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JUNE 2002

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

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(Petition for Reconsideration of Commission's Order Denying Review on May 3, 2002)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 19, 2002

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

v.

VIRGINIA SLATE COMPANY

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Docket No. VA 99-8-M

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This is a civil penalty proceeding arising from the issuance of citations by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) against Virginia Slate Company (“Virginia Slate”), pursuant to 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 Avram Weisberger, upon remand, correctly determined that two violations were not due to Virginia Slate’s unwarrantable failure and properly assessed penalties. 23 FMSHRC 867 (Aug. 2001) (ALJ). For the reasons that follow, we vacate and remand the judge’s unwarrantable failure determinations and penalty assessments.

I.

Factual and Procedural Background

A. Virginia Slate I

This is the second time that this proceeding has been before the Commission. A more complete summary of the background facts is found in the Commission’s prior decision. 23 FMSHRC 482 (May 2001) (“Virginia Slate I”), vacating and remanding 22 FMSHRC 378 (Mar. 2000) (ALJ).

Virginia Slate operates an open pit mine from which it extracts slate, grinds it in a crusher, and produces various kinds of building materials. 23 FMSHRC 482; Tr. I 22. Virginia Slate is owned by Adco Land Corporation, which is owned by V. Cassel Adamson, Jr. (“Adamson, Jr.”), who also served as attorney for Virginia Slate in the Commission proceedings. 23 FMSHRC 482. Adamson’s son, Cassel Adamson III (“Adamson III”), worked at the mine. *See id.* at 484-85. Roy Terry served as a foreman; Leroy Williams and James Carter were crusher operators. 22 FMSHRC at 379, 381.

Briefly, on June 2, 1998, MSHA inspector Ricky Joe Horn conducted an inspection of Virginia Slate’s operation. 23 FMSHRC at 482-83. As a result, Horn issued a total of fourteen citations and orders. S. Ex. 1-14. Among those citations and orders, two are directly at issue before the Commission. Order No. 7711667 charged a violation of 30 C.F.R. § 56.9301¹ for failing to use bumper blocks or other impeding devices to prevent a front-end loader, which was loading the hopper on a crusher, from running into the hopper, hitting a rock, or overturning. 23 FMSHRC at 483. The inspector determined that the violation was significant and substantial (“S&S”)² and that it occurred as a result of Virginia Slate’s unwarrantable failure³ to comply with the regulation. *Id.*

Horn also issued Order No. 7711681, which cited a violation of 30 C.F.R. § 56.14100,⁴ for failing to inspect mobile equipment prior to its being placed in operation on a shift. *Id.* Horn concluded that preshift examinations had not been adequately performed because he found a number of equipment defects that should have been detected and corrected. *Id.* The inspector designated the violation as S&S and due to Virginia Slate’s unwarrantable failure. *Id.*

Subsequently, the Secretary filed a civil penalty assessment of \$8978 for the citations and

¹ Section 56.9301 provides: “Berms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning.” 30 C.F.R. § 56.9301.

² The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

³ The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

⁴ Section 56.14100(a) provides: “Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift.” 30 C.F.R. § 56.14100(a).

orders that were issued. Virginia Slate challenged the penalty assessments, and a hearing was held before an administrative law judge.⁵ The judge affirmed the underlying violations. However, the judge disagreed with the inspector's determinations that some of the violations were S&S or due to Virginia Slate's unwarrantable failure to comply with the applicable regulations. 22 FMSHRC at 380-92. The judge reduced the Secretary's proposed penalty assessments to \$4400. *Id.* at 392.

On review, the Secretary appealed the judge's finding of no unwarrantable failure with regard to two citations (Citation Nos. 7711663 and 7711665) and three orders (Order Nos. 7711661, 7711667, and 7711681). 23 FMSHRC at 483. The Commission affirmed the judge's determination of no unwarrantable failure with regard to Citation No. 7711665. *Id.* at 488-89. However, with regard to the remaining citation, Citation No. 7711663, and the three orders, the Commission vacated and remanded the judge's negative unwarrantable failure determinations. *Id.* at 484-87, 490-92. The Commission also vacated and remanded the judge's penalty assessments, because he failed to consider the relevant penalty criteria in assessing penalties for the citations and orders. *Id.* at 492-95.

B. Remand⁶

1. Unwarrantable Failure

In Order No. 7711667, Virginia Slate was charged with failing to provide berms, bumper-blocks, safety hooks, or similar impeding devices for the front-end loader that loaded the hopper of the crusher. 23 FMSHRC at 490. The judge reviewed record testimony and concluded that the Secretary had failed to adduce sufficient evidence to establish that the violation was so obvious that Virginia Slate should have known of the conditions. 23 FMSHRC at 868. He credited Adamson, Jr. over crusher operator Williams in finding that the front-end loader was used only to load the hopper for about 10 minutes on June 1, 1998. *Id.* The judge acknowledged the testimony of MSHA Inspector Horn, who stated that Adamson III told him that the front-end loader had been used during the week prior to June 2 (the day the citation issued); however, the judge further noted that the Secretary failed to call Adamson III as a witness or explain her failure to do so. *Id.* The judge concluded that it had not been established that Virginia Slate's conduct reached the level of aggravated conduct that would constitute unwarrantable failure. *Id.*

In Order No. 7711681, the judge noted that there was a lack of evidence to indicate the

⁵ The hearing was held over a three-day period (October 12-14, 1999), and transcript references note the day of hearing by Roman numeral I through III, followed by the page number.

⁶ On remand, the judge addressed the unwarrantability designations of Order No. 7711661 and Citation No. 7711663. These two determinations were not appealed or otherwise directed for review and, thus, are not now before the Commission.

duration of the conditions of mobile equipment that had not been disclosed by preshift examinations. *Id.* at 869. Nor was there anything to indicate how long Virginia Slate had failed to conduct preshift examinations. *Id.* The judge concluded that, for the reasons stated in his prior decision, 22 FMSHRC at 390, the Secretary failed to establish that violation was a result of Virginia Slate's unwarrantable failure. 23 FMSHRC at 869.

2. Penalties

The judge reaffirmed the penalties he had assessed in his initial decision for the citations and orders that the Commission had remanded to him for further consideration. The judge began by addressing the penalty for Citation No. 7711660. 23 FMSHRC at 869. However, as the Commission noted in *Virginia Slate I*, 23 FMSHRC at 484 n.5, the Secretary had vacated that citation prior to the judge's first decision. In addition, the judge omitted any discussion of the penalty for Citation No. 7711663, which had been remanded to him.

In addressing the penalty for Order No. 7711661,⁷ which involved Virginia Slate's failure to have a protective guard on the V-belt drive and pulleys on the feeder attached to the crusher, the judge first noted that the level of gravity was relatively high, given that the violation could have resulted in a miner injury. 23 FMSHRC at 870. He further found that the violation was abated in a timely fashion, and that there was no evidence that a fine would have an adverse impact on Virginia Slate's ability to remain in operation. *Id.* He stated that there was no evidence that the penalty should be mitigated by the size of Virginia Slate's operation. *Id.* He then noted that the history of violations did not result in mitigating or increasing the penalty. *Id.* Finally, the judge held that the level of negligence was no more than moderate – less than that ascribed by the Secretary. *Id.* The judge concluded by finding that a penalty of \$300 was appropriate. *Id.*

With regard to Citation No. 7711665, which addressed Virginia Slate's failure to provide guard rails or catwalks to ensure safe access to the clutch and throttle levers to operate the crusher, the judge omitted any reference to the level of gravity of the violation. *Id.* He found no evidence on the following criteria: that the penalty would have any adverse effect on Virginia Slate's ability to remain in business; that the penalty should be mitigated by the size of its operation; and that would suggest that its history of violations was either very good or very bad. *Id.* Taking this into account along with the level of negligence, which was less than asserted by the Secretary, the judge concluded by finding that a \$300 fine was appropriate. *Id.*

In addressing Order No. 7711667, which concerned Virginia Slate's failure to provide berms, safety hooks, or other similar impeding devices for the front-end loader that was at the crusher hopper, the judge noted that the gravity of the violation was high given the danger of overturning the loader. *Id.* Based on crediting the testimony of Adamson, Jr. (that the loader

⁷ This order is inadvertently referred to as "Order No. 771161" in the judge's decision on remand. 23 FMSHRC at 870.

was only used for a brief time), the judge found that the violation was not so obvious that Virginia Slate's level of negligence was more than moderate. *Id.* at 871. The judge found that the violation was timely abated. *Id.* As with the prior citation, he found no evidence with regard to ability to remain in operation, appropriateness of the penalty compared to size of the operator, and history of violations. *Id.* He concluded that a \$200 penalty was appropriate. *Id.*

Finally, the judge addressed the penalty in connection with Order No. 7711681, which charged Virginia Slate with failing to perform adequate preshift examinations on mobile equipment. *Id.* The judge found that the violation was timely abated. *Id.* As in his prior penalty analysis, he found no evidence that the penalty would have an adverse impact on its ability to remain in business or that the penalty should be mitigated by the size of its business, and that its history of violations was neither very good nor very bad. *Id.* The judge further noted that the level of negligence was less than that asserted by the Secretary. *Id.* He concluded by imposing a \$300 penalty. *Id.*

On September 17, 2001, the Commission issued a sua sponte direction for review limited to issues raised by the judge's penalty assessments. Concurrently with the issuance of the Commission's direction for review, the Secretary of Labor filed a petition for discretionary review challenging the judge's unwarrantability determination with regard to two of the four violations on remand. On September 25, 2001, the Commission issued a second direction for review granting the Secretary's petition.

II.

Disposition

A. Unwarrantable Failure

1. Order No. 7711667

The Secretary's primary argument in support of vacating the judge's negative unwarrantability determination in Order No. 7711667 is that the judge abused his discretion when he failed to explain why the "missing witness rule" (sometimes referred to as the "adverse inference rule") was not applied against Virginia Slate. PDR at 5-7.⁸ Specifically, the Secretary had contended that the fact that Adamson III was not called as a witness by Virginia Slate warranted an inference that, if he had been called, his testimony would have been adverse to the operator. *Id.* Significantly, the Secretary failed to raise this matter before the judge in *Virginia*

⁸ The Secretary designated her Petition for Discretionary Review as her brief on the merits in addressing the judge's negative unwarrantability determinations. Virginia Slate did not file a brief with the Commission.

Slate I with regard to this particular violation. See S. Trial Br. at 39-41.⁹ Further, the Secretary did not attempt to raise it before the judge on remand, as neither party filed supplemental pleadings with the judge. Having failed to raise the missing witness rule before the judge, it is now too late for the Secretary to argue on review for the application of the rule. 30 U.S.C. § 823(d)(2)(A)(iii). Cf. *Eagle Energy, Inc.*, 23 FMSHRC 1107, 1119-20 & n.18 (Oct. 2001) (Commission reviewed judge's application of missing witness rule, an issue which had been raised at trial).

The Secretary further challenges the judge's crediting Adamson, Jr. over crusher operator Williams with regard to how long the front-end loader had been used. PDR at 8-9. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). The Secretary has failed to put forth any persuasive reason to override these well-established principles regarding the judge's credibility determinations.

Nonetheless, the Secretary correctly asserts that the judge failed to adhere to the Commission's remand instructions and consider all the relevant aggravating factors in determining unwarrantability. PDR at 9-10. We specifically instructed the judge in *Virginia Slate I* to consider "the relevant aggravating factors, such as the obviousness of the violation, the operator's knowledge of the violation, or any abatement efforts by the operator." 23 FMSHRC at 490. Despite this explicit instruction, the judge's discussion of unwarrantability was largely limited to the duration of the violation. 23 FMSHRC at 868. The only specific evidence he cited in his entire analysis of the unwarrantability of this violation concerned testimony relevant to the length of time the front-end loader was used, on which he based his conclusion that it was only utilized for approximately 10 minutes. *Id.*

However, whether conduct is "aggravated" in the context of unwarrantable failure is determined by examining many other factors as well, including the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation poses a high degree of danger, and the operator's knowledge of the existence of the violation. See *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000) ("*Consol*"); *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);

⁹ Nor did the Secretary raise the issue before the Commission in *Virginia Slate I*. See PDR at 10-11, 19-20.

BethEnergy Mines, Inc., 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

Given the judge's limited examination of the unwarrantability factors that he was asked to consider, we must again vacate his determination, with instructions to consider *all* the unwarrantability factors in conjunction with the specific facts of the violation. For example, the judge should analyze whether the violation posed a high degree of danger, particularly in light of his finding (in the context of his penalty determination) that as a result of the violation, there was a danger of the loader overturning. 23 FMSHRC at 870. Similarly, when discussing whether the operator had knowledge of the violation, the judge should explain his finding through reference to specific record evidence. In his unwarrantable failure analysis, he simply made a global statement that the Secretary failed to prove the violation was so obvious "that the operator *should have had* knowledge of these conditions." *Id.* at 868 (emphasis added). However, the judge on remand should also determine the extent of the operator's knowledge of the violation, specifically addressing testimony of Adamson, Jr. Tr. II 155-71.¹⁰

If the judge finds that Adamson, Jr. knew or had reason to know that impeding devices had not been provided around the front-end loader, the judge should also consider whether or not Adamson, Jr. was a supervisor, and, if he was, whether he violated the standard of care required of supervisory personnel by failing to stop a known violation. Under Commission precedent, supervisors are held to a high standard of care, *Midwest Material*, 19 FMSHRC at 35, and a supervisor's involvement in a violation should be considered in an unwarrantability analysis of the violation. *See Lion Mining Co.*, 19 FMSHRC 1774, 1778 (Nov. 1997) (foreman's failure to stop a known violation was a contributing factor in an unwarrantable failure finding because of the high standard of care to which foremen and other supervisory personnel are held).¹¹

¹⁰ In his testimony, Adamson, Jr. did not contradict the inspector's assertions that no stop blocks or impeding device had been used to prevent the front end loader from over-traveling or overturning. Tr. II 134. Moreover, Adamson, Jr. made clear that he had agreed to permit the loader to be utilized to feed the crusher, Tr. II 156, 161, despite the fact that he "felt uncomfortable with it not having a steel thing around it or a concrete thing around it, something that was stronger than just the loose rock piled up." Tr. II 165.

