otherwise have not been objected to. Therefore, I have considered these documents in the disposition of this matter.

⁵ References to information provided by Dolan an F&E in response to the April 20, 2001, Order requesting additional information and documentation will be shown as "*Dolan's Resp.*" or "*F&E's Resp.*" followed by the page number or exhibit.

(*Id.* at 147). The appeals panel, citing previous Texas Workers' Compensation Commission cases, determined the hearing officer "could determine that an injury occurred whether or not there was objective evidence of injury." (*Id.* at 148).

The Texas Workers' Compensation Commission decision is relevant evidence. However, considerations concerning the weight to be given to the hearing officer's decision and credibility findings therein are analogous to the evidentiary considerations given to arbitration decisions. The Commission has long ago held that:

The Hearing before the administrative law judge is still *de novo* and it is the responsibility of the judge to render a decision in accordance with his own view of the facts, not the arbitrator. Arbitral findings, even those addressing issues perfectly congruent with those before the judge, are not controlling on the judge.

Secretary of Labor o/b/o David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2795 (October 1980).

In weighing the evidentiary significance of external adjudicative decisions it is important to weigh the adequacy of the record upon which the decision is based. *Id.* While the medical documentation contains subjective complaints of muscle weakness and nausea, it is noteworthy that Dolan's medical records lack any significant objective laboratory or clinical findings that would support a diagnosis of lead poisoning or other chronic illness related to toxicity. In this regard, there is no evidence of muscle atrophy, significant impairment of sensation, significant cognitive loss,⁶ or, abnormal blood chemistry findings.

The diagnostic work-up performed by Dolan's personal physician Dr. Arch I. Carson shortly after Dolan resigned in April 1996 is particularly instructive. Dolan was initially seen by Carson on May 17, 1996, for a variety of subjective complaints including joint pains, tremor and severe headache. (*Dolan's Resp.* at 4). At that time Dolan related a history of toxic fume exposure. (*Id.* at 5). Physical examination revealed no obvious distress, neurological testing was unremarkable, and there were no clinical findings of muscle wasting or weakness. (*Id.* at 6). All blood and urine tests were within normal limits and showed no detectible presence of abnormal levels of heavy metals, including lead, cadmium, arsenic, mercury, and chromium with the exception of a very mildly elevated plasma chromium level of unclear significance. *Id.* Dr. Carson noted that the mildly elevated chromium level was unlikely attributable to workplace exposure in light of normal values of heavy metals. (*Id.* at 6-7).

Dolan was again seen by Dr. Carson on July 9, 1996, with continuing complaints of joint pains, numbness, goose bumps and chills. (*Id.* at 7). Dolan reported that co-workers had similar

⁶ Dolan currently works as a substitute teacher for the Cuero, Texas Independent School District. (*Dolan's Resp.* at 152).

symptoms.⁷ (*Id.*) On July 27, 1996, Dr. Carson discussed Dolan's lab results with him assuring him that heavy metal toxicity was essentially ruled out as a cause of his symptoms. (*Id.*)

Dolan was again seen on October 15, 1996. Dr. Carson noted:

Mr. Dolan's symptoms of joint pains and migrating myalgias have improved significantly since his last visit. I believe it is possible for him to return to work without significant workplace restrictions at this time. I believe it will be beneficial for him to get back into a workplace environment where he can engage in gainful employment while continuing his recovery. His response to therapy with nonsteroidal and anti-inflammatory agents suggests an inflammatory nature of his symptoms.

(*Id.* at 7-8). Dr. Carson's "presumptive diagnoses" were: 1. noxious vapor inhalation injury; 2. metal polymer fume fever; 3. chronic arthritis/arthritis NOS; 4. reactive anxiety; 5. reactive depression; and 6. bilateral carpal tunnel syndrome. (*Id.* at 33).

Dolan's blood levels were periodically monitored for lead by F&E on several occasions. Dolan's micrograms of lead per deciliter of blood were: 10 on August 11, 1995; 6 on November 17, 1995; 17 on February 8, 1996; and 8 on April 16, 1996. These levels were below the 40/30 micrograms per deciliter of blood considered to be the threshold levels for concern by the Occupational Safety and Health Administration (OSHA), and below the 50 microgram per deciliter of blood level that requires a worker's removal from lead abatement work.⁸ Given the OSHA standards concerning blood lead level action thresholds, these readings are not evidence of toxicity. Moreover, these blood level readings have not been relied on by any physician to support a specific diagnosis of lead toxicity.

Finally, the Texas Workers' Compensation Commission assigned Dr. Stephen Brooks, a consulting physician, to determine the nature and extent of Dolan's impairment. (*F&E's Resp.* at 10-11). Dr. Brooks examined Dolan on February 12, 1999, for the purpose of establishing an

⁷ There is no evidence of any relevant identifiable medical condition or diagnosis concerning Dolan's co-workers.

⁸ OSHA standards reflect that harmful effects from exposure to lead do not usually occur unless an employee's blood level exceeds 40 micrograms per deciliter (40 $\mu\text{g}/\text{dl}$) of blood. The standards do not require temporary removal from lead work until a worker's blood level reaches 50 $\mu\text{g}/\text{dl}$. (29 C.F.R. 1926.62, App. A; Resp. Ex. 1). Such an employee may resume lead work when two consecutive blood tests indicate the employee's blood level is at or below 40 $\mu\text{g}/\text{dl}$. *Id.* However, the standard provides that the blood level of employees intending to have children should be maintained below 30 $\mu\text{g}/\text{dl}$. *Id.*

impairment rating and the date of Dolan's maximum medical improvement. Dr. Brooks summarized his examination findings as follows:

Mr. Dolan complains of numerous symptoms, and he states that he feels that he is worsening, despite having been removed from the workplace environment for a period of 34 months. However, after interviewing and examining Mr. Dolan and reviewing the records available to me in this matter, I am unable to find objective evidence of a ratable disorder other than carpal tunnel syndrome.

(*Id.* Ex.4). Dr. Brooks determined Dolan had a 5% impairment rating and that Dolan reached his maximum medical improvement on June 18, 1998. (*Id.*)

In the final analysis, Dolan asserts he suffers from job related toxicity although there is no material evidence of toxic substances in his body. While Dolan may sincerely believe that his physical complaints are the result of his employment, as the proponent in this matter, Dolan has failed to satisfy his burden of proof. Consequently, in the absence of a diagnosis of an identifiable occupational disease supported by objective clinical findings, the evidence fails to establish that Dolan's work conditions on April 16, 1996, were intolerable *per se* because his employment was the cause of his disability.

II. Dolan's Working Conditions

Having concluded that Dolan's working conditions were not *per se* intolerable, the analysis shifts to application of the objective standard to determine whether Dolan's working conditions as they existed on April 16, 1996, were intolerable. The objective standard is a legal standard that is based on conduct and perceptions external to a particular person. *Black's Law Dictionary* 1413 (7th ed. 1999). For example, the reasonable person standard is considered an objective standard because it does not require a determination of what a party to a law suit was thinking. *Id.* Thus, applying the objective standard requires considering whether a reasonably prudent person familiar with welding and lead abatement work precautions and practices would have considered Dolan's April 16, 1996, working conditions intolerable. See *Ideal Cement Company*, 12 FMSHRC 2409, 2415 (November 1990) (application of "reasonable person test" to evaluate particular factual settings).

In applying the reasonable person test to resolve the constructive discharge question, it is important to focus on the term "intolerable working conditions." Working conditions are "intolerable" if they are "unbearable" or if they are "not capable of being borne or endured." *Webster's Third New International Dictionary* 1185 (1993 edition). As the court stated in *Simpson v. FMSHRC*, 842 F.2d 453, 463 (D.C. Cir. 1988), "the requirement that conditions be 'intolerable' to support a constructive discharge will not easily be met."

Turning to Dolan's working conditions, as previously noted F&E does not deny that Dolan's employment conditions were potentially hazardous prior to March 1996, when Dolan was burning lead paint with a torch without any respiratory or other personal protection equipment. However, the issue for resolution is whether Dolan's use of a full-face respirator, Tyvek suits and HEPPA vacuums on April 16, 1996, were inadequate measures to protect Dolan from lead exposure.

As a general proposition, OSHA's permissible exposure limit (PEL) standard prohibits employee exposure to lead concentrations in excess of 50 micrograms per cubic meter ($50 \mu\text{g}/\text{m}^3$) of air averaged over an 8-hour period. (29 C.F.R. § 1926.62; Comp. Ex.1). Employees exposed to lead levels in excess of the PEL must wear respiratory protection. Under the OSHA standard, a half-mask air purifying respirator with high efficiency filters protects an employee from exposure levels up to $500 \mu\text{g}/\text{m}^3$. (29 C.F.R. § 1926.62, Table 1). Similarly, a full-face purifying respirator with high efficiency filters, or a full-face supplied air respirator operated in demand mode, provides employee protection up to $2,500 \mu\text{g}/\text{m}^3$. *Id.*

Thus, evaluation of the effectiveness of the full-face respirator used by Dolan requires a determination of the degree of exposure. In response to Dolan's initial safety complaints, Dolan was provided with a half-face respirator that, as noted, provides protection to $500 \mu\text{g}/\text{m}^3$. Air sample monitoring taken from March 20 through March 22, 1996, in the vicinity of Dolan and his crew by HSM, reflected that Dolan, while using the cutting torch, was exposed to averages of $467 \mu\text{g}/\text{m}^3$ on March 20, and $136 \mu\text{g}/\text{m}^3$ on March 21, in excess of OSHA's PEL of $50 \mu\text{g}/\text{m}^3$ averaged over an 8 hour period. Other crew members not using the cutting torch during this period were exposed to impermissible levels of average lead concentration ranging from $60 \mu\text{g}/\text{m}^3$ to $136 \mu\text{g}/\text{m}^3$. (Exs. C-3, C-28).

As a result of its monitoring results, HSM recommended that the employee using the cutting torch be furnished with a full-face respirator with high efficiency filters while the other crew members used half-face respirators. Thus, the full-face respirator provided to Dolan, and the half-face respirators furnished to Dolan's crew members not using a cutting torch, provided protection by a factor of approximately five times the amount of actual exposure.

In support of his assertion that the full-face respirator was inadequate to protect him from the hazards of toxic metal exposure, Dolan relies on the testimony of Robert Miller, an industrial hygienist. While the evidence supports Miller's testimony that half-face respirators did not provide adequate protection to personnel, such as Dolan, using a cutting torch, F&E ultimately provided Dolan with a full-face respirator prior to his April 16, 1996, resignation. Miller's testimony that respirators may leak due to poor fit, or perspiration, was credited at the hearing to support Dolan's asserted good faith belief that a hazard continued to exist. However, Miller's general concern about the effectiveness of respirators, a means of protection commonly used in industry, does not overcome the fact that, according to OSHA standards, the full-face respirator was adequate protection given Dolan's level of exposure. Accordingly, the evidence, when viewed objectively, does not reflect that Dolan's use of a full-face respirator was an intolerable working condition.

Tyvek suits are flame retardant, thin, disposable coveralls made of spun olefin. Miller opined that the Tyvek suits furnished to Dolan were inadequate protective clothing. In this regard, Miller testified that Tyvek suits were not an “optimal solution” because of a propensity of spun olefin materials to develop holes from tears or burns posing a contamination risk to clothing underneath. 22 FMSHRC 178. Miller recommended fire resistant overalls as a better solution. Once again, Miller’s testimony supports the good faith nature of Dolan’s safety fears, not the inappropriateness of Tyvek use. Fire resistant overalls woven with heavy material, as recommended by Miller, undoubtedly would provide a greater level of protection despite their obvious non-disposable disadvantage. However, the issue before me on this remand is whether Dolan’s use of Tyvek suits constituted objectively “unbearable” working conditions, not whether there was a more suitable alternative. In this regard, Dolan’s training instructions concerning safe lead abatement procedures included the utilization of Tyvek suits. (Comp. Ex.1) .

More importantly, ALCOA’s *Handbook for Lead Activities*, proffered by Dolan, specifically addresses the propriety of disposable Tyvek protective clothing. ALCOA’s *Handbook for Lead Activities* applies to all outside contractors as well as ALCOA employees.⁹ ALCOA’s handbook states:

PROTECTIVE CLOTHING

When you are required to work with lead containing material, protective work clothing will be provided. Facilities to change into and out of the protective clothing will be provided. Shower facilities for decontamination shall also be provided. **The typical protective clothing will be disposable coveralls such as Tyvecs** (sic).

(Comp. Ex. 12) (emphasis added). Consequently, the evidence fails to establish that F&E’s reliance on Tyvek overalls as a means of personal protection is contrary to industry standards. Accordingly, Tyvek use cannot be deemed to be intolerable.

In summary, the evidence fails to support the conclusion that a reasonable person familiar with welding and lead abatement work would consider the use of a full-face respirator, Tyvek overalls and HEPPA vacuums as a means of personal protection against lead exposure to be intolerable working conditions that fail to satisfy OSHA, or general industrial safety standards. Accordingly, on balance, Dolan has failed to demonstrate, by a preponderance of the evidence, that he faced intolerable working conditions at the time of his April 16, 1996, resignation.

⁹ Dolan was employed by F&E as a contract employee at ALCOA’s Point Comfort Plant.

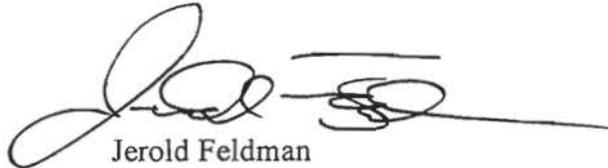
III. F&E's Reassignment Offer

Finally, the Commission has directed that I reconsider Dolan's rejection of F&E's offer of reassignment to non-lead abatement activities in light of the objective constructive discharge issue. As previously discussed, my initial remand decision credited Dolan's skepticism concerning the sincerity of F&E's offer of reassignment in view of Dolan's reasonably held belief that he had been exposed to unsafe working conditions, and F&E's failure to quell Dolan's fears. From Dolan's perspective, it is not difficult to understand his feelings that a reassignment to non-lead work would be temporary and only postpone his inevitable return to conditions he believed to be unsafe.

However, the Commission has directed that I revisit the reassignment issue using an objective standard to consider the overall conditions Dolan faced at the time of Dolan's resignation. 23 FMSHRC 242 ("*Dolan II*"). Given F&E's responses to Dolan's safety complaints consisting of performing air sampling, as well as providing respirators and protective clothing that have not been shown to violate industry standards, applying the reasonable person test, Dolan's refusal to accept F&E's offer of reassignment was objectively unreasonable.