¹¹ Chairman Verheggen would affirm the judge's determination that unwarrantable failure was not established on the ground that the judge adequately considered the unwarrantability factors pursuant to our explicit instruction. 23 FMSHRC at 490-91; *see Consol*, 22 FMSHRC at 353 (providing that a judge need only consider the relevant factors in an unwarrantability analysis). The judge found that the violation lasted only 10 minutes in duration based on his crediting the testimony of Adamson, Jr. over the conflicting testimony of crusher operator Williams. 23 FMSHRC at 868; slip op. at 3. In addition, the judge determined that the Secretary failed to establish any prior obviousness or knowledge of the violative conditions.

2. Order No. 7711681

The Secretary's primary argument on review is that the judge ignored the Commission's remand instructions and record evidence. PDR at 11-14. On its face, the judge's unwarrantability analysis does not address the factors that the Commission instructed him to consider, namely "the extent and duration" of Virginia Slate's failure to perform adequate preshift examinations, "its knowledge that it was not adequately carrying out such examinations," and "the obviousness" posed by the underlying violations.¹² 23 FMSHRC at 492. Relying on a purported lack of record evidence on duration, the judge appears to have done little more than reiterate his prior unwarrantability determination without examining the other factors that he was specifically instructed to consider. 23 FMSHRC at 869. Thus, we must again vacate and remand the judge's unwarrantability analysis.

In addition, we conclude that the judge looked at the record evidence too narrowly and ignored relevant evidence that is pertinent to the issue of duration. As the Secretary notes on appeal, PDR at 12, the judge did not even consider testimony of Roy Lee Green in support of a defective seatbelt violation (Order No. 7711669) that he credited in *Virginia Slate I*, 22 FMSHRC at 387-88. This testimony was indicative of how long the underlying seatbelt violation existed and, therefore, was relevant to the issue of how long the operator failed to perform adequate preshift examinations of mobile equipment. Thus, the judge erred when he concluded that there was "nothing in the record to indicate how long the safety defects had been in existence prior to being cited." 23 FMSHRC at 869. For this additional reason, vacating the judge's analysis is warranted.¹³

B. Penalties

As was noted in *Virginia Slate I*, the Commission has recently reiterated the need for its judges to fully satisfy the statutory requirements of section 110(i) by providing findings of fact

These findings are backed by substantial evidence given the scant amount of evidence presented by the Secretary to support the unwarrantable designation. *See* Tr. II 133-42.

¹² Commissioner Beatty also concluded that the judge should consider the danger posed by the underlying violations. 23 FMSHRC at 492 n.22.

¹³ In *Virginia Slate I*, Commissioner Jordan concluded that the record evidence would support only one conclusion – that the violation was the result of the operator's unwarrantable failure – and she would have reversed the judge. 23 FMSHRC at 499-500. Consistent with that opinion, Commissioner Jordan would again reverse the judge's determination and affirm the inspector's unwarrantability designation.

on each of the six penalty criteria when assessing a penalty.¹⁴ 23 FMSHRC at 493 (citations omitted). Such findings of fact are necessary to provide operators with notice of the basis upon which the penalty is being assessed and to provide the Commission and any reviewing court with the information they need to accurately determine whether a penalty is appropriate. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000). An explanation is particularly essential when a judge's penalty assessments substantially diverge from the Secretary's proposed penalties. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). As the Commission noted in *Sellersburg*, without an explanation for such a divergence, "the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Id.*

The Commission previously vacated the judge's penalty assessments because he failed to explain the basis for the penalties, and remanded to the judge "for detailed findings of fact as to each of the six section 110(i) criteria and reassessment of an appropriate penalty" for each of the five violations at issue. 23 FMSHRC at 493-95. The judge's penalty assessments presently on review must again be vacated because they fail to include factual findings for all of the criteria. Nevertheless, in vacating these assessments, we do not imply that the judge cannot draw on his factual determinations from his two prior decisions when he once again analyzes the penalty criteria.¹⁵ Rather, he clearly can utilize these prior findings along with the new findings that we are instructing him to make, in order to arrive at an appropriate penalty assessment under section 110(i).

1. Citation No. 7711660

It is apparent that the judge erred in addressing Citation No. 7711660. The Secretary had vacated that citation before the judge's initial decision in *Virginia Slate I*. Thus, the judge should not have considered Citation No. 7711660 in his remand decision, and his assessment is vacated.

2. Order No. 7711661

On balance, the judge's consideration of the penalty criteria lacks findings specific to the violation before him. As the Secretary notes, S. Br. at 2, the judge reduced the proposed penalty from \$700 to \$300. Consistent with the principles noted above, greater analysis is required to substantiate the reduction. *See Cantera Green*, 22 FMSHRC 616, 622-23 (May 2000).

Further, the judge stated there was no evidence in the record as to whether the penalty

¹⁴ The guiding legal principles concerning penalty assessments are more fully set out in our prior decision in *Virginia Slate I*, 23 FMSHRC at 492-93.

¹⁵ Although these two prior decisions will have been vacated, the judge is free to resuscitate any findings on specific penalty criteria that we have not overturned.

should be mitigated by Virginia Slate's size or whether it would have any effect on the operator's ability to remain in business. However, there is a reference to Virginia Slate's size in the Secretary's Petition for Civil Penalty Assessment (dated November 23, 1998), which states that the size of the mine is "9767 production tons or hours." Ex. A. Thus, Virginia Slate is a small operator (*see* 30 C.F.R. § 100.3(b)), a factor that the judge should consider in his penalty analysis for each violation. Moreover, in the absence of evidence that the proposed penalty would affect Virginia Slate's ability to continue in business, "it is presumed that no such adverse affect would occur." *Sellersburg*, 5 FMSHRC at 294. Thus, the judge should affirmatively apply this principle in his penalty analysis.

Finally, the judge stated, "A penalty should not be mitigated or increased as the result of the history of violations." 23 FMSHRC at 870. Later, in his discussion of other violations, the judge stated that "there was no evidence" to suggest that Virginia Slate's history of violations was either very good or very bad. *Id.* at 870-71. At trial, the Secretary had admitted into evidence an "Assessed Violation History Report" for a two-year period prior to the trial. S. Ex. 33. Thus, there is evidence that the judge should fully consider, which he apparently did not, in assessing penalties for the violations at issue.

The above discussion concerning the penalty criteria regarding size, ability to stay in business, and history of violations also apply to the penalty analyses for the citations and orders listed below.

3. Citation No. 7711663

The judge omitted any discussion of this citation and penalty assessment, which had been remanded by the Commission in *Virginia Slate I*. 23 FMSHRC at 494. Therefore, the judge must address the penalty in connection with this violation consistent with the legal principles noted above.

4. Citation No. 7711665

Consistent with our discussion of the penalty criteria in Order No. 7711661, the judge must fully consider the size of Virginia Slate's operation and its history of violations. In addition, the judge omitted from his analysis any discussion of gravity in the penalty assessment for this violation; however, he clearly considered gravity in his decision in *Virginia Slate I*. 22 FMSHRC at 384. He should include this analysis on remand.

5. Order No. 7711667

As with Citation No. 7711665, the judge must fully consider the size of Virginia Slate's operation and its history of violations.

6. Order No. 7711681

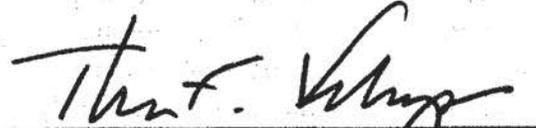
The judge did not include in his penalty assessment any consideration of the gravity of the violation. 23 FMSHRC at 871. While the judge omitted from his analysis any discussion of gravity in the penalty assessment for this violation, he clearly considered gravity in his decision in *Virginia Slate I*, 22 FMSHRC at 390, as he did with Citation No. 7711665. The judge should include this analysis in his decision on remand.

In sum, the administrative law judge has now addressed the section 110(i) penalty criteria in two decisions. Omissions in the judge's decision presently on review, as with the judge's decision in *Virginia Slate I*, require that we again vacate and remand to the judge for his analysis of the proposed assessment. As we noted above, the judge can make full use of the findings on the statutory criteria that he has previously made that are supported by record evidence. However, the judge's determination of the penalty assessed for a particular violation is an exercise of his discretion that is bounded by proper consideration of *all* of the six statutory criteria. See *Sellersburg*, 5 FMSHRC at 292-94. Accordingly, in light of our decisions in *Virginia Slate I* and here, in which we have vacated the judge's penalty analyses because of his incomplete consideration of the penalty criteria, the judge on remand must consider, *in toto*, all six of the penalty criteria. See Commission Rule 30(a), 29 C.F.R. § 2700.30(a) ("The decision shall contain findings of fact and conclusions of law on each of the statutory criteria . . .").

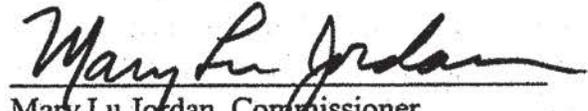
III.

Conclusion

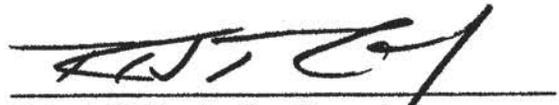
Based on the foregoing, we vacate the judge's negative unwarrantability determinations and his penalty assessments and remand the proceeding to the judge for further consideration consistent with this decision.



Theodore F. Verheggen, Chairman



Mary Lu Jordan, Commissioner



Robert H. Beatty, Jr., Commissioner

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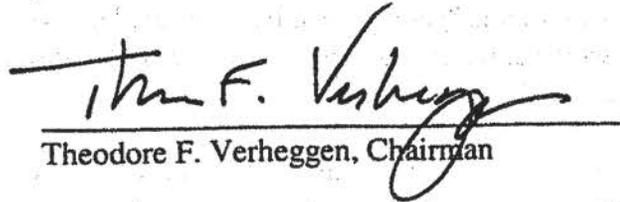
citation. *Id.* at 1, Attach. It contested both citations¹ and reached an agreement with the Secretary to settle both the citations and related civil penalties, even though proposed penalty assessments had not yet been issued. *Id.* at 1-2. The settlement was delayed to allow the Secretary time to assess the penalties. *Id.* at 2. On January 30, 2002, MSHA issued the proposed penalty assessment relating to Citation No. 7865333. Oglebay asserts that one of its employees inadvertently failed to send MSHA the green card contesting the proposed penalty. *Id.* Oglebay's motion is accompanied by the signed declaration of Ron Jordan, Oglebay's production director, which supports the operator's assertion that the green card was not sent due to an employee mistake. *Id.*, Attach.

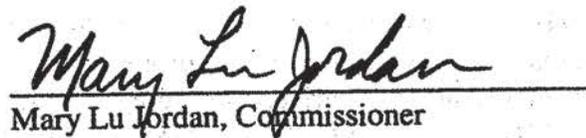
We have held that, in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"); *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994). We have also observed 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," Rule 60(b) of the Federal Rules of Civil Procedure. *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 Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

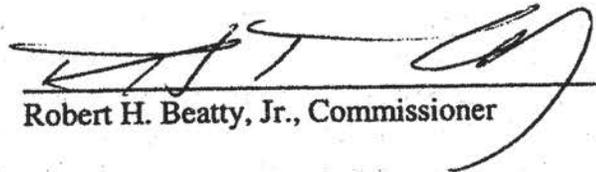
The record indicates that Oglebay intended to contest the proposed penalty assessment, but failed to do so due to internal mishandling. Oglebay contested the underlying citation. Moreover, the signed declaration attached to Oglebay's motion is sufficiently reliable and supports its allegations. In the circumstances presented here, we treat Oglebay's failure to file a hearing request as resulting from inadvertence or mistake. *See 46 Sand & Stone*, 23 FMSHRC 1091, 1091-93 (Oct. 2001) (granting operator's request to reopen where operator alleged its failure to timely request a hearing was due to internal mishandling as a result of change in personnel and operator's assertions were supported by affidavit); *Heartland Cement Co.*, 23 FMSHRC 1017, 1018-19 (Sept. 2001) (same).

¹ Oglebay contested Citation No. 7865333 in Docket No. CENT 2001-71-R.

Accordingly, in the interest of justice, we grant Oglebay's request for relief, reopen the penalty assessment that became a final order with respect to Citation No. 7865333, and remand to the judge for further proceedings on the merits. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


Theodore F. Verheggen, Chairman


Mary Lu Jordan, Commissioner


Robert H. Beatty, Jr., Commissioner

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and Administrative Law Judge Gary Melick found in Freeman's favor, vacating the citations. 22 FMSHRC 1345 (Nov. 2000) (ALJ). We granted the Secretary's petition for discretionary review challenging the judge's decision.

I.

Factual and Procedural Background³

Freeman uses diesel-powered personnel carriers at its underground coal mine. 22 FMSHRC at 1346. These proceedings concern citations MSHA issued to Freeman because the approval markings on the diesel engines were not supplied by the manufacturer.

On October 25, 1996, MSHA published final rules establishing new safety standards (30 C.F.R. §§ 75.1900-75.1916) and an approval process (30 C.F.R. §§ 7.81-7.108) for diesel engines and equipment in underground coal mines.⁴ 61 Fed. Reg. 55412. Two years later, in a memorandum dated October 8, 1998, American Isuzu Motors, Inc. ("Isuzu") notified operators of underground coal mines who owned non-permissible diesel engines, previously certified for use in noncoal mines, of the need to obtain approval of the engines under the regulations in Part 7. S. Resp. to Mot. for Sum. Dec., Attach. B. Each of Freeman's diesel engines at issue here had been

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- (a) Ventilation rate.
 - (b) Rated power.
 - (c) Rated speed.
 - (d) High idle.
 - (e) Maximum altitude before deration.
 - (f) Engine model number.

³ There were no stipulations in this proceeding, and the judge gave only a very brief recitation of the facts in the case. Accordingly, we have relied on other undisputed facts alleged by Freeman and the Secretary.

⁴ The new Part 7 approval procedure is divided into two subparts. Subpart E addresses diesel engines used in areas where permissible electric equipment is required (Category A engines) and diesel engines used in areas where non-permissible electric equipment is allowed (Category B engines). 30 C.F.R. § 7.81. Subpart F addresses diesel power packages used in areas where permissible electric equipment is required. 30 C.F.R. § 7.95. *See generally* 61 Fed. Reg. at 55413, 55415. Only Subpart E is involved in this proceeding. In addition to these subparts, Subpart A (30 C.F.R. §§ 7.1-7.9), which specifies general requirements for MSHA approval of equipment in underground coal mines, is applicable to diesel engines. *See* 30 C.F.R. § 7.81.

approved under 30 C.F.R. Part 32,⁵ and approval plates were attached to the engines. F. Mot. for Sum. Dec., Affidavit of Thomas Austin, Freeman Director of Safety ("Austin Aff.") at 2. The Isuzu memorandum stated that customers who owned Isuzu engines with "obsolete Part 32 certifications" had an opportunity to "upgrade" the engines in order to qualify for Part 7 approvals. S. Resp. to Mot. for Sum. Dec., Attach. B. In addition to requesting information about each engine, such as model and serial number, the memorandum noted that as part of the re-certification procedure, the fuel injection pump might require re-calibration and the engine's fuel injection timing might have to be reset. *Id.* Isuzu supplied a form on which an operator could supply the engine-specific information that Isuzu needed in order to issue the "MSHA mine approval label." S. Resp. to Mot. for Sum. Dec., Attach. C.

Isuzu sought to charge Freeman \$450 per tag for each engine, which would have cost Freeman a total of about \$27,000 for its fleet of carriers. F. Mot. for Sum. Dec., Austin Aff. at 2. To avoid the expense of purchasing individual tags from Isuzu and to make a tag that was more durable than the one Isuzu offered, Freeman began fabricating its own approval tags during October and November 1999. F. Resp. Br. at 4-5.

In December 1999, counsel for Freeman asked MSHA whether Freeman could produce and install plates that contained information relating to approval of diesel engines under Part 7 by duplicating the information from a tag supplied by Isuzu for a similar engine. *See* S. Resp. to Mot. for Sum. Dec., Attach. A. In a letter dated December 13, 1999, MSHA Administrator for Coal Mine Safety and Health, Robert Elam, responded to Freeman's inquiry. *Id.* Elam explained that the Part 7 requirements applied to the approval holder, which in most cases is the manufacturer of the product and that the approval is issued based on MSHA's acceptance of testing, specifications and drawings submitted by the holder. *Id.* He noted that the approval marking tells the user that the engine meets the technical requirements, and that "[o]nly the approval holder can do this." *Id.* Elam further explained that this system of marking established a mechanism by which products could be traced in the event that defects were discovered. *Id.* Finally, Elam stated that MSHA was addressing the legibility and permanence of the approval tags issued by Isuzu and would require reissuance of tags that met those requirements. *Id.*

On April 1, 2000, MSHA issued Procedure Instruction Letter (PIL) No. 100-V-2 to address mine operator complaints about inadequate diesel engine approval markings that were being supplied by various engine manufacturers. F. Mot. for Sum. Dec., Attach. 3. The PIL stated: "The approval marking is supplied by the engine manufacturer." *Id.* at 1. In the case of an approval marking that had become detached or illegible, the PIL instructed mine operators to verify that the diesel engine is approved, obtain a replacement approval marking from the engine manufacturer (that could be kept on file in the mine office if the approval marking were of the same design as the prior marking), and notify MSHA of the problem. *Id.* MSHA would then

⁵ Prior to the publication of the rules in 1996, Part 32 addressed the approval of mobile diesel-powered equipment in noncoal mines. 30 C.F.R. Part 32 (1996). *See* 61 Fed. Reg. at 55415-16. With the issuance of the new Parts 7 and 75 rules, Part 32 was revoked. *Id.* at 55416.

require the manufacturer to develop an improved approval marking that is legible and permanent as required by section 7.90. *Id.*

On June 22, 2000, MSHA Inspector Larry Rinehart issued citations alleging that four diesel engines at the mine with tags fabricated by Freeman were not being maintained in accordance with 30 C.F.R. Part 7 because the approval markings required by 30 C.F.R. § 7.90 had not been supplied by the engine manufacturer. F. Mot. for Sum. Dec., Austin Aff. at 2; Citation No. 7584882. Freeman filed notices of contest, and the abatement period was extended while the citations were being litigated. Following its notice of contest, Freeman filed a motion for summary decision with the judge. The Secretary responded and filed her cross-motion for summary decision. Oral argument was held before the judge.

The judge concluded that the plain language of section 7.90 did not preclude the use on the cited diesel engines of approval markings supplied by Freeman, and he vacated the citations. 22 FMSHRC at 1347. He rejected the Secretary's argument that the regulation was ambiguous and that he should therefore defer to her interpretation. *Id.* The judge further noted that although regulations that address health and safety should be interpreted broadly, that rule of construction should not be used to rewrite "a clearly worded regulation whose plain meaning cannot reasonably be disputed." *Id.*

II.

Disposition

The only issue in this case, as in the companion case, *The American Coal Company*, 24 FMSHRC ___, No. LAKE 2000-111-R (June 26, 2002), is whether the approval marking required by 30 C.F.R. § 7.90 must be supplied by the engine manufacturer. Thus, disposition of this case turns on the meaning of section 7.90.

Commissioners Jordan and Beatty, writing separately, vote to reverse the judge and remand the case for penalty assessment. The separate opinions of the Commissioners follow.⁶

⁶ Chairman Verheggen, in an opinion dissenting from the result reached by his colleagues, votes to affirm the judge.

Commissioner Jordan, reversing and remanding:

This case arose when Freeman was cited for failing to comply with the requirement of 30 C.F.R. § 7.90 that “[e]ach approved diesel engine shall be identified by a legible and permanent approval marking”¹ Although every one of the diesel engines observed by the MSHA inspector bore a tag containing the information required by section 7.90, MSHA did not consider the tags to be approval markers as required by 30 C.F.R. § 7.90 because they had been produced by Freeman instead of the engines’ manufacturer, American Isuzu Motors, Inc. (“Isuzu”).

Freeman contends that section 7.90’s failure to specifically identify the manufacturer as the source of the approval marking entitles Freeman to affix the requisite information to the engine. The Secretary argues that section 7.90 cannot be read in isolation from the regulations governing MSHA’s approval process, and because that process permits only the manufacturer to apply for and secure the approval that allows the diesel engine to be used in a coal mine, only a designation by that manufacturer can suffice as an approval marker under section 7.90. The judge focused exclusively on “the plain language” of section 7.90 and concluded that “there is nothing to preclude the use on the cited diesel engines of approval markings supplied by Freeman United itself.” 22 FMSHRC 1345, 1347 (Nov. 2000) (ALJ). Because I disagree with the judge’s conclusion regarding the “plain language” of section 7.90, I join in reversing his decision to vacate the challenged citations, and remand for an assessment of an appropriate penalty.

In order to determine the “plain language” or “plain meaning” of a regulatory requirement, we must consider the ordinary meaning of the terms used. *Western Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989). The ordinary understanding of the phrase “approval marking” is that it refers to a designation placed on an item, the purpose of which is to provide assurance of that item’s conformity with certain requirements or specifications. It stands to reason that only someone who can reliably ascertain the item’s conformity with those standards is in a position to place a mark on the item signifying its approved status. A marking affixed to an object that does not authoritatively verify that object’s compliance with the pertinent standards

¹ Section 7.90 provides:

Each approved diesel engine shall be identified by a legible and permanent approval marking inscribed with the assigned MSHA approval number and securely attached to the diesel engine. The marking shall also contain the following information:

- (a) Ventilation rate.
- (b) Rated power.
- (c) Rated speed.
- (d) High idle.
- (e) Maximum altitude before deration.
- (f) Engine model number.

can hardly be considered an “approval marking” as that term would be commonly understood. Therefore, the plain language of section 7.90 does in fact preclude the use of approval markings supplied by an entity not in a position to authoritatively verify the diesel engine’s compliance with the relevant design and performance standards.

The relevant question before us then becomes: “Did the Secretary correctly conclude that only the manufacturer could authoritatively ascertain the diesel engines’ approved status?” A review of the standards governing MSHA’s approval process requires that this question be answered with an emphatic “yes.”² I note at the outset that the use of approval markings on mining equipment is not a recent phenomenon. Indeed, as MSHA stated in the preamble to the diesel regulations, “[a]pproval markings to identify equipment appropriate for use in mining have been used for more than 85 years, and are routinely relied upon by users of mining equipment as well as state and federal inspection authorities.” 61 Fed. Reg. 55412, 55422 (Oct. 25, 1996).³

The approval process that permits a diesel engine to be used in an underground coal mine is set forth in 30 C.F.R. Part 7. Subpart A explains the general procedures that apply in obtaining approval, not only for diesel engines, but for numerous other products that are used in underground mines. The only applicant recognized in the approval process is “[a]n individual or organization that manufactures or controls the assembly of a product” 30 C.F.R. § 7.2. The regulations go on to state that each application must contain “[t]he documentation specified in the appropriate subpart of this part.” 30 C.F.R. § 7.3(c)(2). The requirements for diesel engines are located at subpart E, 30 C.F.R. §§ 7.81-7.92, and reference to that section reveals extensive “performance and exhaust emission requirements.” 30 C.F.R. § 7.81. Applicants are required to perform tests on the diesel engines and it takes several pages (which include diagrams and mathematical formulas) to describe how those tests must be carried out and what kind of testing equipment must be used. *See* 30 C.F.R. §§ 7.86 - 7.89. As part of the approval process MSHA also requires a “certification by the applicant” that the product conforms with design requirements and that the applicant will perform the required quality assurance functions. 30 C.F.R. § 7.3(f).

That it is only the applicant who is authorized to produce approval markings finds further support in the warning that “[a]n applicant shall not advertise or otherwise represent a product as approved until MSHA has issued the applicant an approval.” 30 C.F.R. § 7.5(a). An approval is defined as “[a] document issued by MSHA which states that a product has met the requirements of this part and which authorizes an approval marking identifying the product as approved.” 30

² In fact Freeman admits that “only Isuzu [the manufacturer] knew with absolute first-hand certainty whether the engines at issue were approved.” F. Resp. Br. at 10 n.7.

³ Approval markings are required for a variety of equipment used in mines including: brattice cloth and ventilation tubing, 30 C.F.R. § 7.29; multiple shot blasting units, 30 C.F.R. § 7.69; electric motor assemblies, 30 C.F.R. § 7.309; and electric cables, signaling cables, and splices, 30 C.F.R. § 7.409.

C.F.R. § 7.2. Further support for the proposition that only the manufacturer is entitled to produce the approval marking is found at section 7.6(c), which provides: "Applicants shall maintain records of the initial sale of each unit having an approval marking." Obviously, this regulation could not be carried out if entities other than the applicant produced approval markings. In addition, MSHA takes steps to protect the integrity of approval markers even after the approval is issued. Approved products are subject to periodic audits and the approval holder must, at MSHA's request, make the product available to the agency at no charge to enable it to carry out those audits. See 30 C.F.R. § 7.8(a)-(b). In sum then, the document that entitles an approval marker to be placed on a product is issued by MSHA to the applicant and, under the regulations, applicants are limited to the manufacturer. There is no indication that the end user of the product is authorized to produce an approval marking.

The Secretary's determination that Isuzu, not Freeman, must supply the approval marking required under section 7.90 is amply supported by the regulations governing her approval process. Indeed it is evident that permitting any entity other than the manufacturer to tag equipment as approved would compromise the integrity of the approval process, not only for diesel engines, but for the many other kinds of equipment that require such designation.

Contending that "the meaning of an explicit term is not at issue," slip op. at 15, my dissenting colleague proceeds to render the term "approval marker" meaningless. Under Chairman Verheggen's analysis, the regulation's failure to specify the producer of an approval marker requires the Secretary to accept any label, affixed to an engine by any person, so long as the label is legible, permanent and contains the information described in section 7.90. Under this view, the phrase does not denote an engine's conformity with MSHA's safety standards and the approval marker itself would be no more significant than a decorative sticker.

For the foregoing reasons, I would reverse the judge's decision and remand for penalty assessment.⁴


Mary Lu Jordan, Commissioner

⁴ I agree with Commission Beatty's view, slip op. at 13 & n.9, that *Pennsylvania Elec. Co.*, 12 FMSHRC 1562 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992), is inapplicable to the disposition of this case, because here a majority of the Commission has voted to reverse the judge.

Commissioner Beatty, reversing and remanding:

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 *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, 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 Sec'y of Labor v. Western 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 and . . . serves a permissible regulatory function." See *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. See *Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); see also *Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

Section 7.90 provides that "Each approved diesel engine shall be identified by a legible and permanent approval marking."¹ 30 C.F.R. § 7.90. As Freeman notes, the clear wording of section 7.90 contains no requirement that the tag be issued by the manufacturer. F. Resp. Br. at 10. Freeman is correct that, on its face, the regulation is silent as to the source of the approval tag. However, neither does the regulation clearly provide that the approval tag can be fabricated by the engine's owner or any other entity. Therefore, the regulation's language is not plain but rather ambiguous on this issue.² I turn next to the question of whether the Secretary's

¹ The judge in the instant proceeding concluded that the language of the regulation was plain (22 FMSHRC 1345,1347 (Nov. 2001) (ALJ)), while the judge in *American Coal Co.* concluded that the language was ambiguous. 23 FMSHRC 505, 509-11 (May 2001) (ALJ). Given these inapposite readings of section 7.90, it is reasonable to conclude that the regulation is ambiguous. See *Daanen & Janssen, Inc.*, 20 FMSHRC 189, 192-193 & n.7 (Mar. 1998) ("Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses.") (quoting 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.02 at 6 (5th ed. 1992)).

² Chairman Verheggen distinguishes "regulatory ambiguity and regulatory silence." Slip op. at 14-15. However, Commission cases have not drawn such a distinction in regulatory contexts similar to the one at issue. See *Rock of Ages Corp.*, 20 FMSHRC 106, 117 (Feb. 1998), *rev'd in part on other grounds*, 170 F.3d 148, 158-59 (2d Cir. 1999) (regulation is either silent or ambiguous on the issue of what may trigger a post-blast examination for misfires); *Steele Branch*

interpretation is reasonable. On this point, it is evident from reading section 7.90 in the context of other related regulatory requirements and the regulatory preamble relating to 30 C.F.R. § 7.6 that the Secretary's position is reasonable. *See also Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260 (Mar. 1988) (separate provisions in the Mine Act must be read together).

Subpart A of Part 7, which specifies the general procedure for testing and approving products used in underground mining, provides that only the manufacturer can submit an application for MSHA's approval. Thus, 30 C.F.R. § 7.2 defines "applicant" as "[a]n individual or organization that manufactures or controls the assembly of a product and applies to MSHA for approval of that product." The same section defines "approval" as "[a] document issued by MSHA . . . which authorizes an approval marking identifying the product as approved." Further, only applicants receive the equipment approval from MSHA. *See* 30 C.F.R. § 7.5(a) ("An applicant shall not advertise . . . a product as approved until MSHA has issued the applicant an approval."). Part 7 subpart A regulations further specify post-approval procedures, including record keeping, quality assurance in the manufacturing process, and audits (30 C.F.R. §§ 7.6, 7.7, and 7.8, respectively) that are the responsibility of the applicant or approval holder. In short, these regulations present an integrated approach to the equipment approval process that impose burdens and continuing responsibilities on the manufacturer.