ORDER

Consistent with the above discussion, Bryce Dolan's April 16, 1996, work refusal was protected activity under section 105(c) of the Mine Act. However, the working conditions faced by Dolan at the time of his April 16, 1996, resignation were not intolerable. Consequently, Dolan's protected work refusal did not constitute a constructive discharge. **ACCORDINGLY**, Bryce Dolan's discrimination complaint **IS DENIED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 11, 2001

REINTJES OF THE SOUTH, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. CENT 99-152-RM
	:	Citation No. 7867324; 1/21/99
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. CENT 99-154-RM
ADMINISTRATION (MSHA),	:	Citation No. 7867336; 2/2/99
Petitioner	:	
	:	Ormet Corporation
	:	Mine ID 16-00354-FDP
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-195-M
Petitioner	:	A.C. No. 16-00354-05501 FDP
v.	:	
	:	Docket No. CENT 99-335-M
REINTJES OF THE SOUTH, INC.,	:	A.C. No. 16-00354-05505
Respondent	:	
	:	Ormet Corporation

ORDER LIFTING STAY
AND
DECISION APPROVING SETTLEMENT

It is **Ordered** that the Stay Order previously entered in these cases is hereby lifted.

It is **further Ordered** that the Decision Approving Settlement, wherein the Respondent agreed to pay the full penalty of **\$55,131.00**, which was issued on June 20, 2000, and subsequently vacated, be hereby reissued as of the date of this **Order**.


Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

June 21, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-37
Petitioner	:	A. C. No. 15-11704-03562
v.	:	
	:	
LODESTAR ENERGY, INC.,	:	
Respondent	:	Preparation Facilities

DECISION

Appearances: Arthur J. Parks, Conference and Litigation Representative, U.S. Department of Labor, Madisonville, Kentucky, on behalf of Petitioner;
Stanley S. Dawson, Esq., Lodestar Energy, Inc., Lexington, Kentucky, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1994), the “Act,” charging Lodestar Energy Inc. (Lodestar) with one violation of the mandatory standard at 30 C.F.R. § 77.207 and proposing a civil penalty of \$55.00 for the alleged violation. The general issue before me is whether Lodestar violated the cited standard as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation No. 7642691 alleges a violation of the standard at 30 C.F.R. § 77.207 and charges that “sufficient illumination was not being provided in the working area of the slurry pond where refuse was being dumped to cover up the slurry.” The cited standard provides that “[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and working areas.” The Commission held in *Secretary v. Capital Aggregates Inc.*, 3 FMSHRC 1338 (June 1981) that what constitutes “illumination sufficient to provide safe working conditions” requires a factual determination based on the working conditions in a cited area and the nature of illumination provided.

Inspector Keith Ryan of the Department of Labor’s Mine Safety and Health Administration (MSHA), has been a surface mine inspector for eight years. He has an Associate Degree in Mining Technology and seven years mining experience. On July 26, 2000, Ryan was

conducting a regular inspection at the Lodestar Preparation Facilities accompanied by a miner's representative. The miner's representative did not testify. During the course of his inspection he proceeded to the slurry pond refuse area - - a holding pond that collects a mixture of water and coal slurry. The slurry pond was being covered with refuse material pursuant to the operator's dumping plan. Trucks would back up to a barrier zone marked by a 55-gallon drum identified with reflective tape. After dumping, a bulldozer would push the material over the slurry pond. Ryan did not observe the truck at issue back past the drum marker. He assumed that the area into which the truck was backing was hard-packed and therefore he considered that an accident would be unlikely. He therefore did not characterize the violation as "significant and substantial."

According to Inspector Ryan, although the terrain over which the truck was backing was hard packed, it was uneven and rutted with a danger of sinkholes. He observed that the truck had lights on both the front and back but he was concerned whether the driver could see when backing up. He did not "feel" he had sufficient lighting to back up. Ryan thought there was only one backup light on the truck and that the light, comparable to a standard automobile headlight, was covered with dirt and mud. There was a portable light plant approximately 50 to 75 yards from the dumping area, but it was not then being utilized.

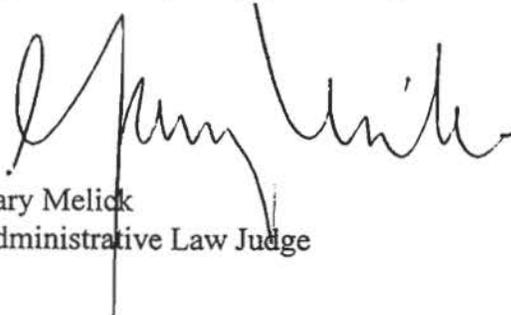
Lodestar truck driver Paul Harmon testified that he was driving the cited Euclid 50-ton truck that night. Harmon testified that the truck had two backup lights (depicted in the upper right hand photograph of Joint Exhibit No. 2) thereby contradicting the inspector's testimony. Harmon further testified that he had performed a pre-operational check that evening and at that time cleaned the lights. Harmon had no problem seeing that night. He noted that the light plant was present but that he preferred it not being used because it actually impaired his visibility. He had no difficulty seeing the barrel marking the dump area.

Third shift Lodestar foreman Harold Hunt testified that he personally examined the truck's two 150 watt backup lights and found them to be clean. He later met with Inspector Ryan after the citation had been issued and told him that it was his practice to leave the decision to use the portable lights to the employees discretion.

The Secretary has the burden of proving a violation by a preponderance of the evidence. In this case I find that the Secretary has not met her burden of proof. The citing inspector testified that he was standing adjacent to the portable light plant when he made his observations that the lighting was inadequate behind the cited dump truck. Admittedly, this point of observation was some 50 to 75 yards away from the truck and the cited area was at least partially obstructed from view by the truck itself. (Joint Exhibit No. 1). I therefore can give but little weight to the inspector's observations in this regard. I also find credible the photograph (Joint Exhibit No. 2) and testimony of truck driver Harmon that the cited truck had two backup lights providing sufficient illumination, thereby further discrediting the inspector's observations in this regard. Under all the circumstances I give greater weight to the testimony of truck driver Harmon and find that the Secretary has not sustained her burden proving the violation at issue. Citation No. 7642691 must accordingly be vacated.

ORDER

Citation No. 7642691 is hereby vacated and these civil penalty proceedings dismissed.



Gary Melick
Administrative Law Judge

Distribution: (By Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 25, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, on behalf of	:	
GARY DEAN MUNSON,	:	Docket No. WEVA 2000-58-D
Complainant	:	MORG-CD-2000-01
v.	:	
	:	Federal No. 2
EASTERN ASSOCIATED COAL CORP.,	:	Mine ID 46-01456
Respondent	:	

DECISION ON LIABILITY

Appearances: Douglas N. White, Esq., Associate Regional Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Rebecca Oblak Zuleski, Esq., Furbee, Amos, Webb & Critchfield, P.L.L.C., Morgantown, West Virginia, for Respondent.

Before: Judge Zielinski

This matter is before me on a complaint of discrimination filed by the Secretary on behalf of Gary Munson pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(c)(2). The complaint seeks an order requiring Respondent, Eastern Associated Coal Corporation (EACC) to reinstate Munson as an employee and other relief including back pay and benefits, as well as a civil penalty in the proposed amount of \$8,500.00. A hearing was held in Morgantown, West Virginia on November 28, 2000 and the parties submitted briefs following receipt of the transcript.¹ The Secretary had previously filed an Application for Temporary Reinstatement on behalf of Munson. A hearing was held on the application and on March 10, 2000, an order was issued directing that Munson be temporarily

¹ Respondent sought to introduce transcripts of depositions of Donald Livengood, Frank Peduti, Richard Eddy, Stanley Eddy and James Taylor. The Secretary's objections to those exhibits were sustained and all of those witnesses subsequently testified at the hearing. Following briefing, those evidentiary rulings were reviewed and the views of the parties expressed during a recorded telephonic conference on June 7, 2001, were considered. The original evidentiary rulings were reaffirmed. See Commission Procedural Rule 1(b) and Fed. R. Civ. P. 32(a) and 43(a).

reinstated pending completion of the investigation of his allegations and final decision on any formal complaint that might be filed.² The parties have stipulated that the record of proceedings from the temporary reinstatement hearing be included in the record of this case. For the reasons set forth below, I find that Respondent discriminated against Munson in violation of the Act, and direct the parties to confer and attempt to reach agreement on the relief to be awarded to Munson and on the amount of an appropriate civil penalty.

Findings of Fact

Gary Munson was discharged from employment by EACC on December 6, 1999. He had been employed by EACC for 28 years and for the three years prior to his discharge held the position of control room operator in the preparation plant working the afternoon shift. Munson was a good worker. He was not regarded as a person with attendance problems, had no disciplinary record and there were no complaints about his work performance. Throughout his tenure with EACC, Munson was active in bringing complaints to management about safety and union contract issues. There is no dispute that he frequently raised safety concerns at, or in conjunction with, weekly safety meetings held by his immediate supervisors, foremen Stanley Eddy and Donald Livengood.³ When his safety concerns were not addressed in a timely fashion, Munson complained about the inaction and told his supervisors that he would call the complaints in to the Department of Labor's Mine Safety and Health Administration (MSHA) on a confidential complaint line, referred to as the "code-a-phone." He posted the MSHA phone number openly at his work station. He also raised concerns about inaction with union officials in EACC's safety office in the presence of EACC managers, stating that he would call MSHA and had done so in the past. Munson's foremen had told him that his safety and contract complaints could result in the mine being shut down. Munson also raised safety concerns with Frank Peduti, EACC's manager of preparation and electrical engineering. Peduti occasionally called meetings to discuss issues and, like other management officials, did not like to have "code-a-phone" complaints made, preferring that employees' safety concerns be handled "in-house" rather than through the more disruptive "code-a-phone" complaint process and its attendant investigation by MSHA. Munson did not raise safety concerns through the formal union contract grievance process because he was unaware that he could file a grievance on a safety complaint.

² The Temporary Reinstatement Proceeding was conducted under Commission Docket No. WEVA 2000-31-D.

³ As control room operator, Munson was required to start work 15 minutes earlier than other shift workers and was unable to attend the safety meetings held at the beginning of the shift. The foreman would generally speak individually with Munson after the meeting, giving him a synopsis of the meeting and an opportunity to provide input.

Munson did file grievances related to labor contract issues and EACC records showed that for calendar years 1998 and 1999 he had filed 22 grievances over various labor matters, substantially more than any other miner at the preparation plant. Munson's foremen had told him that his grievances and safety complaints could result in the plant being shut down. Munson was authorized by the union to accompany MSHA and state mine inspectors on inspections of EACC's surface facilities. Because the inspections usually started on the day shift and initially focused on the underground operations, his involvement generally lasted only an hour or two, during which he pointed out any safety concerns then existing. He performed this function when a member of the union's safety committee was not available, which limited his involvement to no more than two or three inspections in a year.

The developments that lead to Munson's discharge commenced on Friday, November 19, 1999, when he did not report to work his assigned shift. He had told his foreman, Stanley Eddy, the previous day that he was going to purchase a "four wheeler" on the 19th and that he might have trouble getting to work if he encountered delay in obtaining a title and registration for the vehicle. He was told to come in if he was going to be less than sixty minutes late. A miner could report tardy by up to sixty minutes without significant repercussions. Munson encountered delays in purchasing and registering the vehicle and did not report to work on November 19, 1999. He did not call in and specifically report that he would not be in or request a personal vacation day. He was not scheduled to work that Saturday or Sunday and had applied for vacation days⁴ for Monday through Wednesday, November 22-24, 1999, to go hunting. Like many of the employees at EACC, Munson was an avid deer hunter and had taken off that first week of the firearm deer season, referred to as "gun week," for several years. Normal mining operations were not scheduled for the Thanksgiving holiday period, November 25 and 26, 1999.

In accordance with required procedure, his application for vacation days had been submitted prior to January 1999 and decisions were made at that time based upon the number and seniority of persons applying for vacation on a particular day. His request for vacation was approved for November 22 and 24, but was denied for the 23rd, and he was given a form noting the decisions made on his vacation requests. He inadvertently had referred to his 1998 vacation leave schedule, mistakenly thought that he had also been granted a vacation day on November 23, 1999, and did not come in to work.⁵ On the 18th, Stanley Eddy had inquired who

⁴ With his seniority level, he was entitled to specified numbers of "graduated" and "floating" days off. In addition, he was entitled to 5 "personal days" off, which he did not need management's permission to take. It appears that as of November 19, 1999, Munson had at least one personal day remaining.

⁵ EACC argues that Munson's absence on November 23, 1999, was not inadvertent, but, rather, was an attempt to secure a day off to which he was not entitled. I reject that argument. Following his discharge, Munson prevailed in an administrative claim for unemployment compensation benefits that was opposed by EACC. The administrative law judge who decided the claim held that EACC had failed to prove that Munson had been discharged for

was going to be working the following short Thanksgiving week, and Munson indicated that he had scheduled days off. The fact that his vacation request for the 23rd had been denied was not raised at that time. On or around November 24, his foreman called him and asked that he sign up to work the holiday on Friday, November 26, 1999. Despite the opportunity for triple pay, he declined, but did agree to work the following day, Saturday, and otherwise worked his normal schedule the following week. At the beginning of his shift on December 6, 1999, he was called to a meeting and served with a letter advising him that he was suspended with the intent to terminate his employment for missing two consecutive work days without a viable excuse.

The formal policies for addressing absenteeism at EACC are found in the National Bituminous Coal Wage Agreement of 1993. Article XXII, Section (i) "Attendance Control" provides in pertinent part:

(4) Absences of Two Consecutive Days

When any Employee absents himself from his work for a period of two (2) consecutive days without the consent of the Employer, other than because of proven sickness, he may be discharged. * * *

The 19th and 23rd were considered consecutive days for Munson, even though there were intervening weekend days and one scheduled vacation day. The term "two (2) consecutive days" had been interpreted in a prior arbitration proceeding to mean two consecutively scheduled work days. Not surprisingly, neither Munson nor his foremen initially considered his absences to have been on consecutive days. As the language indicates, EACC had the discretion to terminate an employee who missed two consecutive days, i.e., the significance of the word "may" was that termination was "not automatic."

Subsection (2) of the contract describes a procedure to address employees who accumulate unexcused absences. An employee who accumulates six days of unexcused absences in a 180-day period or three days of unexcused absences within a 30-day period is designated an "irregular worker" and is subject to "progressive steps of discipline." If an "irregular worker" has an unexcused absence within 180 days of his last unexcused absence he may be given a written warning, if another unexcused absence occurs within 180 days of the warning, he may be suspended for 2 working days and if another unexcused absence occurs within 180 days of the suspension, he may be suspended with intent to discharge.

an act of misconduct. Munson would not have been paid for the unexcused absence and could easily have preserved his pay status and taken the day off by taking one of his personal days. All he had to do was to call in that morning and leave a message on a recording machine. In any event, there is no evidence that Munson's termination was based on a suspicion that he had knowingly subjected himself to discharge by taking two consecutive, unexcused days off.

In addition to these formal policies, EACC had for many years applied an informal, procedure referred to as “last chance agreements.” Under this procedure, an employee who was subject to discharge would be given a “last chance” to retain his job, by entering into an agreement to maintain required attendance and possibly take other actions to address the cause of his absenteeism. Whether an employee subject to discharge would be given a last chance agreement was within the discretion of EACC. In a 1989 arbitration decision, it had been held that because some employees had been discharged without being offered last chance agreements, there was no legitimate expectation that a last chance agreement would automatically be offered. That same decision noted that in determining whether to offer a last chance agreement, the employer considered factors such as, “whether an employee’s poor attendance is of recent origin or has been a longstanding problem” and whether, in light of the assurances made by the employee, there was a reasonable expectation that if given a last chance agreement the employee “will develop into a reliable member of the work force.”⁶

EACC records indicate that approximately 38 last chance agreements had been entered into between December 14, 1980 and February 4, 1999. A summary of the agreements indicated that the underlying reason for the disciplinary action was generally absenteeism. On seven occasions the absenteeism was related to a substance abuse problem. Sixteen of the agreements involved unexcused absences on two or more consecutive days and the discipline imposed in conjunction with the last chance agreement ranged from a 1-day suspension to an 18-day suspension. In some instances, it appears that employees were allowed to substitute vacation or personal days in lieu of actual suspension.

Examples of circumstances in which last chance agreements were entered into included a December 9, 1997 agreement with an employee who had seven unexcused absences over a sixteen day period, including two absences of three consecutive days, because he had misunderstood that his vacation day requests had been disapproved. Another employee who had two consecutive unexcused absences was allowed to enter into a last chance agreement in November of 1998. Other examples included an employee who misunderstood the consequences of consecutive absences because he was considered developmentally slow; an employee who had a substance abuse problem related to the death of his wife and needed only a short period of employment to qualify for retirement; and, an employee who misunderstood the pre-scheduling of vacation day policy, had vacation days available to take and needed only one more year to qualify for retirement.

The status of EACC’s policy on last chance agreements at the time of Munson’s discharge was the subject of conflicting testimony. Bradley Hibbs had become the operations manager shortly before Munson was discharged. Hibbs and other EACC management officials testified that he had the final authority to offer or withhold a last chance agreement. He testified that last chance agreements were no longer viable at the mine. In his opinion last chance agreements had “proven not to be successful” and, “if it was strictly up to [him]” they would not

⁶ Resp. Ex. 7, at pp. 15-16.

be available. EACC's responses to discovery also indicated that Hibbs exercised final authority on the question of whether Munson would be offered a last chance agreement. When Stanley Eddy, Munson's foreman, attempted to intervene following the discharge and obtain a "second chance" for Munson, he was told by Peduti that last chance agreements were no longer available. However, despite his claimed "final authority" on last chance agreements, Hibbs also testified that each case was considered on its individual facts and that his superiors might override a decision to deny a last chance agreement. Robert Areford, the Human Resources Manager at the time, testified that he would "never say never" to the availability of last chance agreements.

On December 7, 1999, Richard Eddy, the union's district president, was advised of the proposed termination action against Munson. He generally tried to resolve termination cases at the earliest opportunity. The following day he phoned Hibbs, who he had known since childhood, to see if he could settle the case so that Munson could keep his job. Hibbs said that he would call Eddy back and did so a day or two later. Hibbs told Richard Eddy that the case could not be settled. Eddy had handled a lot of "worse cases" where last chance agreements were entered into. When he asked Hibbs to explain why he would not settle the Munson case, the response was that Munson was very outspoken on safety and grievance issues, had called in code-a-phone complaints and was not liked by his fellow miners and supervisors. Hibbs also made clear that the determination was not about absenteeism. Richard Eddy disputed the comment about Munson's relationship with other miners, because he felt that the union local was a very close knit group. He felt that Hibbs was more candid with him than he would have been with other union officials because of their long-standing relationship. Subsequently, Richard Eddy handled another discharge case and was told by Hibbs that that case would not be settled, but could have been, had it not been for the decision in Munson's case. In November of 2000, following Hibbs departure from EACC, another miner who had missed two consecutive days of work was allowed to enter the first stage of the attendance control plan, rather than being discharged.

When an employee is served with a notice of intent to terminate, the next step in the process is a meeting, referred to as a "24-48 meeting," involving management and union representatives and the employee at which various issues are discussed, including the validity of the asserted grounds for termination and any mitigating circumstances. If management determines to go forward with the termination, union officials also uniformly make every attempt they can to keep the employee's job, including asking for a last chance agreement. The 24-48 meeting on Munson's termination was held on December 9, 1999. In addition to Munson, local union officials James Taylor, Joe Reynolds, William Deegan, Vic Alvarez, and district union officials Ricky Yanero and Jack Rinehart attended. EACC was represented by Hibbs, Peduti and Areford. Munson readily admitted that he was absent on the 19th because he was procuring a vehicle and that he mistakenly thought that he had an approved vacation day for the 23rd. He questioned whether the absences were on consecutive days, but that issue was summarily dismissed because of a previous arbitration decision.

Union officials repeatedly asked whether there was anything short of termination that could be done and specifically cited prior successful last chance agreements as examples of discipline short of discharge. They, as well as Munson himself, expected that he would be offered a last chance agreement that would involve a period of suspension, substitution of vacation days for the days he missed and a commitment to appropriate future attendance. Their expectations were based upon their experience with the use of last chance agreements and their knowledge that Munson's case compared quite favorably with other cases in which last chance agreements had been entered into. As Ricky Yanero, the union board member who handled the case stated, although EACC management was concerned about absenteeism, they acknowledged that Munson was not a problem with respect to absenteeism. Union officials normally looked to the miner's employment background for mitigating factors and management acknowledged that Munson had never been disciplined and there were no problems or complaints about his work. He had made a mistake as to one vacation day. After recessing the meeting for a few minutes, management representatives returned and Hibbs announced that EACC would proceed with the termination. The union representatives were surprised by Hibbs' decision. Yanero felt that Munson had a better record "by far" than many people who had been offered last chance agreements. Feeling that the "real" reason for the termination decision had not been articulated, Yanero questioned whether it had anything to do with Munson's filing of contract grievances. Hibbs responded that it did not. Yanero's union responsibilities did not involve safety issues and he was unaware of Munson's involvement in safety issues until after the meeting. Union officials indicated that the decision would be arbitrated, normally the next step in the process. However, arbitration was not pursued. The decision not to pursue arbitration was based on concerns about the merits of the case and the knowledge that Munson intended to pursue a discrimination complaint under the Act. They felt that the discrimination complaint process was a preferable remedy because arbitrators were reluctant to deal with claims based on statutory rights.⁷

Following Munson's discharge, the number of safety complaints made on the second shift declined dramatically. Miners discussed Munson's discharge and its relationship to his safety complaints and grievances. They also voiced their expectation that Munson would be offered a last chance agreement. However, Stanley Eddy and Donald Livengood told them that it was Munson's grievances and safety complaints that got him "in trouble," that he was "done" even before he was completely discharged and that he would not be offered a last chance agreement because there were no more last chance agreements.

Munson filed a complaint of discrimination with MSHA on January 4, 2000, alleging that he was discharged and was subject to disparate treatment when he was not given a last chance agreement because he had made numerous safety complaints to his immediate supervisors and had informed management that he had made code-a-phone complaints to MSHA when his safety

⁷ Judging from the 1989 arbitration decision referenced previously, however, it appears that a claim of disparate treatment in the administration of the informal last chance agreement policy might have been entertained by an arbitrator.

complaints were not satisfactorily addressed. An Application for Temporary Reinstatement was filed on Munson's behalf. A hearing was held on the application on March 7, 2000. On March 10, 2000, an Order was entered directing Munson's reinstatement pending completion of the investigation of his MSHA complaint and a decision on any subsequent complaint of discrimination that might be filed on his behalf. EACC and Munson agreed that he would accept economic reinstatement, i.e. continued receipt of pay and benefits, in lieu of actually returning to work. The Secretary filed the instant complaint on May 1, 2000. On November 6, 2000, Munson filed a complaint with the United States Equal Employment Opportunity Commission alleging that his discharge was the result of discrimination based upon his age. The EEOC eventually issued a decision in EACC's favor.

There were some problems with Munson's receipt of pay and benefits during his economic reinstatement, but they were resolved after discussions between the parties' representatives. Munson also later determined that he would prefer to report to work, rather than continue on economic reinstatement. One of his concerns was the unavailability of training. EACC declined to alter the economic reinstatement agreement. Frank Peduti explained that there were concerns about whether an employee involved in litigation over his termination could maintain adequate attention to his job duties. The Secretary filed a motion in the Temporary Reinstatement Proceeding, seeking enforcement of the Order entered in that case and maintains that EACC's determination not to allow Munson to return to work should be considered evidence of hostility to Munson's rights under the Act and should be taken into consideration in the determination of a civil penalty.

Conclusions of Law - Further Factual Findings

A complainant alleging discrimination under the Act establishes a prima facie case by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *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 (3rd Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n. 20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Complainant clearly established a prima facie case of discrimination. He suffered adverse action when he was discharged on December 6, 1999. He frequently engaged in activity protected by the Act, making safety complaints to his immediate supervisors and other officials of EACC. A complaint made to an operator or its agent of "an alleged danger or safety or health violation" is specifically described as protected activity in § 105(c)(1) of the Act. Munson frequently raised safety issues with his supervisors and, on occasion, with the manager of the preparation plant. He also freely told his supervisors that he had and/or would phone complaints directly to MSHA when his safety concerns were not timely addressed. In addition to the findings made earlier, Daniel Conaway, EACC's safety supervisor acknowledged that he had heard that Munson had phoned complaints to MSHA. I accept the testimony of Richard Eddy and find that Hibbs believed that Munson had made complaints to MSHA and find that Hibbs was well aware of Munson's frequent raising of safety issues and contract grievances.

There is also abundant evidence that Munson's discharge was motivated, at least in part, by his protected activity. Aside from the fact that Munson was treated differently than similarly situated miners with past absentee problems, Hibbs' statements to Richard Eddy clearly indicate that he determined to discharge Munson, in part, because of his protected activity. As Munson's foremen told his fellow workers after the discharge, it was Munson's safety complaints and grievances that got him in trouble and resulted in his discharge.

The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Secretary on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (September 1999). Consequently, the Commission has held that "(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" are all circumstantial indications of discriminatory intent. *Id.* Here all three factors are present. The responsible official was aware of Munson's protected activity, was hostile to it, and the adverse action occurred during the course of Munson's ongoing protected activity.

EACC has vigorously disputed Munson's allegations throughout the litigation. It argues that Munson's raising of issues involving safety with his immediate supervisors was not protected activity -- that only formal complaints to management, such as written grievances on safety issues pursuant to the union contract, constitute activity protected under the Act. Not surprisingly, Respondent cites no authority for this remarkable proposition. Despite Respondent's protestations, informal or verbal raising of safety issues is activity protected by the Act. The record is replete with evidence of Munson's protected activity, including his numerous verbal reports of safety concerns to his foremen, similar complaints to the preparation plant manager and announcements to his foremen and to others that he had phoned complaints to MSHA. There is also abundant evidence, as noted above, that EACC management officials were aware of Munson's protected activity.

Respondent's primary defense is that the sole reason for Munson's termination was his unexcused absences on two consecutive work days and his inability to advance "extenuating circumstances" that would have justified something short of termination, e.g., a last chance agreement. This contention rebuts Munson's prima facie case, in that it is urged that Munson's protected activity was not a factor in the decision to discharge him, and constitutes an affirmative defense, i.e., that even if protected activity was found to be a motivational factor for Munson's discharge, he would have been terminated solely for his unprotected activity. As noted above, the first prong of Respondent's argument is rejected because there is ample evidence that Munson engaged in protected activity and that his discharge was motivated, in part, by his protected activity. The issue that must be resolved with respect to Respondent's affirmative defense is whether EACC would have discharged Munson for his unprotected activity alone. As explained in *Ankrom v. Wolcottville Sand and Gravel Corp.*, 22 FMSHRC 137, 141-42 (Feb 2000):

An operator bears the burden of proving an affirmative defense to a discrimination complaint. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937 (Nov. 1982). This line of defense applies in "mixed motive" cases, e.g., cases in which the adverse action is motivated by both protected and unprotected activity. *Id.* The ultimate burden of persuasion does not shift from the complainant. *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 15 (Jan. 1984). An operator may attempt to prove that it would have disciplined a miner for unprotected activity alone by "showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Id.*

A complainant may attempt to refute an affirmative defense by showing that he did not engage in the unprotected activities complained of, that the unprotected activities played no part in the operator's motivation, or that the adverse action would not have taken place in any event for such unprotected activities alone. *Robinette*, 3 FMSHRC at 818 n. 20. Because the ultimate burden of persuasion never shifts from the complainant, if a complainant who has established a prima facie case cannot refute an operator's meritorious affirmative defense, the operator prevails. *Id.*

There is no dispute that Munson's unexcused absences on November 19 and 23, 1999, were unprotected activity and that EACC had the discretion under the personnel rule specified in the union contract to discharge him for that activity. I am persuaded, however, that EACC's claim that Munson would have been terminated for the unprotected activity alone is not credible and that the termination would not have occurred in the absence of Munson's protected activity. This determination is based upon the conflicting explanations of the discharge decision offered

by Hibbs, the evident disparity between the treatment accorded to Munson and that accorded to other miners who had two or more consecutive unexcused absences, and admissions made by Hibbs regarding his motivation for Munson's termination.