The rules in Subpart A of Part 7 were issued well prior to the 1996 issuance of the rules governing MSHA approval of diesel engines. Significantly, 30 C.F.R. § 7.6(a), provides: "Each approved product shall have an approval marking." The preamble to the publication of the final rule explained in greater detail the rationale for the rule:

Once MSHA has approved a product, the *manufacturer* is authorized to place an approval marking on the product that identifies it as approved for use in underground mines. Use of the MSHA marking obligates the *manufacturer* to maintain the quality of the product. The MSHA marking indicates to the mining community that the product has been manufactured according to the drawings and specifications upon which the approval was based.

Mining, 15 FMSHRC 597, 601-02 (Apr. 1993) (operator must file an accident report with MSHA within a reasonable time when the regulation is silent as to the period of time required for compliance). *See also Akzo Nobel Salt, Inc.*, 21 FMSHRC 846, 865 (Aug. 1999) (Comm. Verheggen, dissenting) (regulation is silent as to the issue presented and thus "inherently ambiguous"), *rev'd*, 212 F.3d 1301, 1303 (D.C. Cir. 2000). *Drummond Co.*, 14 FMSHRC 661, 684-85 (May 1992), cited by my colleague (slip op. at 15), is readily distinguishable from the instant proceeding in that *Drummond* involved the imposition of penalties for Mine Act violations greater than those permitted in the Secretary's regulations through use of an administratively issued "Program Policy Letter."

53 Fed. Reg. 23486 (June 22, 1988) (emphasis added). Thus, the preamble to the final rule regarding approval marking identifies the manufacturer as the entity responsible for attaching the approval tag to the equipment, because only the manufacturer can ensure that a particular engine is manufactured in accordance with the model design specifications submitted to MSHA for approval. The provisions of Subpart A are applicable to the approval and testing of diesel engines for use in underground coal mines. *See* 30 C.F.R. § 7.81.

In addition to the general provisions of Part 7, Subpart E of Part 7 specifically addresses the technical requirements, approval, and testing of diesel engines used in underground coal mines. As part of the application process set forth in Subpart E, the manufacturer must submit a large amount of technical information, including drawings and design specifications. *See* 30 C.F.R. § 7.83. Regulations specifying the technical requirements and testing for diesel engines are detailed and complex. *See* 30 C.F.R. §§ 7.84-7.89. This information is the basis for MSHA approval of the equipment for use in underground mining. 61 Fed. Reg. 55412, 55419 (Oct. 25, 1996). Further, the Secretary noted in the preamble to the final rules regarding approval of diesel equipment in underground coal mines: "Approved diesel engines must be manufactured in accordance with the specifications contained in the approval . . ." *Id.* Finally, section 7.90(a)-(f) specifies information to be included on the approval marking that the manufacturer is in the best position to provide.

It is apparent from reading Subparts A and E of Part 7 and their preambles that the drafters of the regulations clearly intended that the manufacturer of approved equipment be the source of the approval tag. The manufacturer is the source of the information that is the basis for the approval. The manufacturer is also responsible for making the equipment in conformity with the design specifications that are the basis for MSHA approval.³ Finally, there are post-approval responsibilities including, quality control, spot testing, and maintaining records of sales of approved equipment, that only the equipment manufacturer can perform. In short, under the regulations at issue, every essential aspect of ensuring that diesel equipment complies with Part 7 regulations is borne by the manufacturer. Therefore, under settled principles of regulatory construction, deference should be given to the Secretary's reasonable interpretation that the approval marking must be provided by the manufacturer of approved equipment.⁴ *See, e.g., Rock*

³ Once the integrity of the approval tag comes into question, then an MSHA inspector cannot quickly and accurately determine by looking at the tag that the engine meets the requirements of Part 7, and the purpose of engine approval tags is largely defeated. In a letter to the Commission, dated May 24, 2001, counsel for Freeman asserts that it knew that its engines had been approved because Isuzu had proffered part 7 approval markings. However, Freeman's knowledge of MSHA approval does not necessarily lead to the conclusion that it had all the information needed for the approval tag under the regulations. *See* 30 C.F.R. § 7.90.

⁴ Chairman Verheggen's plain meaning approach in applying the regulation leads to an absurd result and cannot stand under established principles of statutory and regulatory construction. *See, e.g., Rock of Ages Corp.*, 20 FMSHRC at 111. Here, the mine operator placed

of Ages Corp., 20 FMSHRC at 117 (Commission deferred to Secretary's reasonable interpretation where the pertinent regulation was either "silent or ambiguous"), *aff'd in pertinent part*, 170 F.3d 148 (2d Cir. 1999); *see also Morton Int'l, Inc.*, 18 FMSHRC 533, 537-38 (Apr. 1996) (Secretary's interpretation of regulation not upheld where inconsistent with regulatory history and not in harmony with other regulations).

Freeman objects to the Secretary's interpretation of the regulation because of the cost of the approval tags and because Isuzu provided tags that were not legible and would not stand up to daily use. F. Resp. Br. at 8. MSHA too was concerned about the poor quality of the approval markings, and that was addressed in the PIL, which specified how mine operators could preserve the original tags pending receipt of new ones. With regard to the cost of the approval tag, it is worth noting that the responsibilities related to obtaining MSHA approval of diesel equipment are extensive, and Isuzu undoubtedly incurred costs during the approval process that it passed on to its customers. The record contains no evidence on the extent of those costs. Freeman, on the other hand, which had not borne any of the responsibilities or costs of the approval process, sought to enjoy the benefits of owning MSHA-approved equipment at no cost by fabricating its own approval tags. In short, there is no record support for Freeman's excessive cost argument.⁵

an approval marking on the equipment, notwithstanding that it did not know with certainty whether the engines at issue had been approved. F. Resp. Br. at 10 n.7. Nevertheless, my colleague believes that as long as all of the required lines are filled in on the approval marker, there is no violation, regardless of whether the person entering the information had access to the records necessary to supply accurate information. Slip op. at 15-16. Under the approach suggested by the dissent, MSHA inspectors would thus have no confidence in the information contained on the approval markers, and would have to conduct an independent search of records to verify that the operator's equipment was in fact approved. The absurdity of such a scheme speaks for itself.

⁵ Chairman Verheggen equates the costs associated with the approval markings to the fines levied by MSHA in *Drummond*. Slip op. at 15. However, it is apparent that fines for Mine Act violations are provided for in the Act and further specified in the Secretary's regulations. Fees for approval markings provided by Isuzu to Freeman, on the other hand, were a matter of private contract. The Chairman's further suggests, *id.*, that the approval markings, because of problems with the permanency and legibility of the tags, did not further miner safety and health. However, MSHA was addressing those issues with Isuzu and accommodating those operators who were supplied approval markings that would not withstand daily use. Notwithstanding that, the dissent would solve the problem of resiliency of the approval tags by effectively undermining the approval process by allowing an operator with incomplete knowledge of the circumstances surrounding the approval to place an approval marking on an engine. *See id.* I find such a prospect much more inimical to miner health and safety.

Freeman further objects to having to pay for approval tags when it was unnecessary to make any changes to the engines to conform to Part 7 regulations. F. Resp. Br. at 4. However, Freeman's argument ignores the substance of the newly issued approval procedures which went into effect in 1996. Prior to 1996, there was no regulatory approval procedure for diesel engines used in underground coal mining. With the issuance of the new Part 7 regulations, all equipment manufacturers had to apply for MSHA approval based on engine performance and exhaust emission requirements. 30 C.F.R. § 7.81. As previously noted, the application requirements under the new Part 7 standards are extensive. Thus, without regard to whether Freeman is correct that no changes had to be made to any of its diesel engines to bring them into compliance with Part 7, it is apparent that there is a burden and cost to the equipment manufacturer in simply applying for approval under Part 7.

Moreover, the Secretary challenged the validity of Freeman's position that certifications under the old Part 32 regulations were effective under the new Part 7 regulations. Before the judge, Freeman asserted that "Part 32 approved engines are grandfathered." F. Mot. for Sum. Dec. at 5. The Secretary took issue with that statement.⁶ S. Resp. to Mot. for Sum. Dec. at 9. Further, contrary to Freeman's assertion before the Commission (F. Resp. Br. at 3), it is not apparent that prior approval of the cited Isuzu engines under Part 32 meant that no changes to the engines were required for approval under the new Part 75. While the regulatory preamble does state that "existing part 32 engine approvals continue to be valid," Part 32 by its terms only applied to approvals for diesel equipment in *noncoal mines*. See 30 C.F.R. Part 32 (1996).⁷ Finally, before the judge, the Secretary cited to a compliance guide that specified that equipment approved under Part 32 had to be approved under the new Part 7 if it was to be used in underground coal mining. S. Resp. to Mot. for Sum. Dec., Attach. E at 4-5 (Compliance Guide for MSHA's Regulations on Diesel-Powered Equipment Used in Underground Coal Mines, Oct. 1997). In short, Freeman's position that no action was required to bring its equipment into compliance with the new Part 7 appears to be, at best, disputed.⁸

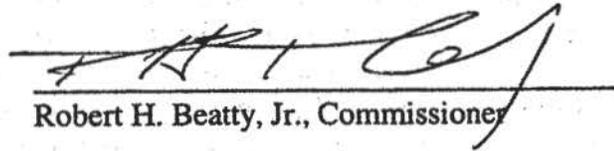
⁶ At oral argument, the judge requested that the parties try and work out stipulations "with respect to whether these engines met the approval requirements." Oral Arg. Tr. 63. However, counsel were unable to do this. Letter to Judge Melick, dated Oct. 20, 2000. Therefore, whether the cited engines were in fact approved under Part 7 appears to be a disputed fact. See S. Resp to Mot. for Sum. Dec. at 8.

⁷ In the final rule publication of Part 75, Part 32 was revoked because it was "outdated" and "obsolete," and manufacturers seeking Part 32 approvals were required to seek approval through the new Part 7, Subpart E, and Part 75. 61 Fed. Reg. at 55416.

⁸ It is difficult to square Freeman's assertion that no action was required to bring its equipment into compliance with Part 7 (F. Resp. Br. at 3) with its further concession that only Isuzu could know with certainty that the engines were approved (F. Resp. Br. at 10 n.7). The scheme that Freeman and the dissent envision for operators (or anyone else) to attach approval markings, without full knowledge of the facts and circumstances surrounding the approval, poses

While there is much that appeals to me in Commissioner Jordan's analysis, I simply cannot agree that the term "approval marking" as used in the regulations at issue plainly means a marking that only the manufacturer can provide, especially given the administrative law judge's finding of a different plain meaning. As for the dissent's commentary invoking *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992) ("*Penelec*"), in this situation, the Chairman clearly misstates applicable Commission law. See slip op. at 16 & n.1. *Penelec* only applies when Commissioners are equally split on whether to reverse or affirm the decision of the administrative law judge at issue. In such an instance, the judge's decision stands as if affirmed. *Penelec*, 12 FMSHRC at 1563-65. By any count, in this case two Commissioners have voted to reverse the judge, while only one has voted to affirm. *Penelec* is thus entirely immaterial to the disposition of this case.⁹

For the foregoing reasons, I would reverse the judge's decision and remand for penalty assessment.



Robert H. Beatty, Jr., Commissioner

hazards to miners as obvious as the financial advantages to Freeman in end running the approval scheme in the regulations as applied by the Secretary.

⁹ The dissent has clearly confused the split in rationales among the majority to reverse the judge with a split in votes on the result of the case. These are two entirely separate issues, with plainly different ramifications. The Secretary does not enforce Commissioner rationales against operators; she enforces her regulations, and her reading of the one at issue here has been upheld by a majority of the Commission. Until such time as it is vacated by a court, that reading stands, the dissent's view of the force of the separate opinions notwithstanding.

Chairman Verheggen, dissenting:

Silence in a regulation does not automatically give license to the Secretary to impose by fiat substantive requirements upon a party under the guise of “interpretation.” This is precisely what the Secretary did here, and I find that in so doing, she stepped beyond the bounds of her authority. I find that the judge properly reached the conclusion that “there is nothing [in section 7.90] to preclude the use on the cited diesel engines of approval markings supplied by Freeman United itself,” 22 FMSHRC 1345, 1347 (Nov. 2000) (ALJ), and I therefore dissent from the contrary result reached by my colleagues.

On one point, the parties and the judge all agreed. When the Secretary told Freeman United that it had to use approval markings supplied by the manufacturer of its diesel vehicles, she based her action on a regulation which clearly on its face requires no such thing. I agree. Section 7.90 requires that “[e]ach approved diesel engine shall be identified by a legible and permanent approval marking inscribed with the assigned MSHA approval number and securely attached to the diesel engine.” 30 C.F.R. § 7.90 (in relevant part). The regulation does not include the phrase “approval marking *provided by the manufacturer.*” The Secretary, however, did not see this silence as any impediment to her action against Freeman United the result of which is the instant litigation.

In a holding that has stood the test of time, the Ninth Circuit stated: “If a violation of a regulation subjects private parties to . . . civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.” *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982) (citations omitted). As in the *Phelps Dodge* case, here, section 7.90 “inadequately expresses an intention to reach the activities to which MSHA applied it,” *id.*, and therefore, the Secretary’s enforcement action on review must fail.