Hibbs is a key figure because it was his determination to discharge Munson rather than offer him a last chance agreement or some other discipline short of discharge. He has provided at least three explanations as to why Munson was discharged: 1) last chance agreements were no longer available at EACC; 2) he never considered a last chance agreement for Munson because he was never asked to; and 3) there were no "extenuating circumstances" to justify offering him one. Hibbs' conflicting testimony substantially undermines his credibility.

I find none of the explanations credible. While EACC argues that there "is no long standing Company policy and/or procedure entitled 'last chance agreements,'"⁸ it clearly employed last chance agreements over the course of many years on some consistent basis. As the arbitration decision upon which EACC relies notes, in situations involving unexcused absences factors used in determining whether to offer a last chance agreement included the miner's attendance record and an assessment of whether the employee would develop into a reliable member of the work force. There was no evidence that prior to Munson's discharge Hibbs or anyone else at EACC communicated to the miners, their union representatives, or anyone else, that last chance agreements would no longer be available. While there is evidence that EACC was more closely scrutinizing last chance agreements, such agreements were available at the time of Munson's discharge, one could have been offered to Munson and it was Hibbs' decision whether or not to do so.⁹

Hibbs testified at the Temporary Reinstatement Proceeding hearing that he made no decision on whether to offer Munson a last chance agreement because he was never asked to do so and that he never considered a last chance agreement for Munson.¹⁰ That testimony is directly contradicted by virtually every other participant in that meeting, including EACC's officials. One of the union officials, James Taylor, was present at the Temporary Reinstatement hearing and questioned Hibbs subsequently as to how he could so testify when last chance agreements had been discussed and there had been repeated requests for an alternative to discharge. Hibbs

⁸ Respondent's brief, p. 3.

⁹ There is evidence that EACC has not entered into any last chance agreements since Munson's termination, although one miner was recently given an alternative to termination that was not called a last chance agreement. Based upon Hibbs' statements to Richard Eddy regarding a subsequent case, I find that to the extent that EACC had a policy precluding the use of last chance agreements, it was a policy implemented following Munson's discharge as a necessity to support its defense against his allegations.

¹⁰ Hibbs did not testify at the November 28, 2000, hearing. His subsequent deposition was introduced into evidence.

responded that he so testified because no-one at the 24-48 meeting used the specific words “last chance agreement.” The weight of the evidence is that last chance agreements were specifically discussed. In any event, there is no question that the union officials at the 24-48 meeting made repeated requests for, what all in attendance including Hibbs understood to be, a last chance agreement for Munson. Those requests were considered and rejected. Richard Eddy made a similar request in his conversation with Hibbs.

The explanation ultimately relied on by Respondent, that there were no “extenuating circumstances” to justify the offering of a last chance agreement, also lacks credibility. While Munson could not proffer an acceptable excuse for his two absences, he had worked for EACC for some 28 years and made a mistake in believing that he had an approved vacation day on a day he had traditionally taken off in the past.¹¹ The factual circumstances presented by Munson compared favorably to those that EACC had determined in the past to constitute “extenuating circumstances” justifying a last chance agreement.

EACC argues that Munson was treated the same as other employees who were discharged for violating the provisions of the union contract. Its argument is based on testimony that there had been past instances where other miners had been terminated without being offered last chance agreements. That fact was also noted in the arbitrator’s decision previously discussed and there is little doubt that some transgressions could be of such a nature to cause EACC to terminate employment with finality. What EACC completely failed to prove, however, is that any such miners were situated similarly to Munson, i.e., instances of past discipline consistent with that meted out to Munson. Respondent offered no evidence of any specific instance where a miner was terminated without being offered a last chance agreement. The only evidence concerning miners situated similarly to Munson, i.e., with two or more consecutive unexcused absences, is that they were offered last chance agreements. Neither Taylor nor Richard Eddy, long-time union officials, could recall any case involving such absences where a last chance agreement had not been entered into and a third official, Yanero, testified at deposition that it was rare that a case involving absences on consecutive days would be taken to discharge, citing no instance when that had actually occurred. The records of last chance agreements include numerous instances where there were two or more days of consecutive absences, often with other negative factors.

¹¹ As to his first absence, Peduti observed that if Munson had personal days available, he should have made some attempt to contact management when he realized that he would not be coming into work. However, Munson had told his foreman the day before of his planned activities on the 19th and the possibility that he might be absent. While this may not have been adequate to excuse his absence, management had reason to anticipate his absence and the reasons therefore.

Munson's primary theory to establish unlawful discriminatory motivation by EACC was that he was subjected to disparate treatment. The most critical element of EACC's affirmative defense, on the facts of this case, was that Munson was not treated disparately — that his discharge was consistent with past discipline. It completely failed to rebut Munson's proof of disparate treatment or establish consistent past discipline.

I have little trouble concluding that Munson was subject to disparate treatment. I accept the testimony of the several union officials that expressed surprise that Munson was not offered a last chance agreement because his case compared favorably, sometime much more favorably, to prior cases in which such agreements had been offered. Munson also easily satisfied the factors cited in the arbitration decision. His absentee problem was of recent origin, a one-time occurrence, and there was little doubt that he would be a reliable member of the work force if offered such an agreement because he had conclusively demonstrated his competence and reliability over the course of his twenty-eight years of employment.

Hibbs' statements to Richard Eddy evidence his true motivation. Hibbs made clear that Munson's termination was not about absenteeism. While Munson was not an elected representative of miners, he was relatively outspoken on a variety of issues and occasionally voiced complaints that other miners had brought to his attention. He frequently raised complaints involving safety issues as well as union contract issues. I find that Munson's complaints about safety issues were a significant motivational factor in Hibbs' decision to terminate him and that, in the absence of that factor, he would not have been terminated, but would have been offered a last chance agreement or some other discipline short of termination.

Respondent makes much of the fact that neither Munson, who testified that he was somewhat in shock, nor anyone on Munson's behalf, raised a claim of discrimination or otherwise complained that his discharge was motivated by his making of safety complaints, until after the discharge process was completed. It argues that his complaint of discrimination is nothing more than an after-the-fact attempt to gain access to another forum to challenge his discharge. I find little significance in the timing of Munson's allegation. He filed his complaint with MSHA some 26 days after the 24-48 meeting, well within the 60 days provided in the Act.¹² Munson and the union officials, even Munson's foreman, fully expected that he would not actually be discharged and it was only at the conclusion of the December 9, 1999, meeting that they found out otherwise, to their considerable surprise. The motivational nexus between his protected activity and the adverse action was not overtly stated and may well have not been realized or suspected immediately. Even if it had been, there was a limited opportunity to raise such an issue and virtually no prospect of changing the outcome.¹³

¹² 30 U.S.C. § 815(c)(2).

¹³ When Yanero suspected that the "real reason" for Munson's termination was not being voiced at the meeting, he questioned whether it had anything to do with Munson's contract grievances (he was unaware of his safety complaints) and received the curt reply that it did not.

Respondent also argues that Munson's later filing of an EEOC age discrimination complaint, that did not also refer to discrimination based on activity protected by the Act, somehow undercuts the credibility of his present claims. It is hardly surprising, however, that his respective discrimination complaints were each raised in the forum that had jurisdiction to hear them. It is also unremarkable that Munson believed that there may have been more than one unlawful motivation for his discharge. Under the federal rules a party is permitted to assert alternative, and even inconsistent, legal and factual allegations in a single pleading. *See Independent Enterprises Inc. v. Pittsburgh Water and Sewer Authority*, 103 F.3d 1165, 1175 (3rd Cir. 1997). Munson's age discrimination complaint does not undercut his present claims in the slightest.

ORDER

Respondent discriminated against Complainant when it discharged him because of his activities protected by the Act. The parties are **ORDERED** to confer within 21 days from the date of this decision in an attempt to reach agreement on the specific relief to be awarded, including the amount of a civil penalty. In discussing the civil penalty issues, the parties are advised that I reject the Secretary's argument that EACC's determination to decline Complainant's request to return to work, rather than continue on the agreed-to economic reinstatement, evidences hostility toward Complainant's rights under the Act. Given this decision establishing Munson's entitlement to relief, any agreement as to the scope of that relief will not preclude either party from appealing this decision.

It is **FURTHER ORDERED** that within 30 days after the date of this decision, the parties shall submit any stipulations that they may have entered into as to appropriate relief and their respective positions on any contested relief provisions. Arguments as to contested issues shall be supported with references to the record, affidavits, and citations to legal authority, as appropriate. If either party requests a hearing on remedial issues, such request shall identify the specific issue(s) on which a hearing is deemed necessary and provide a proffer of the evidence intended to be introduced. The other party shall submit a similar proffer within five days. Any hearing on remedial issues will be scheduled expeditiously.

Jurisdiction of this case is retained by the undersigned Administrative Law Judge. This is not a Decision of the Judge within the meaning of Commission Procedural Rule 69(a). 29 C.F.R. § 2700.69(a). It will not become a final decision until a supplemental decision is issued resolving all remaining contested issues and awarding specific relief.


Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 28, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-395-M
Petitioner	:	A.C. No. 41-01684-05507
v.	:	
	:	Roper Quarry
BILBROUGH MARBLE DIVISION,	:	
TEXAS ARCHITECTURAL	:	
AGGREGATE,	:	
Respondent	:	

DECISION

Appearances: Tina D. Campos, Esq., Mary Schopmeyer Cobb, Esq., U.S. Department of Labor, Office of the Solicitor, Dallas, Texas, for Petitioner;
David M. Williams, Esq., San Saba, Texas, for Respondent.

Before: Judge Bulluck

This case is before me upon Petition for Assessment of Penalty filed by the Secretary of Labor, through her Mine Safety and Health Administration ("MSHA"), against Bilbrough Marble Division, Texas Architectural Aggregate ("Bilbrough"), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 815(d). The petition seeks a civil penalty of \$500.00 for an alleged violation of section 56.15003, 30 U.S.C. § 56.15003.

A hearing was held in San Antonio, Texas. During the course of the hearing, the parties reached a settlement on all eight citations respecting Docket No. Cent 2000-336-M, which was approved by Decision Approving Settlement issued April 27, 2000. The parties' Proposed Findings of Fact and Briefs are of record. For the reasons set forth below, the citation and order shall be VACATED.

I. Stipulations

The parties stipulated to the following facts:

1. Bilbrough Marble Division of Texas Architectural Aggregate ("Bilbrough") Mine ID No. 41-01684, is the lessee and operator of the Roper Quarry.

2. Bilbrough is engaged in mining, and its mining operations affect interstate commerce.
3. Bilbrough is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*
4. True copies of Citation Nos. 7889527, 7889528, 7889529, 7889530, 7889531, 7889532, 7889533, 7889534 and 7889535 were served on Bilbrough or its agent, as required by the Act.
5. The plastic gasoline can brought to the hearing by Respondent was fairly and accurately represented by Government Exhibit P-13.
6. The language on the back of the plastic gasoline can brought to the hearing by Respondent read: "Nonmetallic petroleum product container, classified by UL, Inc., in accordance with the standard specs for plastic container (Jerry cans) for petroleum products, ANSI/ASTN @ 343J-00, approved mass gasoline container."
7. The idler brought to the hearing by Respondent was fairly and accurately represented by Government Exhibit P-5.
8. The mine history, Government Exhibit P-1, was authentic.

II. Factual Background

On March 2, 2000, MSHA Inspector Danny Ellis conducted a regular inspection of Bilbrough's Roper Quarry, a surface limestone/dolomite mine and crushing operation, located in Marble Falls, Texas. At the time of the inspection, 8:30 a.m., he observed stockpiles of material, a front-end loader loading a customer truck, a Euclid haul truck operating, and two employees in the open break area (Tr. 12-14, 18-19, 87). Inspector Ellis observed the operator of the Euclid haul truck wearing tennis shoes and another employee wearing cowboy boots and, with all employees assembled in the break area, the inspector inquired whether they were wearing hard-toed footwear and he physically checked their footwear by touch of his hand or foot (Tr. 16-19, 85, 87-89). Foreman Ollie Joe Conely, who had been working the excavator in the pit, summoned general manager Joe Williams, Jr. to the mine, and by the time Williams arrived within the half hour to accompany Inspector Ellis on his inspection, Ellis had prohibited the workers' entry to certain areas of the plant, unless they changed to steel-toed footwear (Tr. 14, 53, 59, 83-84, 97, 144, 150-52). As a consequence, Conely had instructed the workers to cease operations (Tr. 91).

Inspector Ellis ultimately cited Bilbrough for several violations (including a citation for the four workers' unsuitable protective footwear) which citations are not at issue herein, and before the inspection actually got underway, the subject of suitable protective footwear became a hotly contested issue between Ellis and Williams, especially since the workers had mistakenly

believed that Ellis had shut down the mine (Tr. 25, 75, 83-84, 97, 100, 103, 127-28). Williams was wearing a pair of Redwing Pecos leather workboots with leather reinforced toes (Tr. 32-33, 98-99), and pursuant to cellular phone conversations with Ellis's supervisor, Ralph Rodriguez, Williams was permitted to accompany Ellis on inspection in his leather workboots, except for areas where, in Ellis's opinion, his footwear would pose a hazard (Tr. 103-04, 144-46, 148-49). As the inspection and footwear debate progressed, with Ellis pointing out to Williams areas in the plant where falling objects could cause foot injuries, Ellis inquired about a belt idler that had come into view. By then, Williams had become quite frustrated, and while explaining how the welder (in steel-toed footwear) would be installing the belt idler on the tailing conveyor, that the idler was light in weight and that installation would not pose a hazard to the feet, Williams lifted the 25-35 pound belt idler waist high to demonstrate how the task would be performed (Tr. 31-32, 105-110, 135-37). Inspector Ellis immediately directed Williams to put the belt idler down and Williams complied (Tr. 32, 107, 109). Apparently, both Williams and Ellis were highly agitated, and Williams telephoned Rodriguez again (Tr. 91-92, 107, 109, 135). As a consequence of Williams having lifted the belt idler, Inspector Ellis issued combined 104(a) Citation/107(a) Order No. 7889528, alleging a significant and substantial violation of 30 C.F.R. § 56.15003 and describing the hazardous condition as follows:

The supt. Joe Williams, Jr. was not wearing hard toed footwear and he picked up a 30 inch belt idler that weighed approximately 20 lbs. The belt idler was made out of angle iron with rollers attached to the angle iron. The belt idler could have fallen on his feet causing a lost time injury. This AR told Mr. Williams to not pick up the belt idler since he did not have on suitable protective footwear and he still picked up the belt idler

(Ex. P-4). Although the citation/order estimates the weight of the belt idler at 20 pounds, 25-35 pounds is a more accurate assessment (Tr. 31; Ex. P-5).