The situation here is similar to a regulatory silence we faced in *Contractor’s Sand & Gravel, Inc. v. FMSHRC*, where the Secretary attempted “grafting onto the plain language of a regulation a [requirement] neither stated nor implied in that regulation.” 199 F.3d 1335, 1342 (D.C. Cir. 2000). At issue in *Contractor’s* was whether the Secretary’s attempt at enforcing her grafted rule was substantially justified under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1). Writing for the court, Judge Sentelle left no doubt that the Secretary’s approach was ill-advised: “It is not substantially justifiable for an agency to persistently prosecute citizens for violating a regulation that does not exist.” 199 F.3d at 1342. Instead, Judge Sentelle suggested that “it [was] time for the Secretary to repair to rulemaking, not to bring one more unsupportable citation.” *Id.*

There is no question that section 7.90 is silent as to who provides Freeman United approval markings for its diesels. There is a distinction between such regulatory silence and regulatory ambiguity. There could be no serious dispute that the Secretary would be well within her authority to require that under the “legibility” requirement of section 7.90, for example, approval markings be in English and in type of a certain size. Insofar as any of the explicit terms of the regulation are susceptible to more than one relevant meaning, the regulation is ambiguous

and we would then turn to an analysis of whether the Secretary's interpretation is reasonable. But here, the meaning of an explicit term is not at issue. Instead, the Secretary is attempting to graft onto section 7.90 a new substantive requirement that imposes new obligations that significantly affect private interests. *See Drummond Co.*, 14 FMSHRC 661, 684-85 (May 1992) (setting forth discussion between substantive rules, which require notice and comment rulemaking, and procedural rules, which do not). Indeed, Freeman United has pointed out that "Isuzu sought to charge . . . \$450 for each of these markings, a cost equivalent to almost 10% the price of a new engine." F. Resp. Br. at 4. The total cost to Freeman United was "\$27,000 – plus the [cost] of additional replacement markings." *Id.*

The Secretary's requirement that the manufacturer must supply such markings is "a regulation that does not exist." 199 F.3d at 1342. And even if the Secretary wanted it to exist, if she believes such a requirement is needed, she must initiate appropriate rulemaking to achieve this goal.

I would hasten to add that, in light of the undisputed facts of this case, even if I were to reach whether it was appropriate to "accord special weight" to the Secretary's interpretation of section 7.90 as including a requirement that manufacturers supply the approval markings, *see Helen Mining Co.*, 1 FMSHRC 1796, 1801 (Nov. 1979), my answer would be "no." The approval markings provided by Isuzu to Freeman United were neither "permanent" nor capable of being "securely attached" to the engines at issue (*see* F. Resp. Br. at 4 and 12-13), and thus did not comply with the regulation. The Secretary's enforcement action, and the interpretation on which the action was based, were clearly at odds with the regulatory text and, thus, unreasonable.

Both my colleagues raise a hue and cry over my approach. Commissioner Jordan claims that I would "render the term 'approval marker' meaningless" because I would require "the Secretary to accept any label, affixed to an engine by any person, so long as the label is legible, permanent and contains the information described in Section 7.90." Slip op. at 7. My colleague's conclusion that the regulation would thus be meaningless simply does not follow from her argument. Any such label, regardless of its source, would have to comply with the clear requirements of section 7.90, i.e., that the approval marking be legible and permanent and contain the information set forth in the regulation. That Commissioner Jordan would view even a marking that meets these requirements as a "decorative sticker" (slip op. at 7) simply because of who made the sticker reveals an astonishing exaltation of form over substance. So long as an approval marking meets the requirements of section 7.90, it matters not from whence the marking comes under the clear terms of the regulation.

Commissioner Beatty finds my reading of the regulation "more inimical to miner health and safety" because it would allow "an operator with incomplete knowledge of the circumstances surrounding the approval process to place an approval marking on an engine." Slip op. at 11 n.5. I have two problems with my colleague's argument. First, to paraphrase the court in *Contractors*, mere invocation of the "expansive theory [of] the commendable goal of promulgating safety" is not sufficient to permit the Secretary "to prosecute activity which

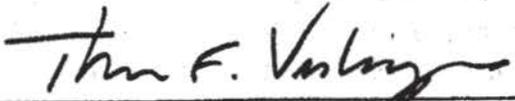
violates no existing rule.” 199 F.3d at 1342. Instead, it is incumbent upon the Secretary to protect the health and safety of miners by instituting a rulemaking to clarify its regulation, not “bring one more unsupportable citation.” *Id.*

Secondly, my colleague is apparently concerned that some operators could produce approval markings that are incorrect. That would indeed be a problem, and would certainly give rise to violations of section 7.90. *But that is not the case here.* As the Secretary’s charges against Freeman United state, the company had on the cited equipment “legible and permanent approval marking[s] as required by [section] 7.90.” See 22 FMSHRC at 1346 (quoting Citation Nos. 7584882, 7584883, 7584884, and 7584885). The *sole* basis for the citations at issue was that the approval markings “had not been supplied by the engine manufacturer.” *Id.* *Otherwise, the markings fully complied with section 7.90.* This is not a case involving approval markings that failed to meet *any* explicit requirement of section 7.90. I thus find my colleague’s concerns misplaced.

I note that although my colleagues affirm the judge here, their reasons for doing so are diametrically at odds. Commissioner Beatty finds section 7.90 ambiguous and affirms the judge’s decision to defer to the Secretary’s interpretation of the regulation. Commissioner Jordan, on the other hand, finds section 7.90 plain and affirms the judge in result. The effect of this split decision is that the judge’s decision is reversed under no rationale, and the case remanded simply for the assessment of a penalty. See *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff’d on other grounds*, 969 F.2d 1501 (3d Cir. 1992). In other words, there is no *Commission* rationale. The split rationales on which my colleagues base their separate opinions are non-binding and non-authoritative, and are thus dicta.¹ The result they reach has no basis – neither plain meaning nor deference – that will bind future Commissioners under the principle of *stare decisis*. I find this unfortunate in light of the congressional charge to us to “develop a uniform and comprehensive interpretation of the law . . . [and to] provide guidance to the Secretary in enforcing the act and to the mining industry and miners in appreciating their responsibilities under the law.” *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).

¹ My colleagues’ opinions are dicta in that they are “unnecessary to the [result of the] decision in the case and therefore not precedential.” *Black’s Law Dictionary* 1100 (7th ed. 1999) (definition of *obiter dictum*).

In this case, the Secretary's interpretation literally exalts a flimsy form over the substance of section 7.90. I reject the Secretary's approach, and therefore would affirm the judge.



Theodore F. Verheggen, Chairman

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June 26, 2002

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

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Docket Nos. LAKE 2000-111-R
LAKE 2000-112-R

v.

THE AMERICAN COAL COMPANY

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners¹

DECISION

BY: Jordan and Beatty, Commissioners

These are contest proceedings arising from two citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") against American Coal Company ("American"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), and alleging violations of 30 C.F.R. § 75.1909(a)(1).² In the

¹ Commissioner Riley participated in the consideration of this matter, but his term expired before issuance of this decision. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

² This regulation requires, among other things, that diesel powered equipment have "an engine approved under subpart E of Part 7 . . ." Reference to that subpart brings us to the requirement actually at issue in this proceeding, 30 C.F.R. § 7.90, which provides:

Each approved diesel engine shall be identified by a legible and permanent approval marking inscribed with the assigned MSHA approval number and securely attached to the diesel engine. The marking shall also contain the following information:

- (a) Ventilation rate.
- (b) Rated power.
- (c) Rated speed.
- (d) High idle.

proceedings below, American and the Secretary of Labor each moved for summary decision. Administrative Law Judge Michael Zielinski found in the Secretary's favor and affirmed the citations. 23 FMSHRC 505 (May 2001) (ALJ). American filed a petition for discretionary review with the Commission challenging the judge's decision.

I.

Factual and Procedural Background

American operates the Galatia Mine, a large underground coal mine, in Harrisburg, Illinois. 23 FMSHRC at 505. In the mine, American uses diesel-powered personnel carriers. *Id.* American Isuzu Motors, Inc. ("Isuzu") manufactured the diesel engines in the carriers. *Id.* at 506. These proceedings concern citations MSHA issued to American because the approval markings on the diesel engines were not supplied by the manufacturer. *Id.* at 507.

On October 25, 1996, MSHA published final rules establishing new safety standards (30 C.F.R. §§ 75.1900-75.1916) and an approval process (30 C.F.R. §§ 7.81-7.108) for diesel engines and equipment in underground coal mines.³ 61 Fed. Reg. 55412.⁴ Under 30 C.F.R. § 75.1909(a)(1), non-permissible diesel-powered equipment must be equipped with an engine approved under 30 C.F.R. Part 7. *Id.* Section 7.90 further requires an approval marking to be placed on all equipment approved by MSHA. *Id.*

Isuzu applied for MSHA approval under these new regulations for diesel engines with model numbers QD 100-301 and C240MA, which were in use at the Galatia Mine. 23 FMSHRC at 506 & n.1. As part of the approval process, Isuzu was required by the regulations to submit engine specifications, design drawings, and test results. *See* 30 C.F.R. §§ 7.83-7.89; S. Resp. to

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- (e) Maximum altitude before deration.
 - (f) Engine model number.

³ The new Part 7 approval procedure is divided into two subparts. Subpart E addresses diesel engines used in areas where permissible electric equipment is required (Category A engines) and diesel engines used in areas where non-permissible electric equipment is allowed (Category B engines). 30 C.F.R. § 7.81. Subpart F addresses diesel power packages used in areas where permissible electric equipment is required. 30 C.F.R. § 7.95. *See generally* 61 Fed. Reg. at 55413, 55415. Only Subpart E is involved in this proceeding. In addition to these subparts, Subpart A (30 C.F.R. §§ 7.1-7.9), which specifies general requirements for MSHA approval of equipment in underground mines, is applicable to diesel engines. *See* 30 C.F.R. § 7.81.

⁴ The equipment in this proceeding (which is classified under MSHA regulation as "non-permissible") had been used at the Galatia Mine well before the effective date of the new approval process. 23 FMSHRC at 506.

Mot. for Sum. Dec., Att. 4 at 1-2 (Decl. of Gene Biron, Isuzu Mgr. of Application Eng.) (“Biron Decl.”). In order for Isuzu to determine whether a particular engine was manufactured in accordance with the design drawings and specifications upon which MSHA’s approval was based, it had to compare the serial number on the engine with its records of the design specifications to which the engine was manufactured. 23 FMSHRC at 507. Equipment owners were required to fill out a form that included the serial number of the engine together with other critical characteristics. Biron Decl. at 3. Isuzu would compare the information in this form with the approval requirements for the approved engine. *Id.* at 4. If the engine met the requirements, Isuzu would record the serial number and issue an approval tag. *Id.*

American was dissatisfied with the quality and cost of Isuzu’s approval tags, and American officials had extensive discussions with MSHA concerning Isuzu’s approval tags and American’s development of its own approval marking. 23 FMSHRC at 506. On April 1, 2000, MSHA issued Procedure Instruction Letter I00-V-2 (“PIL”), to address mine operator complaints about inadequate diesel engine approval markings that were being supplied by various engine manufacturers. *Id.*; PIL at 1. The PIL stated: “The approval marking is supplied by the engine manufacturer.” PIL at 1. In the case of an approval marking that had become detached or illegible, the PIL instructed mine operators to verify that the diesel engine is approved, obtain a replacement approval marking from the engine manufacturer (that could be kept on file in the mine office if the approval marking were of the same design as the prior marking), and notify MSHA of the problem. MSHA would then require the manufacturer to develop an improved approval marking that is legible and permanent as required by section 7.90. *Id.*

American did not obtain Part 7 approval markings from Isuzu. 23 FMSHRC at 507. Instead, American’s maintenance department purchased a labeling machine to fabricate tags that it attached to its diesel engines. *Id.* American was able to ascertain from public records maintained by MSHA that Isuzu-manufactured engines with the same model number as those in this proceeding had been approved by MSHA. *Id.*; see S. Mot. for Sum. Dec., Att. A. However, American did not have access to the documentation that was the basis for MSHA approval of the engines. 23 FMSHRC at 506, 508. Nor did American have access to Isuzu’s records that reflected which engines with a specified serial number of a particular model were manufactured according to the design drawings and specifications that were submitted to MSHA. *Id.* at 508. Consequently, American could not determine whether its engines had, in fact, been approved. *Id.*

In June 2000, MSHA issued two citations charging that two Isuzu diesel engines, one used in a mantrip and another in a personnel carrier, were not being maintained in accordance with the regulations because a legible and permanent approval marking required by section 7.90 was installed but had not been supplied by the engine manufacturer. *Id.* at 507. American contested the citations, and both American and the Secretary moved for summary decision. *Id.* at 505.

The judge granted the Secretary’s motion for summary decision and dismissed the notices of contest. *Id.* at 512. The judge noted that section 7.90 was silent regarding the source of the

approval marking and that this silence created ambiguity regarding permissible sources for the approval marking. *Id.* at 509-11. He held that the Secretary's interpretation was reasonable and more consistent with the safety purposes of the Act than the operator's interpretation because an operator cannot determine if a particular engine is covered by an MSHA approval. *Id.* at 511. The judge found that only the manufacturer can ascertain whether an engine was manufactured according to the design drawings and specifications upon which MSHA approval was based. *Id.* He further noted that, even though American could determine that the engine model that it owned was approved, it could not determine whether its particular engines had been manufactured according to the design and specifications upon which the approval was obtained. *Id.* Therefore, the judge concluded that an MSHA inspector attempting to determine whether a mine met applicable ventilation requirement for dissipating emissions could not rely on approval markings supplied by American. *Id.* The judge rejected American's position that it did not have notice of the Secretary's interpretation, noting that the Secretary's position was consistent with the long-standing approval scheme for mining equipment, that MSHA representatives had discussed this requirement with American, and that American was specifically put on notice by the PIL. *Id.* at 512.

II.

Disposition

The only issue in this case, as in the companion case, *Freeman United Coal Mining Co.*, 24 FMSHRC ___, No. LAKE 2000-102-R (June 24, 2002), is whether the approval marking required by 30 C.F.R. § 7.90 must be supplied by the engine manufacturer. Thus, disposition of this case turns on the meaning of section 7.90.

Commissioners Jordan and Beatty, writing separately, vote to affirm the judge. The separate opinions of the Commissioners follow.⁵

⁵ Chairman Verheggen, in an opinion dissenting from the result reached by his colleagues, votes to reverse the judge.

Commissioner Jordan, affirming:

This case arose when American Coal Company (“American”) was cited for failing to comply with the requirement of 30 C.F.R. § 7.90 that “[e]ach approved diesel engine shall be identified by a legible and permanent approval marking”¹ Although every one of the diesel engines observed by the MSHA inspector bore a tag containing the information required by section 7.90, MSHA did not consider the tags to be approval markers as required by 30 C.F.R. § 7.90 because they had been produced by American instead of the engines’ manufacturer, American Isuzu Motors, Inc. (“Isuzu”).

American contends that section 7.90’s failure to specifically identify the manufacturer as the source of the approval marking entitles American to affix the requisite information to the engine. 23 FMSHRC 505, 508 (May 2001) (ALJ). The Secretary argues that section 7.90 cannot be read in isolation from the regulations governing MSHA’s approval process, and, because that process permits only the manufacturer to apply for and secure the approval that allows the diesel engine to be used in a coal mine, only a designation by that manufacturer can suffice as an approval marker under section 7.90. *Id.* at 509. The judge held that the Secretary’s interpretation that the approval marking must be issued by the manufacturer was reasonable. *Id.* at 511. Because I agree with the judge’s conclusion, I join in affirming his decision denying American’s motion for summary judgement and granting the Secretary’s motion. I write separately, though, because my view that the citations should be affirmed is based on the plain meaning of the standard.

In order to determine the “plain language” or “plain meaning” of a regulatory requirement, we must consider the ordinary meaning of the terms used. *Western Fuels–Utah, Inc.* 11 FMSHRC 278, 283 (Mar. 1989). The ordinary understanding of the phrase “approval marking” is that it refers to a designation placed on an item, the purpose of which is to provide assurance of that item’s conformity with certain requirements or specifications. It stands to reason that only someone who can reliably ascertain the item’s conformity with those standards

¹ Section 7.90 provides:

Each approved diesel engine shall be identified by a legible and permanent approval marking inscribed with the assigned MSHA approval number and securely attached to the diesel engine. The marking shall also contain the following information:

- (a) Ventilation rate.
- (b) Rated power.
- (c) Rated speed.
- (d) High idle.
- (e) Maximum altitude before deration.
- (f) Engine model number.

is in a position to place a mark on the item signifying its approved status. A marking affixed to an object that does not authoritatively verify that object's compliance with the pertinent standards can hardly be considered an "approval marking" as that term would be commonly understood. Therefore, the plain language of section 7.90 does in fact preclude the use of approval markings supplied by an entity not in a position to authoritatively verify the diesel engine's compliance with the relevant design and performance standards.

The relevant question before us then becomes: "Did the Secretary correctly conclude that only the manufacturer could authoritatively ascertain the diesel engines' approved status?" A review of the standards governing MSHA's approval process requires that this question be answered with an emphatic "yes." I note at the outset that the use of approval markings on mining equipment is not a recent phenomenon. Indeed, as MSHA stated in the preamble to the diesel regulations, "[a]pproval markings to identify equipment appropriate for use in mining have been used for more than 85 years, and are routinely relied upon by users of mining equipment as well as state and federal inspection authorities." 61 Fed. Reg. 55412, 55422 (Oct. 25, 1996).²

The approval process that permits a diesel engine to be used in an underground coal mine is set forth in 30 C.F.R. Part 7. Subpart A explains the general procedures that apply in obtaining approval, not only for diesel engines, but for numerous other products that are used in underground mines. The only applicant recognized in the approval process is "[a]n individual or organization that manufactures or controls the assembly of a product" 30 C.F.R. § 7.2. The regulations go on to state that each application must contain "[t]he documentation specified in the appropriate subpart of this part." 30 C.F.R. § 7.3(c)(2).³ The requirements for diesel engines are located at subpart E, 30 C.F.R. §§ 7.81-7.92, and reference to that section reveals extensive "performance and exhaust emission requirements." 30 C.F.R. § 7.81. Applicants are required to perform tests on the diesel engines and it takes several pages of regulations (which include diagrams and mathematical formulas) to describe how those tests must be carried out and what kind of testing equipment must be used. *See* 30 C.F.R. §§ 7.86-7.89. As part of the approval process MSHA also requires a "certification by the applicant" that the product conforms with

² Approval markings are required for a variety of equipment used in mines including: brattice cloth and ventilation tubing, 30 C.F.R. § 7.29; multiple-shot blasting units, 30 C.F.R. § 7.69; electric motor assemblies, 30 C.F.R. § 7.309; and electric cables, signaling cables, and splices, 30 C.F.R. § 7.409.

³ It is undisputed that American does not have access to the approval documentation submitted by Isuzu on which the MSHA approval was based. 23 FMSHRC at 508.

design requirements⁴ and that the applicant will perform the required quality assurance functions. 30 C.F.R. § 7.3(f).

That it is only the applicant who is authorized to produce approval markings finds further support in the warning that “[a]n applicant shall not advertise or otherwise represent a product as approved until MSHA has issued the applicant an approval.” 30 C.F.R. § 7.5(a). An approval is defined as “[a] document issued by MSHA which states that a product has met the requirements of this part and which authorizes an approval marking identifying the product as approved.” 30 C.F.R. § 7.2. Further support for the proposition that only the manufacturer is entitled to produce the approval marking is found at 30 C.F.R. § 7.6(c), which provides: “Applicants shall maintain records of the initial sale of each unit having an approval marking.” Obviously, this regulation could not be carried out if entities other than the applicant produced approval markings. In addition, MSHA takes steps to protect the integrity of approval markers even after the approval is issued. Approved products are subject to periodic audits and the approval holder must, at MSHA’s request, make the product available to the agency at no charge to enable it to carry out those audits. See 30 C.F.R. § 7.8(a)-(b). In sum, the document that entitles an approval marker to be placed on a product is issued by MSHA to the applicant and, under the regulations, applicants are limited to the manufacturer. There is no indication that the end-user of the product is authorized to produce an approval marking.⁵

The Secretary’s determination that Isuzu, not American, must supply the approval marking required under section. § 7.90 is amply supported by the regulations governing her approval process. Indeed, it is evident that permitting any entity other than the manufacturer to tag equipment as approved would compromise the integrity of the approval process, not only for diesel engines, but for the many other kinds of equipment that require such designation.

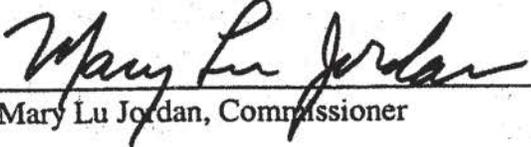
Contending that “the meaning of an explicit term is not at issue,” slip op. at 15, my dissenting colleague proceeds to render the term “approval marker” meaningless. Under Chairman Verheggen’s analysis, the regulation’s failure to specify the producer of an approval marker requires the Secretary to accept any label, affixed to an engine by any person, so long as

⁴ As the judge concluded, “[e]ven though American Coal could determine that engines of that model had been approved, it could not determine whether its engines had been manufactured according to the design and specifications upon which the approval was obtained. Consequently, it could not determine whether its engines had, in fact, been approved” 23 FMSHRC at 511. American does not dispute this finding in its brief.

⁵ As an Isuzu official acknowledged, engines with the same model number are not necessarily identical, because over time changes can be made in the manufacture of a certain model engine, including changes in the parts used, the settings, or the engine configuration. Biron Decl. at 3. Thus, the fact that American could ascertain from MSHA records that MSHA had approved Isuzu engines with the same model number as engines owned by American could not serve as a basis for American to determine that its particular engines had been approved.

the label is legible, permanent and contains the information described in section 7.90. Under this view, the phrase does not denote an engine's conformity with MSHA's safety standards and the approval marker itself would be no more significant than a decorative sticker.

For the foregoing reasons, I vote to affirm the judge's decision.⁶


Mary Lu Jordan, Commissioner

⁶ I agree with Commission Beatty's view, slip op. at 13 & n.6, that *Pennsylvania Elec. Co.*, 12 FMSHRC 1562 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992), is inapplicable to the disposition of this case, because here a majority of the Commission has voted to affirm the judge.

Commissioner Beatty, affirming:

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 Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). If, however, 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 Sec'y of Labor v. Western 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 and . . . serves a permissible regulatory function." *See Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations omitted). The Commission's review, like the courts', involves an examination of whether the Secretary's interpretation is reasonable. *See Energy West*, 40 F.3d at 463 (citing *Sec'y of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435, 1439 (D.C. Cir. 1989)); *see also Consolidation Coal Co.*, 14 FMSHRC 956, 969 (June 1992) (examining whether Secretary's interpretation was reasonable).

Section 7.90 provides that "Each approved diesel engine shall be identified by a legible and permanent approval marking."¹ As American notes, the clear wording of section 7.90 contains no requirement that the tag be issued by the manufacturer. A. Br. at 3. American is correct that, on its face, the regulation is silent as to the source of the approval tag. However, neither does the regulation clearly provide that the approval tag can be fabricated by the engine's owner or any other entity. Therefore, the regulation's language is not plain but rather ambiguous on this issue.² I turn next to the question of whether the Secretary's interpretation is reasonable.

¹ The judge in the instant proceeding concluded that the language of the regulation was ambiguous (23 FMSHRC 505, 509-11 (May 2001) (ALJ)), while the judge in *Freeman United Coal Mining Company* concluded that the language was clear. 22 FMSHRC 1345, 1347 (Nov. 2000) (ALJ). Given these inapposite readings of section 7.90, it is reasonable to conclude that the regulation is ambiguous. *See Daanen & Janssen, Inc.*, 20 FMSHRC 189, 192-193 & n. 7 (Mar. 1998) ("Ambiguity exists when a statute is capable of being understood by reasonably well-informed persons in two or more different senses.") (quoting 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.02 at 6 (5th ed. 1992)).

² Chairman Verheggen distinguishes "regulatory silence and regulatory ambiguity." Slip op. at 15. However, Commission cases have not drawn such a distinction in regulatory contexts similar to the one at issue. *See Rock of Ages Corp.*, 20 FMSHRC 106, 117 (Feb. 1998), *rev'd in part on other grounds*, 170 F.3d 148, 158-59 (2d Cir. 1999) (regulation is either silent or ambiguous on the issue of what may trigger a post-blast examination for misfires); *Steele Branch*

On this point, it is evident from reading section 7.90 in the context of other related regulatory requirements and the regulatory preamble relating to 30 C.F.R. § 7.6 that the Secretary's position is reasonable. *See also Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260 (Mar. 1988) (separate provisions in the Mine Act must be read together).

Subpart A of Part 7, which specifies the general procedure for testing and approving products used in underground mining, provides that only the manufacturer can submit an application for MSHA's approval. Thus, 30 C.F.R. § 7.2 defines "applicant" as "[a]n individual or organization that manufactures or controls the assembly of a product and applies to MSHA for approval of that product." The same section defines "approval" as "[a] document issued by MSHA . . . which authorizes an approval marking identifying the product as approved." Further, only applicants receive the equipment approval from MSHA. *See* 30 C.F.R. § 7.5(a) ("An applicant shall not advertise . . . a product as approved until MSHA has issued the applicant an approval."). Subpart A Part 7 regulations further specify post-approval procedures, including record keeping, quality assurance in the manufacturing process, and audits (30 C.F.R. §§ 7.6, 7.7, and 7.8, respectively) that are the responsibility of the applicant or approval holder. In short, these regulations present an integrated approach to the equipment approval process that impose burdens and continuing responsibilities on the manufacturer.

The rules in Subpart A of Part 7, which apply to underground mines generally, were issued prior to the 1996 issuance of the rules governing MSHA approval of diesel engines for use in underground coal mines. Significantly, 30 C.F.R. § 7.6(a) (1996), provides: "Each approved product shall have an approval marking." The preamble to the publication of the final rule explained the procedures for tagging approved products then in force:

Once MSHA has approved a product, the *manufacturer* is authorized to place an approval marking on the product that identifies it as approved for use in underground mines. Use of the MSHA marking obligates the *manufacturer* to maintain the quality of the product. The MSHA marking indicates to the mining community that the product has been manufactured according to the drawings and specifications upon which the approval was based.

Mining, 15 FMSHRC 597, 601-02 (Apr. 1993) (operator must file an accident report with MSHA within a reasonable time when the regulation is silent as to the period of time required for compliance). *See also Akzo Nobel Salt, Inc.*, 21 FMSHRC 846, 865 (Aug. 1999) (Comm. Verheggen, dissenting) (regulation is silent as to the issue presented and thus "inherently ambiguous"), *rev'd*, 212 F.3d 1301, 1303 (D.C. Cir. 2000). *Drummond Co.*, 14 FMSHRC 661, 684-85 (May 1992), cited by my colleague (slip op. at 15), is readily distinguishable from the instant proceeding in that *Drummond* involved the imposition of penalties for Mine Act violations greater than those permitted in the Secretary's regulations through use of an administratively issued "Program Policy Letter."

53 Fed. Reg. 23486 (June 22, 1988) (emphasis added). *See, e.g.*, 30 C.F.R. §§ 19.12, 20.13, and 23.12. The issuance of the new Part 7 did not result in any material change to the approval marking process but established a single provision, section 7.6, that had general application to products that had to be approved for use in underground mines.³ 53 Fed. Reg. at 23486-87. Thus, the preamble to the final rule regarding approval marking identifies the manufacturer as the entity responsible for attaching the approval tag to the equipment, because only the manufacturer can ensure that a particular engine is manufactured in accordance with the model design specifications submitted to MSHA for approval. The provisions of Subpart A are applicable to the approval and testing of diesel engines for use in underground coal mines. *See* 30 C.F.R. § 7.81.

In addition to the general provisions of Part 7, Subpart E of Part 7 specifically addresses the technical requirements, approval, and testing of diesel engines used in underground coal mines. As part of the application process set forth in Subpart E, the manufacturer must submit a large amount of technical information, including drawings and design specifications. *See* 30 C.F.R. § 7.83. Regulations specifying the technical requirements and testing for diesel engines are detailed and complex. *See* 30 C.F.R. §§ 7.84-7.89. This information is the basis for MSHA approval of the equipment for use in underground mining. 61 Fed. Reg. 55412, 55419 (Oct. 25, 1996). Further, the Secretary noted in the preamble to the final rules regarding approval of diesel equipment in underground coal mines: "Approved diesel engines must be manufactured in accordance with the specifications contained in the approval . . ." *Id.* Finally, section 7.90(a)-(f) specifies information to be included on the approval marking that the manufacturer is in the best position to provide.

It is apparent from reading Subparts A and E of Part 7 and their preambles that the drafters of the regulations clearly intended that the manufacturer of approved equipment be the source of the approval tag. The manufacturer is the source of the information that is the basis for the approval. The manufacturer is also responsible for making the equipment in conformity with the design specifications that are the basis for MSHA approval. Finally, there are post-approval responsibilities including quality control, spot testing, and maintaining records of sales of approved equipment, that only the equipment manufacturer can perform. Under the regulations at issue, every essential aspect of ensuring that diesel equipment complies with Part 7 regulations is borne by the manufacturer. Thus, the placement of a tag on approved equipment is the final step in the approval process that, from a standpoint of logic as well as from a concern of miner safety, must be borne by the manufacturer. Therefore, under settled principles of regulatory construction, deference should be given to the Secretary's reasonable interpretation that the approval marking must be provided by the manufacturer of approved equipment.⁴ *See, e.g., Rock*

³ In addition, the new Part 7 allowed product testing by manufacturers, or third party laboratories, instead of MSHA. 53 Fed. Reg. at 23487.