III. Findings of Fact and Conclusions of Law

A. 104(a) Citation No. 7889528

30 C.F.R. § 56.15003 provides as follows:

All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the feet.

The Commission and the courts have recognized the broad applicability of generally worded standards, and have applied an objective test to challenges based on failure to provide adequate notice of prohibited or required conduct, i.e., whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *BHP Minerals International, Inc.*, 18

FMSHRC 1342, 1345 (August 1996) (citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)); *Freeman United Coal Mining Co. v. FMSHRC* 108 F.3d 358, 362 (D.C. Cir. 1997). In interpreting a standard, the Commission has determined how a reasonable person would act by considering such factors as accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine. *BHP Minerals International* at 1345 (citing *U.S. Steel Corp.*, 5 FMSHRC 3, 5 (January 1983)).

Although section 56.15003 is not specific as to the type of footwear necessary for adequate protection in and around the various areas and activities of a mine, a reasonably prudent person working in the mining industry is put on notice that, where the feet are exposed to the hazards of being struck by falling or stationary objects of a nature that can be expected to cause broken bones or other serious injuries, hard-toed protective footwear must be worn. MSHA's Program Policy Manual is worded in general terms, as well, indicating that "substantial hard-toed footwear" is considered the minimum protection acceptable for most mining applications, and that there may be instances where special purpose foot protection is need or, conversely, where heavy leather shoes or boots will provide adequate safety for the feet. *MSHA Program Policy Manual, Volume IV, Part 56/57, Subpart N* (07/01/88). It follows, then, that what constitutes suitable protective footwear is determined on a case-by case basis and requires a situational analysis of the tasks the miner is performing and could be performing during the course of his shift (Tr. 50-52, 62-63, 133-34).

Reviewing the circumstances at the mine giving rise to the citation at issue herein, Inspector Ellis observed a front-end loader and haul truck being operated upon his arrival, and despite his determination that four workers were not wearing suitable protective footwear necessary for protection against hazards, he determined that none of the men were currently working in areas where hard-toed footwear was needed, and prohibited them from entering those areas (Tr. 17, 21-23, 59, 68, 76, 144-46; Ex. P-2). I credit Williams' testimony that when he arrived on-site in leather workboots, Ellis prohibited him from accompanying him on the inspection (Tr. 97). Ellis testified that he considered Williams to be wearing soft-toed boots (Tr. 77). Indeed, the inspection did not proceed until Rodriguez overrode Ellis and authorized Williams to accompany Ellis in his leather workboots (Tr. 97-100, 103-04, 144-46). Considering that the miners were under the impression that the mine had been shut down, and Ellis and Williams had locked horns as to the suitability of the miners' footwear, it is apparent that the inspection proceeded in an emotionally charged environment (Tr. 75, 97, 104, 134-35). I credit Ollie Joe Conely's testimony that he overheard heated discussion between Ellis and Williams at the time of the alleged violation (Tr. 91), and discredit Ellis's testimony that he was not agitated (Tr. 56-57, 65). Because I am convinced that discussion of the belt idler arose while tempers flared, I credit Williams' testimony that his action, motivated by extreme frustration, was spontaneous and not premeditated (Tr. 105-107). In so finding, I discredit Inspector Ellis's testimony that beforehand, he specifically directed Williams not to pick up the belt idler (Tr. 31-32, 36, 65-69, 108). A more likely scenario, viewing the evidence in its entirety, is that Ellis told Williams not to pick up the belt idler as it was being lifted.

Although Inspector Ellis testified that he issued the citation because Williams was

engaging in activity that required hard-toed footwear (Tr. 33), it is clear that MSHA determined Williams' footwear suitable for accompanying Ellis on inspection, consistent with its own policy that leather boots provide adequate safety under some circumstances. Ellis testified that the location of the belt idler posed no hazard of falling objects (Tr. 155-56). It is also evident that Williams was not performing any work when he lifted the belt idler, but illustrating a point during the course of the inspection, and at all times maintained control of the object. In explaining how he happened to "snatch up" the belt idler, Williams testified credibly that he had been picking up 100 pound bags since he was 12 ½ years old, which he considered "not much weight" (Tr. 106-08). Moreover, Ellis testified that he had no indication that Williams would drop the belt idler (64-65). Ellis even conceded, as pointed out by Williams, that the top-heavy configuration of the belt idler substantially reduced the possibility of it dropping straight down onto the feet (Tr. 124-25, 146-47). Consequently, having found that Williams' leather workboots were suitable protective footwear for accompanying the inspector, and having found that Williams was not in an area or performing a task that would subject him to hazards that would cause foot injury, I conclude that the standard was not violated. Accordingly, Citation No. 7889528 is vacated.

B. 107(a) Order No. 7889528

Section 3(j) of the Mine Act defines "imminent danger" as the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated." 30 U.S.C. § 802(j). Section 107(a) of the Mine Act provides, in pertinent part, for imminent danger orders, as follows:

If, upon any inspection or investigation of a coal or other mine which is subject to this [Act], an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section [104(a)], to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

Considering that an inspector must act quickly in the face of a perceived dangerous condition, the Commission and the courts have held that an inspector's findings and decision to issue an imminent danger order should be supported unless there is an abuse of discretion or authority. *Island Creek Coal Co.*, 15 FMSHRC 339, 345 (March 1993); *Utah Power & Light Co.*, 13 FMSHRC 1617, 1627 (October 1991); *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2164 (November 1989); *Old Ben Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 523 F.2d 25, 31 (1975).

There are several cases in which the Commission has held that there must be some degree of imminence to support an imminent danger order and has defined “imminent” as “ready to take place[;] near at hand[;] impending...[;] hanging threateningly over one’s head[;] amazingly near.” *Island Creek Coal Co.* at 345; *Utah Power & Light Co.* at 1621. In *Utah Power & Light Co.*, the Commission stated that “where an injury is likely to occur at any moment, and an abatement period, even of a brief duration, would expose miners to risk of death or serious injury, the immediate withdrawal of miners is required.” 13 FMSHRC at 1622. In *Rochester & Pittsburgh Coal Co.*, the Commission recognized that “an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.” 11 FMSHRC 2163 (quoting *Eastern Associated Coal Corp. v. Interior Bd. of Mine Operations Appeals*, 491 F.2d 277, 278 (4th Cir. 1974)); *Island Creek Coal Co.* at 345. Finally, the Commission has held that an inspector, albeit acting in good faith, abuses his discretion, in the sense of making a decision that is not in accordance with the law, if he issues a 107(a) order without determining that the condition or practice presents an impending hazard requiring the immediate withdrawal of miners. *Island Creek Coal Co.* at 345; *Utah Power & Light Co.* at 1622-23.

Inspector Ellis testified that he issued an oral imminent danger order the minute Williams picked up the 25-35 pound belt idler, because if he were to drop it on his feet, it was more than likely that he would have sustained broken bones (Tr. 32-33). Ellis further testified that his order indicated that “Williams did something at that time that could immediately result in a serious injury to him or to someone else” and that the effect of the order was “for him to cease and desist what he was doing” (Tr. 61; see 143-44, 146-47).

The instant imminent danger order was issued under circumstances where there was no likelihood of injury and no degree of imminence necessitating Williams’ withdrawal. Williams’ testimony that he was in control of the belt idler and Ellis’s acknowledgment that Williams was in no danger of dropping it established that no dangerous situation existed. Moreover, considering the order in light of a perceived dangerous condition leads to the same conclusion, i.e., that Williams’ withdrawal was not required to avert the danger. Indeed, Inspector Ellis was able to put a stop to Williams’ actions by directing him to put the belt idler down, thereby ending the perceived danger immediately. I am convinced that Inspector Ellis’s judgement was affected by the antagonistic atmosphere attendant the inspection, and because he failed to make a determination that the perceived hazard was impending, it is my finding that he abused his discretion in issuing an imminent danger order. Accordingly, Order No. 7889528 is vacated.

ORDER

Combined 104(a)Citation/107(a) Order No. 7889528 is hereby **VACATED**, and this civil penalty proceeding is **DISMISSED**.


Jacqueline R. Bulluck
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DENVER, CO 80204-3582
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June 28, 2001

GREG POLLOCK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2000-625-DM
v.	:	
	:	Bingham Canyon Mine
KENNECOTT UTAH COPPER CORP.,	:	
Respondent	:	Mine I.D. 42-00149

DECISION

Appearances: Harry Tuggle, United Steelworkers of America, Pittsburgh, Pennsylvania, for Complainant;
James M. Elegante, Esq., Kennecott Utah Copper Corp., Magna, Utah, for Respondent.

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Greg Pollock against Kennecott Utah Copper Corporation ("Kennecott") 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 Kennecott issued a written warning to Mr. Pollock in January 2000 after he called the Department of Labor's Mine Safety and Health Administration ("MSHA") about an accident that occurred at the mine. Mr. Pollock contends that the written warning was issued in violation of section 105(c) of the Mine Act. Harry Tuggle, Mine Safety and Health Specialist with the United Steelworkers of America ("USWA"), entered an appearance on behalf of Mr. Pollock after the complaint was filed. An evidentiary hearing was held in Salt Lake City, Utah. For the reasons set forth below, I find that Mr. Pollock did not establish that he was discriminated against and I dismiss his complaint of discrimination.

I. FINDINGS OF FACT

Kennecott is the operator of the Bingham Canyon Mine, a large open pit copper mine in Salt Lake County, Utah. Mr. Pollock has worked at the mine in various positions for about 24 years. Mr. Pollock has been president of the USWA local at the mine for about eight years. The case arose as a result of events that occurred in late December 1999 and January 2000, as described below.

On December 30, 1999, Thomas R. Lohrenz, a senior employee relations representative with Kennecott, called a meeting of local union presidents to present and discuss the company's incentive program for the year 2000. Kennecott started an incentive program in 1999 that was designed to pass on certain cost savings to employees. Mr. Lohrenz called the meeting to inform the local union leaders of the changes the company proposed for the year 2000. He used a projector and slides to present the information.

When the meeting began at 7:30 a.m., representatives were present from the clerical union, the electrical workers union, the transportation workers union, the machinists' union, and the operating engineers' union. Mr. Pollock was not present. When Lohrenz asked those present whether he should go ahead and start the meeting, the consensus was that he should wait a few minutes. After waiting a few more minutes, Lohrenz announced that he was going to start in order to avoid delaying everyone. Lohrenz began by introducing the topic and asking that they hold their questions to the end because the slide presentation may answer many of the questions.

At about 7:40 a.m., Mr. Pollock entered the meeting. Lohrenz again asked everyone to hold their questions until the end. Pollock immediately asked Lohrenz questions about the incentive program and about other employee relations issues. Again, Lohrenz asked that Pollock hold his questions until the end. At that point, Dale Evans, chairman of the local electrical workers union (IBEW), through either a hand signal or through spoken words asked Mr. Pollock to be quiet. In response, Mr. Pollock blew up and became very abusive towards Mr. Evans. Using profanity, Pollock said that nobody could tell him to shut up and that he could ask any questions he wanted. Lohrenz remembers Pollock verbally attacking Mr. Evans and insulting the IBEW. Evans testified that he did not take any of Pollock's remarks personally.

During this altercation, Lohrenz asked Pollock to sit down and be quiet. Pollock refused to do so. Lohrenz walked over to where Pollock was standing and told him to leave the meeting. Lohrenz testified that he was angry at Pollock and that he believed that Pollock's outburst at the meeting was totally uncalled for. Lohrenz followed Pollock out of the meeting and told Pollock that he was out of line. Lohrenz advised Pollock that he would not allow him back in the meeting but that he would give Pollock his own separate briefing at a later time. Lohrenz returned to the meeting which lasted about one hour with questions and answers.

Lohrenz was very angry with Pollock in part because this was not the first time that he had to talk to Pollock about his personal behavior at the mine. Lohrenz was particularly concerned because he felt that Pollock's attacks were personal and very disruptive. He believed that some type of disciplinary action should be brought against Mr. Pollock for his behavior. Later that afternoon, Lohrenz began drafting a proposed letter of discipline to be issued to Mr. Pollock. (Tr. 210; Ex. R-10). This letter would constitute a written warning under the mine's labor agreement. He discussed the events and his proposed discipline with Nancy Arritt, the director of employee relations for Kennecott, who was Lohrenz's supervisor. (Tr. 243-44).

On the morning of December 31, 1999, Mr. Lohrenz sent an e-mail to Ms. Arritt. (Tr.210; Ex. R-12). He attached his draft disciplinary letter and asked for her advice. Later that

day, Lohrenz discussed this matter with her. They discussed how Pollock should be disciplined, when the USWA's Utah staff representative should be notified, and who should issue the discipline. (Tr. 211, 243-47). It is Mr. Lohrenz's understanding that, as of December 31, a decision had been made to discipline Mr. Pollock for his disruptive and abusive behavior at the incentive plan meeting, but that all the details had not been worked out. (Tr. 211-13).

On January 1, 2000, there was an accident at the mine. Jerry Martinez was operating a large truck when he drove over a smaller truck. The operator of the smaller vehicle was able to escape his vehicle before it was run over. Consequently, no miners were injured. After conducting an investigation, Kennecott determined that Mr. Martinez was at fault and issued a notice of investigation and hearing against him with the intent to terminate him from employment.

On January 5, 2000, Kennecott managers held a meeting to discuss the proposed discipline against Mr. Pollock. The meeting was attended by Ms. Arritt, Mr. Lohrenz, and Ed Morrison, counsel in the labor relations department. (Tr. 248-). On January 11, Ms. Arritt drafted a disciplinary letter to be issued to Mr. Pollock. It was similar to the one that Lohrenz had drafted but, because Ms. Arritt decided that she should issue the letter rather than Lohrenz, she reworked it using her own language. (Tr. 254).