⁴ Chairman Verheggen's plain meaning approach in applying the regulation leads to an absurd result and cannot stand under established principles of statutory and regulatory

of Ages Corp., 20 FMSHRC 106, 117 (Feb. 1998) (Commission deferred to Secretary's reasonable interpretation where the pertinent regulation was either "silent or ambiguous"), *aff'd in pertinent part*, 170 F.3d 148 (2d Cir. 1999); *see also Morton Int'l, Inc.*, 18 FMSHRC 533, 537-38 (Apr. 1996) (Secretary's interpretation of regulation not upheld where inconsistent with regulatory history and not in harmony with other regulations).⁵

Notwithstanding the foregoing, American argues that, under its reading of section 7.90, any equipment user can place a tag on approved diesel equipment. American and my dissenting colleague would carve out this function among all others assigned to manufacturers in Part 7. However, this reading would lead to an illogical result, would be inconsistent with other applicable rules in Part 7, and would defeat the policies behind the promulgation of the Part 7 regulations. Indeed, under this reading of section 7.90, the protections of miner health and safety would largely be eviscerated. This is so because, as the judge noted, "[t]he operator cannot determine that a particular engine is covered by an MSHA approval because it has no way of determining whether the engine was manufactured according to the design drawings and specifications upon which the MSHA approval was based." 23 FMSHRC at 511. Only the manufacturer is privy to the information that is the basis for MSHA approval. Without access to the information that is the basis for the approval, an operator would be guessing as to whether his equipment is within the class of equipment approved. Such a reading of section 7.90 would thwart the purpose of providing for equipment approvals and undermine the safety objectives of the Mine Act and should be avoided. *See Dolese Bros. Co.*, 16 FMSHRC 689, 693 (Apr. 1994).

construction. *See, e.g., Rock of Ages Corp.*, 20 FMSHRC at 111. Here, the mine operator placed an approval marking on the equipment, notwithstanding that it did not know with certainty whether the engines at issue had been approved. 23 FMSHRC at 508. Nevertheless, my colleague believes that as long as all of the required lines are filled in on the approval marker, there is no violation, regardless of whether the person entering the information had access to the records necessary to supply accurate information. Slip op. at 16. Under the approach suggested by the dissent, MSHA inspectors would thus have no confidence in the information contained on the approval markers, and would have to conduct an independent search of records to verify that the operator's equipment was in fact approved. The absurdity of such a scheme speaks for itself.

⁵ *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982), cited by the dissent (slip op. at 15) in support of his position, addressed the application of an electrical equipment regulation to hazards resulting from mechanical motion. *Id.* at 1190-92. The court concluded that the primary intent of the regulation was to protect miners from electrical shock, rather than machinery motion. *Id.* at 1192-93. Contrary to the decision in *Phelps Dodge*, it is readily apparent from the regulatory history and context in the instant case that the Secretary intended equipment manufacturers to supply approval tags. In this regard, I find the court's decision in *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358 (D.C. Cir. 1997), more instructive to the issue of regulatory silence. The court noted, "specific regulations cannot begin to cover all of the infinite variety of . . . conditions which employees must face' . . ." *Id.* at 362. (citations omitted).

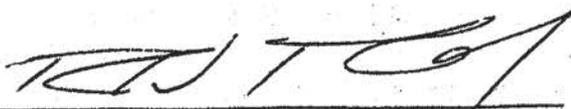
Further, allowing any entity other than the manufacturer to tag engines as approved compromises the integrity of the approval process. As noted above, only the manufacturer can attach an approval marking on an engine because it can do so with the certainty that the engine conforms to the specifications submitted to MSHA. The manufacturer's approval marking is an integral part of the approval process. MSHA must be able to depend on the accuracy and authenticity of the approval tag. S. Resp. to Mot for Sum. Dec., Att. 5 at 2-3 (Decl. of Terry Bentley, Deputy Chief, Coal Mine Safety and Health). The tag includes such critical information as the ventilation rate that must be maintained in the mine to dissipate engine emissions. 30 C.F.R. § 7.90(a). Once the integrity of the approval tag comes into question, an MSHA inspector cannot accurately determine that the engine meets the requirements of Part 7, and the purpose of approval tags is largely defeated.

Finally, American objects to the Secretary's interpretation of the regulation because Isuzu provided tags that were flimsy or demanded excessive consideration for them. MSHA too was concerned about the poor quality of the approval markings, and that was addressed in the PIL, which specified how mine operators could preserve the original tags pending receipt of new ones. With regard to the cost of the approval tag, it is worth noting that the responsibilities related to obtaining MSHA approval of diesel equipment are extensive (*see* Biron Decl. at 1-2), and Isuzu undoubtedly incurred costs during the approval process that it passed on to its customers. The record contains no evidence on the extent of those costs. American, on the other hand, which had not borne any of the responsibilities or costs of the approval process, sought to enjoy the benefits of owning MSHA-approved equipment at no cost by fabricating its own approval tags. In short, there is no record support for American's excessive cost argument.

While there is much that appeals to me in Commissioner Jordan's analysis, I simply cannot agree that the term "approval marking" as used in the regulations at issue plainly means a marking that only the manufacturer can provide, especially given the ALJ's finding of a different plain meaning in *Freeman United*. As for the dissent's commentary invoking *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3rd Cir. 1992) ("*Penelec*"), in this situation, the Chairman clearly misstates applicable Commission law. *See* slip op. at 17 & n.1. *Penelec* only applies when Commissioners are equally split on whether to reverse or affirm the decision of the ALJ at issue. In such an instance, the ALJ's decision stands as if affirmed. *Penelec*, 12 FMSHRC at 1563-65. By any count, in this case two Commissioners have voted to affirm the judge, while only one has voted to reverse. *Penelec* is thus entirely immaterial to the disposition of this case.⁶

⁶ The dissent has clearly confused the split in rationales among the majority to affirm the judge with a split in votes on the result of the case. These are two entirely separate issues, with plainly different ramifications. The Secretary does not enforce Commissioner rationales against operators; she enforces her regulations, and her reading of the one at issue here has been upheld by a majority of the Commission. Until such time as it is vacated by a court, that reading stands, the dissent's view of the force of the separate opinions notwithstanding.

For the foregoing reasons, I vote to affirm the judge's decision that American violated sections 75.1990(a)(1) and 7.90 when it fabricated the approval tags for its diesel engines.



Robert H. Beatty, Jr., Commissioner

Chairman Verheggen, dissenting:

In this matter, the regulation at issue, 30 C.F.R. § 7.90, does not on its face require the use of approval markings for diesel engine supplied by the engine manufacturer. The judge opined that the “regulation’s silence creates ambiguity as to permissible sources for the approval marking” at issue. 23 FMSHRC 505, 511 (May 2001) (ALJ). He then proceeded to defer to the Secretary’s “interpretation” of the purported ambiguity. *Id.* at 511-12. The judge made an analytical leap here, but fell far short of bridging the chasm between the regulatory silence and the Secretary’s attempt to fill that silence. I disagree with his decision as a matter of law, and thus dissent from my colleagues’ separate opinions affirming the judge’s decision in result.

The judge’s analytical error is in equating silence with ambiguity. This conclusion is directly at odds with a well-established holding of the Ninth Circuit in which that court stated: “If a violation of a regulation subjects private parties to . . . civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.” *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982) (citations omitted). Indeed, section 7.90 simply requires that “[e]ach approved diesel engine shall be identified by a legible and permanent approval marking inscribed with the assigned MSHA approval number and securely attached to the diesel engine.” 30 C.F.R. § 7.90 (in relevant part). The regulation does not include the phrase “approval marking *provided by the manufacturer.*”

The distinction the judge misses in his decision is between regulatory ambiguity and regulatory silence. Clearly, the Secretary would be well within her authority to require that under the “legibility” provision of section 7.90, for example, approval markings be in English and in type of a certain size. Insofar as any of the explicit terms of the regulation would be susceptible to more than one relevant meaning, the regulation would be ambiguous and we would then turn to an analysis of whether the Secretary’s interpretation of the ambiguity is reasonable. But here, the meaning of an explicit term is not at issue. Instead, the Secretary is attempting to graft onto section 7.90 a new substantive requirement that imposes new obligations that significantly affect private interests. *See Drummond Co.*, 14 FMSHRC 661, 684-85 (May 1992) (setting forth discussion between substantive rules, which require notice-and-comment rulemaking, and procedural rules, which do not).

The situation here is similar to a regulatory silence we faced in *Contractor’s Sand and Gravel, Inc. v. FMSHRC*, where the Secretary attempted “grafting onto the plain language of a regulation a [requirement] neither stated nor implied in that regulation.” 199 F.3d 1335, 1342 (D.C. Cir. 2000). At issue in *Contractor’s* was whether the Secretary’s attempt at enforcing her grafted rule was substantially justified under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(1). Writing for the court, Judge Sentelle left no doubt that the Secretary’s approach was ill-advised: “It is not substantially justifiable for an agency to persistently prosecute citizens for violating a regulation that does not exist.” 199 F.3d at 1341. Instead, Judge Sentelle suggested that “it [was] time for the Secretary to repair to rulemaking, not to bring one more unsupportable citation.” *Id.* at 1342.

As I stated in *Freeman United*:

The Secretary's requirement that the manufacturer must supply [the] markings [at issue here] is "a regulation that does not exist." [*Contractors*, 199 F.3d at 1342.] And even if the Secretary wanted it to exist, if she believes such a requirement is needed, she must initiate appropriate rulemaking to achieve this goal.

Freeman United Coal Mining Co., 24 FMSHRC ____, slip op at 15, No. LAKE 2000-102-R (June 24, 2002).

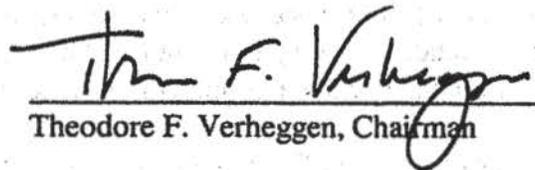
As I point out in my opinion in *Freeman*, my colleagues find serious fault with my approach. Commissioner Jordan claims that I would "render the term 'approval marker' meaningless" because I would require "the Secretary to accept any label, affixed to an engine by any person, so long as the label is legible, permanent and contains the information described in Section 7.90." Slip op. at 7-8. My colleague's conclusion that the regulation would thus be meaningless simply does not follow from her argument. Any such label, regardless of its source, would have to comply with the clear requirements of section 7.90, i.e., that the approval marking be legible and permanent and contain the information set forth in the regulation. That Commissioner Jordan would view even a marking that meets these requirements as a "decorative sticker" (slip op. at 8) simply because of who made the sticker reveals an astonishing exaltation of form over substance. So long as an approval marking meets the requirements of section 7.90, it matters not from whence the marking comes under the clear terms of the regulation.

Commissioner Beatty finds that under my reading of the regulation, "the protections of miner health and safety would largely be eviscerated" because mine operators would not be able to "determine that a particular engine is covered by an MSHA approval." Slip op. at 12 (quoting 23 FMSHRC at 511). I have two problems with my colleague's argument. First, to paraphrase the court in *Contractors*, mere invocation of the "expansive theory [of] the commendable goal of promulgating safety" is not sufficient to permit the Secretary "to prosecute activity which violates no existing rule." 199 F.3d at 1342. Instead, it is incumbent upon the Secretary to protect the health and safety of miners by instituting a rulemaking to clarify her regulation, not "bring one more unsupportable citation." *Id.*

Secondly, my colleague is apparently concerned that some operators could produce approval markings that are incorrect. That would indeed be a problem, and would certainly give rise to violations of section 7.90. *But that is not the case here.* As the Secretary's charges against American state, the company had on the cited equipment "legible and permanent approval marking[s] as required by [section] 7.90." 23 FMSHRC at 507. The *sole* basis for the citations at issue was that the approval markings "had not been supplied by the engine manufacturer." *Id.* *Otherwise, the markings fully complied with section 7.90.* This is not a case involving approval markings that failed to meet *any* explicit requirement of section 7.90. I thus find my colleague's concerns misplaced.

Finally, I note that although my colleagues affirm the judge here, their reasons for doing so are diametrically at odds. Commissioner Beatty finds section 7.90 ambiguous and affirms the judge's decision to defer to the Secretary's interpretation of the regulation. Commissioner Jordan, on the other hand, finds section 7.90 plain and affirms the judge in result. The effect of this split in rationales is to allow the judge's decision to stand as if affirmed. *Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (August 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992). However, there is no *Commission* rationale. The rationales on which my colleagues base their separate opinions are non-binding and non-authoritative, and are thus dicta.¹ In other words, the result they reach has no basis – neither plain meaning nor deference – that will bind future Commissioners under the principle of stare decisis. I find this unfortunate in light of the congressional charge to us to “develop a uniform and comprehensive interpretation of the law . . . [and to] provide guidance to the Secretary in enforcing the act and to the mining industry and miners in appreciating their responsibilities under the law.” *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).

Accordingly, I would reverse the judge and vacate the challenged citations.


Theodore F. Verheggen, Chairman

¹ My colleagues' opinions are dicta in that they are “unnecessary to the [result of the] decision in the case and therefore not precedential.” *Black's Law Dictionary* 1100 (7th ed. 1999) (definition of *obiter dictum*).

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 26, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. CENT 2002-250-M
v.	:	A.C. No. 25-01008-05507
	:	
TRICO RECYCLING, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY THE COMMISSION:

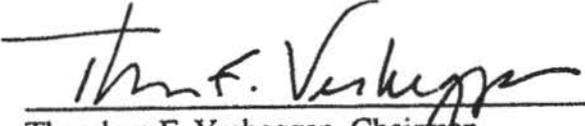
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On May 28, 2002, the Commission received a request from TriCo Recycling, Inc. ("TriCo") to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

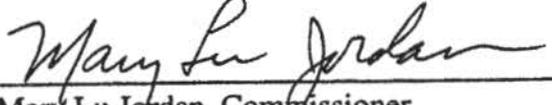
Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is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

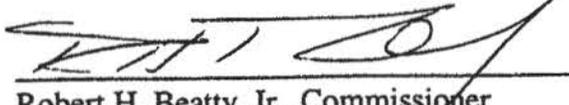
In its request, TriCo contends that it did not submit a request for a hearing because it did not receive the proposed penalty assessment issued on December 21, 2001, by the Department of Labor's Mine Safety and Health Administration ("MSHA"). Mot. at 2. Attached to TriCo's request is a copy of a letter dated May 9, 2002, from the Department of Labor's Office of the Solicitor to TriCo stating that the proposed penalty assessment sent to TriCo "appears to have been 'returned to sender.'" *Id.*, Attach. TriCo also attached to its request a copy of the proposed penalty assessment and a copy of a certified mail receipt indicating that the assessment was returned undelivered to MSHA. *Id.*, Attach.