A meeting was held on Kennecott's proposed termination of Martinez on January 12, 2000, at about 8 a.m. Lohrenz, Pollock, and Martinez were present. (Tr. 216-17). John Kinneberg, Kennecott's operations superintendent was also present. As the local president, Pollock argued that the company's proposed termination was not fair because the miner in the smaller vehicle was not being disciplined. (Tr. 72). It was Pollock's position that the other driver was as much at fault as Martinez. Near the end of the meeting, Pollock said that if Martinez is fired, "then I've got no recourse but to go to MSHA because you're not taking care of the problem, you're trying to sweep it under the rug. . . ." *Id.* Martinez was terminated by Kennecott. Pollock called MSHA at the end of this meeting. Lohrenz told Arritt that Martinez had been terminated.

On January 12, 2000, at about 11:30 a.m., Ms. Arritt sent an e-mail, with her proposed disciplinary letter attached, to a number of Kennecott managers to get their comments. (Ex. R-13). The distribution list included Chris Robison, the mine manager, and Ed Morrison. Arritt proposed that the letter be sent to Pollock via an overnight delivery service. Morrison thought that it should be delivered in person. Arritt agreed with his recommendation and did not send out the letter.

At about 1 p.m., on January 12, MSHA Inspector Terry Powers arrived at the mine. A Kennecott safety representative called Lohrenz to ask him to sit in on the meeting with MSHA because there were no operations people available at that time. (Tr. 221). It was quite unusual for someone from employee relations to be involved in MSHA matters. (Tr. 314). The meeting with Inspector Powers lasted several hours and was attended by a company safety representative, Kinneberg, Lohrenz, Pollock, and others. Pollock told the inspector that "the company was

trying to lay this whole thing off on one person and that [the union had] some problems with it.” (Tr. 73). Pollock testified that Kinneberg became very upset that he had called MSHA. He testified that Kinneberg became quite angry at this meeting, especially after he was advised by the inspector that citations would be issued. (Tr. 73-74). Lohrenz testified that “Kinneberg’s deportment was nothing but professional” and that he did appear to be angry. (Tr. 222-23).

On January 13, Inspector Powers issued three significant and substantial (“S&S”) citations. Each citation was issued for the conduct of Mr. Martinez. (Ex. C-7). No citations were issued for the conduct of the driver of the smaller truck. One citation was issued because Martinez failed to sound a warning before moving his haul truck. Another was issued because Martinez moved the haul truck without a signal from the spotter to do so. The third citation was issued because Martinez failed to maintain control of his haul truck.

On January 17, 2000, Ms. Arritt talked with Carl Collins, Pollock’s immediate supervisor, to schedule a meeting with Pollock to deliver the disciplinary letter. A meeting was scheduled for January 18. The meeting had to be postponed because Pollock had a conflict on that day. Unknown to Ms. Arritt, Pollock was at an MSHA close-out conference on that date with respect to an unrelated MSHA inspection. (Tr. 260-61). On January 20, Arritt attempted to reschedule the meeting. The meeting was held on January 21, 2000, in Ms. Arritt’s office at Arbor Park in Magna, Utah. Arritt, Collins, and Pollock were in attendance. Arritt handed Pollock the letter at this meeting. (Exs. C-3, R-19). She also explained why the letter was being issued. (Tr. 267). The letter is dated January 18 because that was the date that the meeting was originally scheduled.

The letter states that Mr. Pollock was being disciplined because of his disruptive behavior at the December 30 meeting. (Exs. C-3, R-19). The letter recounts the events at the meeting. It states that Pollock had been counseled in the past for similar behavior. It states that “you have left us with no choice but to issue this letter as a warning to you that further obstructive and harassing behavior such as you exhibited on the morning of December 30th when you disrupted a meeting on company business will not be tolerated.” *Id.* The letter further states that Pollock remains free to conduct union business, but that he does not have the “the freedom to disrupt or take over or otherwise make it impossible to continue meetings such as Tom Lohrenz was conducting for the company. . . .” Finally, the letter states that if another similar incident should occur “a hearing will be held to determine the level of disciplinary action to be taken, up to and including termination of your employment.” *Id.* The letter is quite similar to the one drafted by Mr. Lohrenz on December 31, 1999. (Ex. R-10).

In response, Pollock stated that the letter violated the labor agreement. (Tr. 267-68; Ex. R-21). He also stated that Lohrenz started the incident and that he was acting in his capacity as a union officer at the meeting and could behave however he wanted. Pollock told Arritt that he would be filing charges with the National Labor Relations Board.

Pollock filed a complaint of discrimination with MSHA under the Mine Act on January 30, 2000. Pollock alleged that the disciplinary letter was issued by Kennecott because he called MSHA to the mine to investigate the Martinez accident. On August 16, 2000, MSHA

“determined that the facts disclosed during [its] investigation do not constitute a violation of section 105(c).” Mr. Pollock filed this case under section 105(c)(3) on September 18, 2000.

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 Greg Pollock engage in protected activity?

Mr. Pollock engaged in protected activity when he called MSHA on January 12, 2000, to complain about the truck accident that occurred on January 1. He called MSHA because he believed that the company was trying to sweep the causes of the accident under the rug by blaming only Martinez for the accident. He apparently believes that Kennecott should change its procedures to prevent such accidents. Instead of placing total responsibility on the operators of large haul trucks, he apparently believes that the operators of smaller vehicles should be required to take steps to notify the haul truck operators of their presence. Although MSHA apparently did not agree with Pollock’s position as evidenced by the citations that were issued, his actions in calling MSHA are protected.

B. Was Kennecott’s written warning to Greg Pollock 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).

Mr. Pollock relies on a number of facts and arguments in support of his case. First, he argues that letter was in violation of the labor agreement and past practices at the mine. He states that the fact that Kennecott failed to follow customary practices indicates that there were other reasons for his discipline. First, Pollock contends that Kennecott was required to hold a hearing before he was disciplined. The labor agreement, however, provides that a hearing is required only when Kennecott is proposing that the employee be suspended or discharged. If an employee is not being discharged or suspended, the employee is only required to be notified of the discipline. In this case, Kennecott determined that Pollock should be issued a written warning for his conduct at the December 30 meeting.

In addition, Pollock argues that the fact that the written warning was issued in the form of a letter on 8½ by 11 paper shows disparate treatment. Kennecott has pre-printed forms that it generally uses for discipline under the labor agreement. One is entitled “Notice of Investigation and Hearing.” It is used when suspension or discharge is contemplated by Kennecott. The other form is entitled “Notice of Disciplinary Action.” The supervisor who fills it out must check one of two boxes labeled “written” or “verbal” warning. This form measures about 5½ by 4½ inches and contains a small area to write the reasons for the discipline. I find that Pollock has not established that he was treated differently. Other employees have been issued written warning letters. (Tr. 284-85). It would have been impossible for Ms. Arritt to set forth the reasons for Mr. Pollock’s written warning on the space provided on the pre-printed form.

Mr. Pollock testified that when Mr. Lohrenz escorted him out of the December 30 meeting, he said “I’m warning you.” Pollock contends that Kennecott cannot issue both a verbal and written warning for the same incident. I reject this argument. There is no evidence that Lohrenz intended that statement, if made, to constitute a verbal warning under the labor agreement. It is the general practice to write up a verbal warning to memorialize it for future reference. Mr. Lohrenz did not write up such a verbal warning in this case.

Mr. Pollock’s most convincing argument concerns the timing of the written warning. The letter was issued to Mr. Pollock seven days after MSHA Inspector Powers issued three S&S citations against the company following Mr. Pollock’s complaint. In analyzing whether Kennecott was motivated in any part by Mr. Pollock’s protected activity, I must look for any circumstantial evidence of discriminatory intent. Commission judges typically consider management’s knowledge of the protected activity, management’s hostility or animus towards the protected activity, the coincidence in time between the protected activity and the adverse action, and any disparate treatment of the complainant. *See Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991). I analyze these factors below.

I find that Kennecott management had knowledge of Mr. Pollock's protected activity on January 21, 2000, the date the warning letter was issued. Mr. Lohrenz was at the meeting with MSHA on January 12. Nevertheless, I credit the testimony of Lohrenz and Arritt that the decision to issue the warning letter was made prior to that date. Ms. Arritt made the final decision to issue the warning letter prior to January 11. (Tr. 281-82). Ms. Arritt wanted to send the warning letter to Mr. Pollock on January 12 after she received final clearance from the mine manager. She agreed to hand deliver the letter on advice of counsel. Pollock did not raise any MSHA issues concerning the January 1 accident until the disciplinary meeting with Martinez and Lohrenz on the morning of January 12. Arritt made the final decision to issue the warning letter before she learned that Pollock had called MSHA following the Martinez meeting. She did not know that Pollock called MSHA in January 2000 until February of that year. (Tr. 274).

Pollock contends that Kinneberg's demeanor at the MSHA meeting on January 12 illustrates management's hostility towards his protected activity. He testified that Kinneberg was visibly upset during the meeting with MSHA Inspector Powers. (Tr. 72-74). Mr. Lohrenz, who also attended this meeting, testified that Kinneberg behaved in a professional manner and did not appear to be angry. (Tr. 222-23). I credit the testimony of Lohrenz over that of Pollock. At the hearing, Mr. Pollock made statements on a number of occasions that, upon further examination, were shown to have little basis in fact or were greatly exaggerated. For example, Pollock testified that by the time he got back from the meeting in Arbor Park "everyone at the plants knew that I'd been given the written warning, because the company made such a spectacle of it, in my words, by taking me to Arbor Park and giving me this discipline." (Tr. 88). He further testified the company "paraded me in front of everyone up in Arbor Park." (Tr. 94). Upon further examination, it is clear that the company neither "paraded" him in front of others nor made a "spectacle" of his discipline. The meeting was around lunch time and it is not clear that anyone saw him go to the Arbor Park office complex or walk to Ms. Arritt's office once he was there except for the receptionist. (Tr. 94-95, 269-70). Indeed, Mr. Evans did not know that Pollock had been disciplined until the day before the hearing. (Tr. 130). It is highly likely that many people at the mine quickly learned that Pollock had been issued the warning letter, but it is clear that there was no parade or spectacle. I have given greater weight to the testimony of Lohrenz and Arritt than the testimony of Pollock in this proceeding when there was a direct conflict.

Pollock maintains that Kennecott's hostility towards his MSHA activity is also evidenced by a notice that was posted on the bulletin board at the mine. (Ex. C-6). The bulletin, entitled "Significant Safety Incident" is dated January 25, 2000, and signed by Mr. Robison. It describes the Martinez accident and includes the following paragraph:

MSHA was called and investigated the incident. They found the employee had violated three procedures, failure to honk when about to move, failure to follow directions from the spotter, and failure to keep his truck under control. All three citations are classified as S&S, and are posted for you to read. The mine will also be required to pay fines on these citations directly impacting our costs.

Id. Although I can appreciate Mr. Pollock's concern, I agree with the company that this bulletin was designed to promote safety by cautioning employees to follow the mine's operating procedures to avoid serious accidents. This bulletin does not indicate that Kennecott was hostile to Pollock's safety activities.

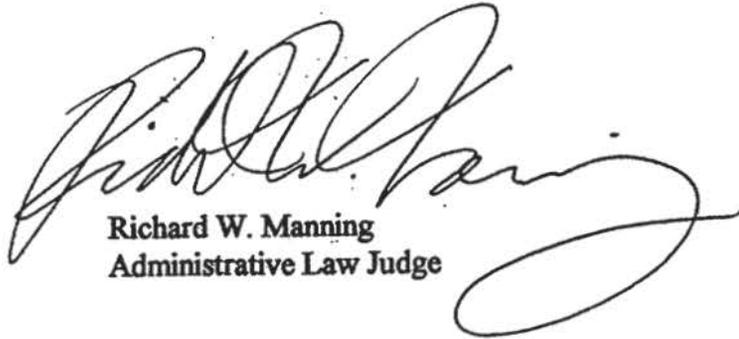
Mr. Pollock also argues that the extraordinarily long delay between the December 30 meeting and the January 21 written warning raises a strong inference that the letter was issued, at least in part, as a result of the events of January 12 and 13 when Pollock called MSHA. The letter was issued only a few days after Inspector Powers issued the citations. Pollock testified that disciplinary warnings are usually given immediately or within a few days after the disputed conduct. Lohrenz and Arritt gave a detailed chronology of the events between December 30 and January 21. I credit their testimony in this regard. Arritt made the decision to issue the written warning by January 11. Because Pollock was a local union president and the circumstances of his discipline were unusual, the company researched the labor relations issues before the letter was issued. (Tr. 254-55). Lohrenz and Arritt testified that the decision to issue the warning letter was not influenced by Pollock's MSHA activities. (Tr. 214-15, 274, 278-79). Arritt is no longer employed by Kennecott. I find that Kennecott's delay in issuing the warning letter was not the result of any discriminatory motive prohibited by the Mine Act. The coincidence in time between the MSHA inspection and the warning letter was just a coincidence.

Pollock is also claiming disparate treatment. Many of these arguments center around the unique nature of the events such as the fact that he was issued a letter rather than a pre-printed warning slip. I have already disposed of most of these issues. He also argues that other union officials have disrupted meetings without receiving any discipline. At a meeting that was attended by various union officials in September 2000, the head of the mechanists' union made derogatory and vulgar remarks to Pollock as everyone was assembling. (Tr.85-87). Pollock testified that Lohrenz simply held his head down and Kinneberg started laughing at the remarks. While these events are unfortunate, the conduct of the head of the mechanists' union is quite different than Mr. Pollock's conduct at the December meeting. The September 2000 meeting was not disrupted. The offending individual did not interrupt or interfere with the conduct of the meeting.

I find that Mr. Pollock was disciplined solely because of his "obstructive and harassing behavior" at the December 30 meeting, as set forth in the written warning. (Ex. R-19). It appears that Mr. Pollock has a quick temper which he has difficulty controlling. Mr. Pollock believes that his warning letter was unfair, given the normal give and take involved in labor relations at this mine. 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). I find that Kennecott's written warning was not motivated in any part by Pollock's protected activities.

III. ORDER

For the reasons set forth above, the complaint filed by Greg Pollock against Kennecott Utah Copper Corporation under section 105(c) of the Mine Act is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

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RWM

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
June 5, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2001-30
Petitioner	:	A. C. No. 46-01318-04447
	:	
v.	:	Docket No. WEVA 2001-31
	:	A.C. No. 46-01318-04448
CONSOLIDATION COAL COMPANY	:	
Respondent	:	Robinson Run No. 95

**ORDER GRANTING MOTIONS FOR LEAVE TO FILE OUT-OF-TIME
AND DENYING MOTIONS TO DISMISS**

These cases are before me on petitions for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(d). The Secretary has moved for leave to file the petitions beyond the time allowed under Commission Procedural Rules. Respondent has opposed the motions and moved that the petitions be dismissed. For the reasons set forth below, the Secretary's motions are granted and Respondent's motions are denied.

Facts

Civil penalties were assessed by the Secretary's Mine Safety and Health Administration (MSHA) for alleged violations of mandatory health and safety standards and Respondent timely served notices of contest on the Secretary. The notice of contest for A.C. No. 46-01318-0447 (Docket No. WEVA 2001-30) was received on January 3, 2001. The notice of contest for A.C. No. 46-01318-04448 (Docket No. WEVA 2001-31) was received on January 2, 2001. Commission Procedural Rule 28(a), 29 C.F.R. § 2700.28(a), specifies that a petition for assessment of civil penalties shall be filed within 45 days of receipt of a timely contest. The petitions for the foregoing penalty assessments should have been filed by February 20, 2001 and February 16, 2001, respectively. They were filed on May 3, 2001, approximately two and one half months beyond the deadline.

The Secretary filed motions for leave to file the petitions out-of-time. Respondent opposed the motions and moved that the petitions be dismissed. Respondent does not claim that it has suffered prejudice as a result of the untimely filings. The Secretary asserts that there was adequate cause for the untimely filings, relying upon a sworn statement by the Assistant District Manager for Inspection Programs. In essence, the Secretary asserts that the untimely filings were the result of inadvertent delay in the transmittal of these cases to the Office of the Solicitor. The

delay resulted from a temporary reduction in secretarial staffing due to the retirement of a secretary in MSHA's Morgantown, West Virginia, field office. The experienced secretary in the Fairmont, West Virginia field office, who normally is responsible for timely forwarding of cases to the Office of the Solicitor, was detailed to perform the retired secretary's duties and was attempting to perform both jobs, devoting most of her time to the detailed position's responsibilities. Apparently, there was also a misunderstanding that led to a failure of one office to retain a copy of a packing list which resulted in an unnecessary delay while that office awaited a copy of the packing list, a problem that is claimed to have been corrected. The materials were transmitted to the Solicitor's Office on May 1, 2001, where it was recognized that the time for filing had expired. Petitions for assessment of civil penalties and motions for leave to late file were promptly filed with the Commission on May 3, 2001.

Applicable Law

The Commission has made clear that the time limits for filing a penalty petition are not to be lightly regarded by the Secretary and that adequate cause must be shown to justify a late filing. Even if adequate cause is shown, a motion to dismiss may be granted if the delay has resulted in prejudice to Respondent. *Rhone-Polenc of Wyoming Co.*, 15 FMSHRC 2089 (October 1993); *Salt Lake Co. Road Dept.*, 3 FMSHRC 1714 (July 1981). In *Salt Lake*, the Commission was critical of the Secretary's reliance on high case loads and limited clerical help as a justification for untimely filing and also admonished the Secretary to proceed with a timely motion to extend time when extra time is legitimately needed.

Nevertheless, the Commission reversed the dismissal that had been entered in that case, holding that "effectuation of the Mine Act's substantive scheme, in furtherance of the public interest" precluded automatic dismissal of an untimely filed petition. *Id.* at 1716. It established the "adequate cause" test for justifying a late filing and recognized that "procedural fairness" could dictate dismissal where an operator could establish that it had suffered prejudice as a result of any delay. The Commission concluded its analysis with the following language: "Allowing * * * an objection [based on prejudice] comports with the basic principle of administrative law that substantive agency proceedings, and effectuation of a statute's purpose, are not to be overturned because of a procedural error, absent a showing of prejudice." (citations omitted). *Id.*

Analysis

The delays in filing here were neither insubstantial nor excessive. While the statement relied upon by the Secretary to explain and justify the delay is not a model of clarity, it does appear to a reasonable degree of certainty that the delays were attributable to a temporary staffing shortage and an error in processing by MSHA field offices. The processing error has been corrected. The materials to support the petitions for assessment of civil penalties were forwarded to the Solicitor's Office after the due dates for filing had passed. The Solicitor's Office immediately noted the error and promptly filed the petitions and motions for leave to file out-of-time.

On the facts of these cases, I find that the Secretary has fulfilled her burden of showing adequate cause for the delay. Because Respondent claims no prejudice attributable to the delay, the motions for leave to late file will be granted.

ORDER

The Secretary's motions for leave to file out-of-time are granted. The Respondent's motions to dismiss are denied.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
June 5, 2001

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 2001-61
Petitioner : A. C. No. 46-01453-04265
 :
v. : Humphrey No. 7
 :
CONSOLIDATION COAL COMPANY :
Respondent :

ORDER GRANTING MOTION FOR RECONSIDERATION
GRANTING THE SECRETARY'S MOTION FOR LEAVE TO FILE OUT-OF-TIME
AND DENYING RESPONDENT'S MOTION TO DISMISS

This case is before me on a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(d). The Secretary moved for leave to file the petition beyond the time allowed under Commission Procedural Rules. The petition, absent a copy of the motion for leave to file out-of-time, was served on Respondent and an answer was filed. The Secretary's motion for leave to file out-of-time was granted as unopposed. Respondent was unaware of the Secretary's motion, until it received the May 21, 2001, Order Accepting Late Filing - Order of Assignment. Respondent has moved to reconsider the granting of the Secretary's motion and moved to dismiss. Respondent does not claim that it has suffered prejudice as a result of the untimely filing. For the reasons set forth below, Respondent's motion to reconsider is granted and, upon reconsideration, the Secretary's motion to late-file the petition is granted and Respondent's motion to dismiss is denied.

Facts

Civil penalties were assessed by the Secretary's Mine Safety and Health Administration (MSHA) for alleged violations of mandatory health and safety standards. Respondent timely served a notice of contest on March 13, 2001. Commission Procedural Rule 28(a), 29 C.F.R. § 2700.28(a), specifies that a petition for assessment of civil penalties shall be filed within 45 days of receipt of a timely contest. The petition should have been filed by April 27, 2001. It was not filed until May 3, 2001, six days late.

Along with the petition, the Secretary filed a motion for leave to file the petition out-of-time. The Secretary argued that there was adequate cause for the untimely filings, relying upon a sworn statement by the Assistant District Manager for Inspection Programs. In essence, the

Secretary asserts that the untimely filings were the result of inadvertent delay in the transmittal of the case to the Office of the Solicitor. The delay resulted from a temporary reduction in secretarial staffing due to the retirement of a secretary in MSHA's Morgantown, West Virginia, field office. The experienced secretary in the Fairmont, West Virginia field office, who normally is responsible for timely forwarding of cases to the Office of the Solicitor, was detailed to perform the retired secretary's duties and was attempting to perform both jobs, devoting most of her time to the detailed position's responsibilities. Apparently, there was also a misunderstanding that led to a failure of one office to retain a copy of a packing list which resulted in an unnecessary delay while that office awaited a copy of the packing list, a problem that is claimed to have been corrected. The materials were transmitted to the Solicitor's Office on April 30, 2001, where it was recognized that the time for filing had expired. A petition for assessment of civil penalties and a motion for leave to late file were promptly filed with the Commission on May 3, 2001.

Applicable Law

The Commission has made clear that the time limits for filing a penalty petition are not to be lightly regarded by the Secretary and that adequate cause must be shown to justify a late filing. Even if adequate cause is shown, a motion to dismiss may be granted if the delay has resulted in prejudice to Respondent. *Rhone-Polenc of Wyoming Co.*, 15 FMSHRC 2089 (October 1993); *Salt Lake Co. Road Dept.*, 3 FMSHRC 1714 (July 1981). In *Salt Lake*, the Commission was critical of the Secretary's reliance on high case loads and limited clerical help as a justification for untimely filing and also admonished the Secretary to proceed with a timely motion to extend time when extra time is legitimately needed.

Nevertheless, the Commission reversed the dismissal that had been entered in that case, holding that "effectuation of the Mine Act's substantive scheme, in furtherance of the public interest" precluded automatic dismissal of an untimely filed petition. *Id.* at 1716. It established the "adequate cause" test for justifying a late filing and recognized that "procedural fairness" could dictate dismissal where an operator could establish that it had suffered prejudice as a result of any delay. The Commission concluded its analysis with the following language: "Allowing * * * an objection [based on prejudice] comports with the basic principle of administrative law that substantive agency proceedings, and effectuation of a statute's purpose, are not to be overturned because of a procedural error, absent a showing of prejudice." (citations omitted). *Id.*

Analysis

The delay in filing here was minimal. It was attributable to a temporary staffing shortage and an error in processing by MSHA field offices. The processing error has been corrected. The materials to support the petition for assessment of civil penalties were forwarded to the Solicitor's Office after the due date for filing had passed. The Solicitor's Office immediately noted the error and promptly filed the petition and a motion for leave to file out-of-time.

On the facts of this case, I find that the Secretary has fulfilled her burden of showing adequate cause for the delay. Because Respondent claims no prejudice attributable to the delay, the Secretary's motion for leave to file out-of-time will be granted.

ORDER

Respondent's motion to reconsider the May 21, 2001, Order granting the Secretary's motion for leave to file the petition out-of-time is granted. Upon reconsideration, the Secretary's motion for leave to file out-of-time is granted. Respondent's motion to dismiss is denied.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

2 Skyline, Suite 1000

5203 Leesburg Pike

Falls Church, Virginia 22041

June 25, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-146-DM
ON BEHALF OF	:	SC MD 00-25
LEE GARRETT,	:	
Complainant	:	Arkansas Operations Mill
	:	
UNITED STEEL WORKERS OF AMERICA,	:	
LOCAL 4880	:	
Intervenor	:	
	:	Mine ID 03-00257
v.	:	
	:	
ALCOA WORLD ALUMINA, LLC, and	:	
its successors,	:	
Respondent	:	

ORDER GRANTING MOTION TO QUASH DEPOSITION

This case is before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Secretary, by counsel, has moved to quash the Respondent's Notice of Deposition of "person or persons at MSHA's office of assessments who made the decision regarding the amount of penalty for this case." For the reasons set forth below, the motion is granted.

The Secretary offers three bases for quashing the notice: (1) High level government officials have a qualified immunity from being deposed; (2) The Commission and its judges assess penalties *de novo*; and (3) The information sought by the deposition is covered by the deliberative process privilege. I find that the first reason does not provide a basis for quashing the notice, but the second and third do.

It has long been held that "top executive department officials should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." *Simplex Time Recorder Co. v. Secretary of Labor*, 766 F.2d 575, 586 (D.C. Cir. 1985) [citing *United States v. Morgan*, 313 U.S. 409, 422 (1941)]. In *Simplex*, the court included the Solicitor of Labor, the Secretary of Labor's Chief of Staff, the Occupational Safety and Health Administration (OSHA) Regional Administrator and the OSHA Area Director as officials included within this prohibition. *Id.*

As the Respondent points out, however, there is no way to determine whether the “person or persons” in the assessment office who determined the amount of penalty in this case come within this prohibition, because the Secretary has not identified who made the decision. Accordingly, this basis for quashing the notice is rejected.

The second reason advanced by the Secretary is sound. Since its beginning, the Commission has held that “in a proceeding before the Commission the amount of the penalty to be assessed is a *de novo* determination based on the six statutory criteria specified in section 110(i) of the Act (30 U.S.C. § 820(i)) and the information relevant thereto *developed in the course of the adjudicative proceeding.*” *Sellersburg Stone Co.*, 5 FMSHRC 287, 291-92 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984) (citations omitted) (emphasis added). Thus, the reasons for the determination of the assessment office are totally irrelevant. Indeed, the Commission has held that even if the judge determines that the Secretary failed to comply with her regulations in proposing a penalty, he does not remand the case to have another penalty proposed, but rather assesses an appropriate penalty based on the record. *Youghioghenny & Ohio Coal Co.*, 9 FMSHRC 673, 679 (April 1987).

The Respondent argues that the recent Commission decisions in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000), and *Cantera Green*, 22 FMSHRC 616 (May 2000), requiring that judges explain their reasons for assessing a penalty different from that proposed by the Secretary somehow makes the reasons of the Secretary for proposing a penalty a part of the proceeding. This position, however, misreads the cases. Both cases, as well as *Hubb Corp.*, 22 FMSHRC 606 (May 2000), merely reiterated the admonition in *Sellersburg*, 5 FMSHRC at 293, that: “When based on *further information developed in the adjudicative proceeding*, 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.” (Emphasis added.) Clearly, the explanation is how the new information leads to a different penalty, not how the judge’s reasoning differs from the Secretary’s.

Since the assessment of a penalty after a hearing is based solely on the information presented during the hearing on the penalty criteria set out in section 110(i), the reasons the Secretary may have relied on in proposing the penalty are not relevant. Consequently, taking the deposition of the “person or persons” in the assessment office cannot lead to relevant evidence and the Notice of Deposition will be quashed.

Finally, I also find that the “deliberative process privilege” applies in this case. The deliberative process privilege is designed to protect “the ‘consultative functions’ of government by maintaining the confidentiality of ‘advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.’” *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992 (June 1992) [quoting *Jordan v. U.S. Dept. of Justice*, 591 F.2d 753, 772 (D.C. Cir. 1978)].

In its Opposition, the Respondent asserts that: "Alcoa does not seek to require that the Secretary make findings of fact concerning the six criteria nor does Alcoa seek to delve into the Secretary's decision-making process. Rather Alcoa looks to have the Secretary provide it with the reasons behind her conclusions." (Opposition at 6-7.) What the Respondent apparently fails to recognize, is that the reasons for the conclusions are the precise types of functions that are covered by the privilege. Therefore, I conclude that the deliberative process privilege is another reason for quashing the notice.¹

ORDER

Accordingly, the motion to quash the notice of deposition of the "person or persons at MSHA's office of assessments who made the decision regarding the amount of the penalty for this case" is **GRANTED**. It is **ORDERED** that the notice of deposition is **QUASHED**.


T. Todd Hodgdon
Administrative Law Judge
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/nt

¹ If this were the only reason put forward by the Secretary, it might have been appropriate to permit the deposition and require the Secretary to object to any questions violating the privilege. However, in this case, the Respondent has stated that the only thing that it is seeking from the witness is information covered by the privilege and I have further determined that the information it seeks is not only privileged, but irrelevant.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 25, 2001

MOUNTAIN CEMENT COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2001-376-RM
	:	Order No. 7919298; 3/26/2001
v.	:	
	:	Docket No. WEST 2001-378-RM
	:	Order No. 7919300; 3/27/2001
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mountain Cement Company
ADMINISTRATION, (MSHA),	:	Mine Id. 48-00007
Respondent	:	

ORDER GRANTING MOTION FOR EXPEDITED HEARING

On March 26 and 27, 2001, MSHA Inspector John R. King issued at least 20 orders of withdrawal to Mountain Cement Company under section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d) ("Mine Act"). Mountain Cement received a section 104(d)(1) citation and order during a previous inspection.

Mountain Cement contested the section 104(d)(2) orders under 29 C.F.R. § 2700.20. The Secretary filed a motion to stay all of the proceedings until civil penalties are proposed. I granted the Secretary's motion to stay with respect to all the cases except the two above-captioned cases. Mountain Cement filed a motion for an expedited hearing in the present cases. The Secretary opposes the motion.

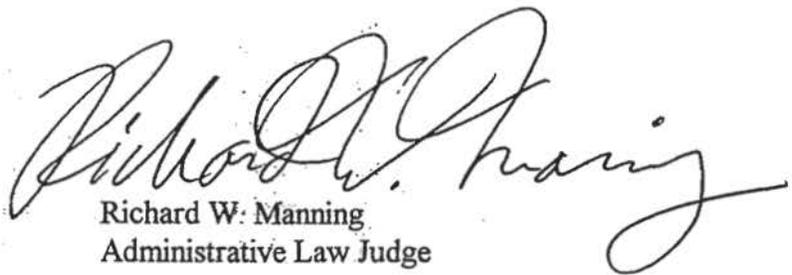
A mine operator has the right under the Mine Act and the Commission's Procedural Rules to contest citations and orders before a petition for assessment of penalty is filed. A mine operator also has the right to a pre-penalty hearing in contest cases such as these. Mountain Cement asked for an expedited hearing. The Procedural Rules do not specify the basis upon which a motion for expedited hearing shall be granted. 29 C.F.R. § 2700.52. Consideration of such a request is within the discretion of the judge. *Wyoming Fuel*, 14 FMSHRC 1282 (Aug. 1992). Commission judges have held that a mine operator must show "extraordinary or unique circumstances resulting in continuing harm or hardship." *Southwestern Portland Cement Co.*, 16 FMSHRC 2187 (Oct. 1994) (ALJ). As a general matter, the fact that a mine operator is on a section 104(d) unwarrantable failure chain is not a sufficient basis for granting a motion for expedited hearing. The possibility that an operator could be subject to future withdrawal orders under section 104(d) is neither extraordinary nor unique under the Mine Act.

The circumstances presented by these cases, however, are rather unique and extraordinary. Mountain Cement requested a conference with MSHA on the section 104(d)(2) orders. Representatives of Mountain Cement met with representatives of MSHA on or about May 15, 2001. At this conference, every section 104(d)(2) order was modified to a section 104(a) citation with the exception of the two orders at issue in the present cases and four other orders that were vacated at the conference. Thus, of the 20 orders issued, only two met the requirements of Section 104(d)(2). This fact raises a very real possibility that the MSHA inspector abused his discretion or seriously misapplied the law regarding unwarrantable failure orders. Most of the alleged violations were not designated as significant and substantial ("S&S") and most of those that were so designated were modified to non-S&S at the conference. As a result, Mountain Cement had to cease all operations while it abated 20 mostly non-S&S violations.

As modified, the two orders at issue allege non-S&S violations. Order No. 7919298 alleges that access in the area of a hopper was obstructed by accumulated material in violation of section 56.20003(a). Order No. 7919300 alleges that spilled material had accumulated on the top deck of the feed tank in violation of section 56.20003(b). The order states that the cited "area is subject to high winds that can cause silica-bearing dust to become airborne" exposing employees to a health hazard. It was designated as an unwarrantable failure for that reason. When the order was modified to delete the S&S determination, the conference officer stated that the "tanks are located indoors, the wind should not be a factor." This disparity raises serious issues that Mountain Cement is entitled to have resolved. Many of the other modifications issued at the conference set forth facts that are at odds with the original orders. The potential harm to Mountain Cement is continuing in nature.

For good cause shown, Mountain Cement's motion for an expedited hearing is **GRANTED**. The 90-day period that is set forth in section 104(d) expires on or about June 26, 2001. A hearing cannot be scheduled prior to the expiration of the 90-day period. As a consequence, although I am granting Mountain Cement's motion, the hearing need not be held within the next two or three weeks.

Mountain Cement did not indicate where it would prefer to hold the hearing. Unless I order otherwise, the hearing will be in the Commission's Denver courtroom. I am available for hearing on the following dates: the week of July 9, July 19 (Denver only), the week of July 23, August 2, and the week of August 27, 2001. I will not schedule the hearing the week of July 9, without the consent of both parties. Other dates may become available as cases settle. The parties shall discuss potential hearing dates and schedule a conference call with me to discuss these cases as soon as practicable.



Richard W. Manning
Administrative Law Judge

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RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 26, 2001

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, on behalf of	:	
DEWAYNE YORK,	:	Docket No. KENT 2000-255-D
Complainant	:	BARB-CD-2000-06
v.	:	
	:	
BR&D ENTERPRISES, INC,	:	Mine ID 15-18028
Respondent	:	

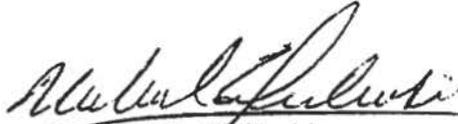
ORDER AMENDING **ORDER OF TEMPORARY REINSTATEMENT**

Presently before me is a joint request by the parties to enter an agreed order amending the August 29, 2000, Decision and Order of Temporary Reinstatement, directing that Dewayne York be immediately reinstated to the position he held prior to his termination on May 25, 2000. Following entry of that Order, the parties agreed to economic reinstatement, i.e., York would receive the same pay and benefits he had been receiving prior to his termination, but he would not actually return to work. That agreement has been in effect since August 31, 2000, and continues to present. On October 11, 2000, the parties submitted an "Agreed Order on Economic Reinstatement," requesting that the Order of Temporary Reinstatement be modified to reflect their agreement.

Because the parties had not addressed the issue of jurisdiction in their submission, I declined their request, invited their attention to the jurisdictional issue and suggested that they could file an appropriate motion with me or the Commission. The Secretary filed a motion with the Commission, pursuant to Commission Procedural Rule 1(b) and Rule 60(b) of the Federal Rules of Civil Procedure, requesting that the proceedings be reopened and that the case be remanded to allow me to rule on their request. By Order, dated April 20, 2001, the Commission ruled that it did not have jurisdiction to entertain the Secretary's motion because the administrative law judge retains jurisdiction over a temporary reinstatement docket pending final resolution of the formal complaint of discrimination. *Sec'y of Labor on behalf of York v. BR & D Enterprises, Inc.*, 23 FMSHRC 386 (Apr. 2001). The parties have renewed their request that the Decision and Order of Temporary Reinstatement be amended to reflect their agreement to economic reinstatement.

ORDER

Upon consideration of the joint request of the parties, it is **ORDERED**: that the August 29, 2000, Decision and Order of Temporary Reinstatement is hereby amended to provide that, in lieu of actual reinstatement, the Respondent may, with the agreement of the parties, provide York with economic reinstatement as specified in the attached Agreed Order on Economic Reinstatement.



Michael E. Zielinski
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

ALEXIS M. HERMAN, Secretary)	DISCRIMINATION PROCEEDING
of Labor, United States)	
Department of Labor,)	
)	DOCKET NO. 2000-255-D
Complainant)	
)	
v.)	MSHA CASE NO. BARB-CD-2000-06
)	
BR&D ENTERPRISES, INC.,)	
)	MINE: BRD #3
Respondent)	

AGREED ORDER ON ECONOMIC REINSTATEMENT

Upon agreement of the parties, and being otherwise fully advised, the Decision and Order of Temporary Reinstatement issued on August 29, 2000 is modified as follows:

1. Dewayne York is to be economically reinstated rather than being placed back to work. This economic reinstatement began on August 31, 2000. Mr. York is to be paid on the regularly scheduled Thursday payday, and is to receive the same amount of pay, including overtime pay, as roof bolter operators working on his former section at the mine. His paycheck is to be mailed to his home address.

2. Dewayne York is also to be provided health insurance as an employee, and is to receive any and all benefits which he would receive or to which he would be entitled if he were working as a roof bolter operator.

3. This economic reinstatement of Dewayne York is to last until he is actually put back to work at his former position,

or until there is an ultimate resolution of this matter, by settlement or final decision and order.

4. Respondent's signature on this Agreed Order, by counsel, shall not constitute a waiver of and respondent expressly retains and reserves all rights and defenses to this action to which respondent is entitled at law. Further, it is expressly acknowledged by the parties that respondent does not waive any of the procedural requirements imposed upon the complainant in the prosecution of the claim subject of this action.

So Ordered this ____ day of _____, 2000.

HONORABLE MICHAEL E. ZIELINSKI
Administrative Law Judge

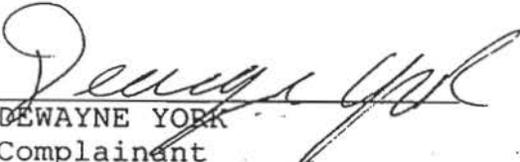
Agreed to by the parties:

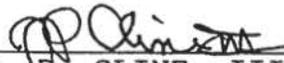
Respectfully submitted,

HENRY L. SOLANO
Solicitor of Labor

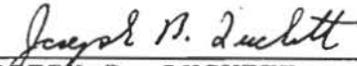
JAYLYNN K. FORTNEY
Regional Solicitor

THERESA BALL
Associate Regional Solicitor


DEWAYNE YORK
Complainant


J. E. CLINE, III
Attorney

BR&D Enterprises, Inc.


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Attorneys for Secretary

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 27, 2001

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, on behalf of	:	
GARY DEAN MUNSON	:	Docket No. WEVA 2000-40-D
Complainant	:	MORG-CD-2000-01
	:	
v.	:	
	:	Federal No. 2
EASTERN ASSOCIATED COAL CORP.	:	Mine ID 46-01456
Respondent	:	

**ORDER DENYING MOTION TO ENFORCE ORDER OF
TEMPORARY REINSTATEMENT WITHOUT PREJUDICE**

Presently before me is a motion by the Secretary for entry of an order enforcing the order of temporary reinstatement previously entered in this case. Respondent has opposed the motion. For the reasons that follow, the motion is denied without prejudice.

On March 10, 2000, following a hearing, a Decision and Order of Temporary Reinstatement was entered, directing Respondent, Eastern Associated Coal Corporation (EACC) to “**REINSTATE** Mr. Munson to the position he held immediately prior to December 6, 1999, or to a similar position, at the same rate of pay and benefits, **IMMEDIATELY ON RECEIPT OF THIS DECISION.**” Munson, however, did not return to work at EACC, because he agreed to economic, as opposed to actual, reinstatement, i.e., Munson accepted an offer from EACC to provide pay and benefits without his physically reporting for work. The parties did not notify the Commission of the economic reinstatement agreement and the March 10, 2000, decision and order remains outstanding.

A few months later, Munson changed his mind about economic reinstatement and requested that he be allowed to return to work. EACC declined his request, taking the position that Munson should be held to his agreement to accept economic reinstatement. The issue was raised with the undersigned administrative law judge, but was not resolved, in part because of a question of jurisdiction. See the order dated September 15, 2000, noting the withdrawal of Respondent’s motion to stay economic reinstatement. No further action was taken on Munson’s request until the filing of the instant motion on May 24, 2001. On June 25, 2001, a Decision on Liability was issued in Commission Docket No. WEVA 2000-58-D, the formal complaint of discrimination filed on Munson’s behalf with the Commission. It was held that EACC

discriminated against Munson in violation of the Act and directed the parties to confer on the relief to be awarded Munson and the amount of an appropriate civil penalty.

While the Commission has recently determined that an administrative law judge retains jurisdiction over a temporary reinstatement docket pending final resolution of the formal complaint of discrimination,¹ there are several questions that have not been addressed by the parties. Accordingly, the present motion will be denied, without prejudice to its refiling with appropriate supporting authority.

As noted previously, the March 10, 2000, decision and order remains outstanding. It is unclear what the Secretary can achieve through the motion to enforce, beyond the presently existing decision and order directing Munson's reinstatement. It seems, therefore, that the Secretary could seek enforcement of that order, either in the appropriate United States Circuit Court of Appeals pursuant to 30 U.S.C. § 816(b) or in a United States District Court pursuant to 30 U.S.C. § 818(a). Unlike an administrative law judge, judges of those courts possess the contempt power and have the capability of compelling compliance with a final order of the Commission. Of course, the Secretary would be met with EACC's defense that Munson agreed to accept economic reinstatement.

The Secretary has stated that Munson has rescinded the economic reinstatement agreement and requested that it be declared "null and void." However, no authority has been cited in support of that request, nor has a legal framework for resolving the issues raised by the motion and EACC's defense even been identified. Also unaddressed are issues such as whether the Commission has jurisdiction to resolve what may be a private contractual dispute raised by EACC's defense, or whether such issues can or should be resolved in the first instance by the Commission or a court.

EACC's opposition to the motion suffers from similar shortcomings. It argues that the economic reinstatement agreement fulfills the primary legislative intent of the temporary reinstatement provision and that Munson should be held to his "binding contractual agreement." However, EACC does not address Munson's purported rescission of the agreement and no legal authority is cited in support of its arguments. EACC likewise did not address the potential jurisdictional issues identified above.

In light of the above, moveant has failed to carry his burden of demonstrating entitlement to the relief requested. Accordingly, the motion will be denied, without prejudice to its being refiled with appropriate supporting authority. Of course, the Secretary is also free to seek enforcement of the March 10, 2000, decision and order through the courts. Ultimate disposition of the merits of his discrimination complaint may also moot the current dispute.

¹ *Sec'y of Labor on behalf of York v. BR&D Enterprises, Inc.*, 23 FMSHRC 386 (Apr. 2001).

ORDER

The Secretary's Motion to Enforce Order of Temporary Reinstatement is **Denied**, without prejudice.



Michael E. Zielinski
Administrative Law Judge

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/mh