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," Rule 60(b) of the Federal Rules of Civil Procedure. 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 *Gen. Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996); *Kinross DeLamar Mining Co.*, 18 FMSHRC 1590, 1591-92 (Sept. 1996); *Stillwater Mining Co.*, 19 FMSHRC 1021, 1022-23 (June 1997).

The record indicates that the proposed penalty assessment was not successfully delivered to TriCo. In the circumstances presented here, we treat TriCo's failure to file a hearing request as resulting from inadvertence or mistake. Accordingly, in the interest of justice, we grant TriCo's request for relief to reopen this penalty assessment that became a final order. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. On remand, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.


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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 11, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. VA 2001-37
	:	A.C. No. 44-06889-03501 TQI
MINE MANAGEMENT CONSULTANTS, INC., Respondent	:	Four O No. 8 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. VA 2001-42
	:	A.C. No. 44-06889-03502 ATQI
TONY M. STANLEY, Employed by MINE MANAGEMENT CONSULTANTS, INC., Respondent	:	Four O No. 8 Mine

DECISION

Appearances: Karen Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Dr. Nick E. Brewer, Appalachia, Virginia, (at hearing), and L. W. Pennell, Special Engineer, Mine Management Consultants, Inc., Jenkins, Kentucky, (on brief), for Respondents.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Mine Management Consultants, Inc. (MMC), and Tony M. Stanley, respectively, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820. The petitions allege a violation of the Secretary's mandatory health and safety standards and seek penalties of \$1,800.00 against the company and \$600.00

against Stanley. A hearing was held in Abingdon, Virginia. For the reasons set forth below, I dismiss the case against Stanley, and modify the citation and assess a penalty of \$300.00 against MMC.¹

Background

Mine Management Consultants, Inc., is an engineering firm in Jenkins, Kentucky.² It is licensed to do business in Kentucky and Virginia. MMC provides engineering services including surveying, mapping, layout and design, construction, and obtaining permits for the development of underground and surface mining for the mining industry. It also provides civil engineering services in the design of sanitary sewers, water distribution systems, waste water treatment plants, bridges and roads. MMC has 22 employees, ten of whom work underground.

MMC began providing surveying and engineering services to Four O Mining Co., Inc., and its predecessors, in the latter part of 1997. On June 29, 2000, an MMC survey crew consisting of Tony Stanley, Benjamin Adams and Larry Mullins arrived at the Four O No. 8 Mine,³ located in Wise County, Virginia, to set spads in the No. 2 Right Crosscut to indicate the direction of mining for meeting the No. 3 Entry. Stanley was the crew's supervisor.

After meeting with Mine Foreman Paul Mullins, the crew entered the mine to perform their work. At that time, the mine was not producing coal and no Four O employees accompanied the surveyors. The crew installed the survey points as requested in about 45 minutes and then left the mine and returned to their office.

On July 7, 2000, MSHA Inspector Gary W. Jessee went to the mine to conduct a six month review of the roof control plan. While conducting this inspection, he observed that survey spads had been installed in by the last row of roof bolts in the No. 2 crosscut. On measuring the distance from the face to the last row of roof bolts, he determined that the roof bolts ranged from five feet, two inches, to six feet from the face. He also observed that a reflectorized warning device had been installed on the last row of roof bolts and that loose, wet gob material had been

¹ The Secretary's brief was filed three days late. The Motion to Accept Brief Filed Out of Time, which accompanied the brief, indicates that the brief was prepared on time, but was not filed through clerical error. The Respondents have not objected to the late filing. Therefore, I grant the motion and accept the brief.

² At the hearing it was determined that the company's name is listed incorrectly with MSHA as Mine Management Consultant, instead of Consultants. (Tr. 37-38.) The caption has been amended to indicate the correct name.

³ At the hearing, the Secretary moved to amend the caption to show that the mine was the Four O No. 8 Mine, instead of the Grace No. 2 Mine. (Tr.14.) The caption has been amended to accomplish this.

pushed into the face. The gob material was within four inches of the roof, at the face, and sloped out from the face toward the last row of roof bolts.⁴ Finally, the inspector observed indentations in the gob where the survey stations had been installed.

As a result of these observations, and after interviewing Paul Mullins and some other miners, Inspector Jessee issued Citation No. 7305787 to MMC, alleging a violation of section 75.202(b) of the Secretary's rules, 30 C.F.R. § 75.202(b), because the survey crew under the direction of Tony Stanley had worked or traveled in by the last row of permanent roof supports on June 29. A subsequent investigation determined that Tony Stanley should be personally assessed a civil penalty for the violation under section 110(c) of the Act, 30 U.S.C. § 820(c).⁵

Reopening Docket No. VA 2001-42

On December 12, 2001, the Secretary, moved to dismiss the case against Stanley, Docket No. VA 2001-42, because he had not filed an Answer to the Secretary's Petition for Civil Penalty. On December 18, 2001, an Order to Show Cause was issued to the Respondent, ordering him to file an Answer within 21 days of the date of the order or to show good cause for his failure to do so. When no response to the order was received, a Default Decision was entered on January 17, 2002.

Subsequently, a response to the order was received by the Commission on January 22, 2002. The Commission treated the response as a timely filed Petition for Discretionary Review of the Default Decision and granted the petition. However, the Commission was unable, based on the record before it, to determine whether Stanley was entitled to relief. Therefore, it vacated the default decision and remanded the case to the judge to determine whether the case should be reopened. *Tony M. Stanley*, 24 FMSHRC 144 (February 25, 2002).

At a prehearing conference held before the hearing, the matter of reopening Docket No. VA 2001-42 was discussed with Gary Royalty, President of MMC, Stanley and counsel for the Secretary. After hearing Royalty's and Stanley's explanation of what had happened, and receiving no objection to reopening by the Secretary, I determined that the case would be reopened. (Tr. 6-7.) Since trial was ready to proceed that day, Stanley obviously did not receive the 20 day written notice of hearing required by Commission Rule 54, 29 C.F.R. § 2700.54. However, Stanley stated that he was ready to proceed and waived the 20 day requirement. (Tr. 7-8.)

⁴ The coal seam in this area was between 44 and 45 inches high.

⁵ Section 110(c) provides, in pertinent part, that: "Whenever a corporate operator violates a mandatory health or safety standard . . . any director, officer or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties"

Accordingly, this decision will concern both Docket Nos. VA 2001-37 and VA 2001-42.

Findings of Fact and Conclusions of Law

Section 75.202(b) provides that: "No person shall work or travel under unsupported roof unless in accordance with this subpart." The parties do not dispute that on July 7, when seen by Inspector Jessee, the last row of roof bolts was more than four feet from the face,⁶ the survey stations were in by the last row of bolts, a warning reflector was hung from the last row of bolts and gob was pushed up into the face. However, MMC and Stanley claim that on June 29, when the survey points were installed, the last row of roof bolts was within four feet of the face, no reflector was present and there was no gob in the face. I find that a preponderance of the evidence supports the Secretary's position in this case.

The only witnesses at the hearing who actually saw the area in question on June 29, were Stanley and Paul Mullins. Their testimony is diametrically opposed and cannot be reconciled.

Stanley testified that he was aware that the mine's roof control plan required that the last row of roof bolts be four feet from the face. (Tr. 42.) He said that he did not see any warning device at the last row of roof bolts. (Tr. 44-45.) He related that he did not check to see if the last row of roof bolts was within four feet of the face, but that Adams did. (Tr. 45.) He said Adams did not measure the distance, but that "he estimated it less than 4 feet because that's what we do everyday, and he told me when he got there. He said, 'This is the last row of bolts.' He said, 'It's less than 4 feet.' He said, 'I can set the spad.'" (*Id.*) Stanley testified that he was 70 feet away at the time. (*Id.*) He maintained that there was no gob in the area. (Tr. 46.) He claimed that when he set up his transit two and one half feet in by the last row of bolts, to shoot the second point, his elbow hit the face. (Tr. 52.) When he left the mine, Stanley stated that he told the outside man to tell Paul Mullins to be careful, that "they'd cut that spad out it was so close." (Tr. 55.)

Paul Mullins testified that when they finished working on June 28, the entry in the 2 Right Crosscut had been cleaned, gob had been pushed into it and it had been rock dusted. (Tr. 18.) He said that he could not remember whether a reflector had been hung at the last row of roof bolts. (*Id.*) He stated that there had not been any mining in the 2 Right Crosscut between June 28 and July 7. (*Id.*) Mullins declared that the reason he knew no mining had taken place during that time period was that the mine had been notified of some violations on the belt line and he had all his miners working on those during that week. (Tr. 158.) He further testified that the entry had not been bolted within four feet of the face because they could not get the roof bolter far enough into the entry to bolt it. (Tr. 28-29, 35.) Finally, he averred that there was no difference in the entry between when he saw it on June 28 and when he saw it with Inspector Jessee on July 7. (Tr. 158.)

⁶ The mine's roof control plan permits a maximum of four feet between the face and the last row of roof bolts. (Govt. Ex. 2, pp. 15-18.)

To explain the difference between what Stanley claims that the entry was like on June 29 and what Inspector Jessee observed on July 7, the Respondents argue in their brief that a little bit more of the entry was mined after June 29. In addition, they assert that it would have been impossible to set up a transit on a tripod in a place where there was only four inches of clearance.

Turning to these last arguments first, I find that they are not persuasive. There is no evidence to support the Respondents' speculation that additional mining of the entry was performed after June 29. Further, such a hypothesis is plainly refuted by Paul Mullins' testimony that no such mining took place. Similarly, the claim that it would have been impossible to set up the transit in four inches of clearance ignores the evidence. While it is true that the transit could not have been used in four inches of clearance, no one claimed that the gob was uniformly four inches from the roof. Rather the evidence is that the gob was within four inches of the roof at the face and sloped downward toward the floor beneath the roof bolts.

This leaves the contradictory testimony of Stanley and Paul Mullins. In determining who to believe, it must be noted that not only is Stanley a party to this proceeding, having a personal stake in its outcome, but he testified that the penalty at MMC for going under unsupported roof is termination. On the other hand, Paul Mullins would appear to have no interest in the case's disposition. He does not work for MMC. At the time he testified, he did not even work for the Four O Mining Company. In addition, the No. 8 Mine was not issued a citation for this violation. Accordingly, I credit Paul Mullins testimony on this issue.

I find that the entry in the No. 2 Right Crosscut was not bolted within four feet of the face on June 29, 2000, and that both Stanley and Adams worked in by the last row of roof bolts to install the two survey points. Therefore, I conclude that they worked under unsupported roof in violation of section 75.202(b).

Significant and Substantial

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

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

particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

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

Having already found a violation of a safety standard, it next must be determined whether there was a measure of danger to safety contributed to by the violation. In *Consolidation Coal Co.*, 6 FMSHRC 34 (January 1984), the company contended that spacing roof bolts farther apart than permitted by the roof control plan contributed neither to a hazard nor a reasonable likelihood that such a hazard would result in an injury. In rejecting this contention, the Commission held that: "Mine roofs are inherently dangerous and even good roof can fall without warning." *Id.* at 37. It went on to say that "despite the generally good conditions and the absence of reportable injuries in the previous six months, these over-wide bolts created 'a measure of danger to safety or health.'" *Id.* at 38. Similarly, I find that working under roof that was between one foot, two inches and two feet wider than it was supposed to be created a measure of danger, i.e. being struck by a roof fall, to safety or health.

Turning to the third and fourth issues, I find it reasonably likely that a roof fall would result in a serious injury. Roof falls are one of the most serious hazards in mining and are among the leading causes of death in coal mines. *Id.* at 37 n.4.

Finding that all of the *Mathies* criteria are met, I conclude that the violation was "significant and substantial."

Unwarrantable Failure

The inspector also concluded that this violation resulted from an "unwarrantable failure" to comply with the rule on the part of the company. The term "unwarrantable failure" is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which assigns more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189,

193-94 (February 1991).” *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994); *see also* *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission’s unwarrantable failure test).

The inspector testified that he found the violation to arise from MMC’s reckless disregard “based upon what I saw on July 7 in that area and what I was told having to do with the people that had operated a roof drill in that area,” that is, that the roof was “softer” in the entry, that a warning device had been installed and that the gob served as a physical barrier to going in by the last row of roof bolts. (Tr. 79.) The facts that emerged at the hearing, however, present a different picture.

Stanley testified that there was not a warning device in the entry at the time he was there.⁷ Paul Mullins could not remember whether a warning device was installed on June 29. Moreover, the inspector was unable to determine who installed the reflector or when it was installed. (Tr. 102.) Consequently, I accord MMC the benefit of the doubt on this question and find that the reflector was not present at the time the surveyors were installing the spads.

The other two factors cited by the inspector are not necessarily significant. Whether or not the roof was softer than elsewhere would be important, as far as unwarrantable failure is concerned, only if the surveyors knew that the roof was soft *and* unsupported and went under it anyway. Likewise, there is no evidence that gob is only pushed up in entries where the roof is unsupported. Thus, the fact that the gob was a barrier to going into the entry did not serve as a warning to the surveyors that they were going under unsupported roof.

Finally, the surveyors were briefed by Paul Mullins before they went into the mine. Although he knew that the roof was not bolted within four feet of the face, he did not warn them that they might have to place the spads in unsupported roof. (Tr. 32.) The only thing he advised them of was that they might have to set the spads “short” because he was afraid there was not enough distance from the center of the entry to the last roof bolt. (Tr. 159-60.)

Based on the facts available to Stanley and his crew when they began to work, it is apparent that they neither acted with reckless disregard of the facts, nor were highly negligent. They were not warned that the roof was unsupported, either by Paul Mullins or by a warning device that they knew indicated unsupported roof. They estimated that the last row of bolts was within four feet of the face. Their estimate was inaccurate. But the distance over four feet, from five feet two inches to six feet, was not so great that their failure to discern it can be characterized as indifference or a serious lack of reasonable care.

I find that Stanley should have discovered that the roof was unsupported, but because he was not informed prior to going into the mine that the roof was unsupported and because the lack

⁷ The inspector did not interview Stanley or any one else from MMC before issuing the citation. (Tr. 100.)

of a warning device indicated that the roof was supported, his negligence and the company's was only "moderate." Accordingly, I conclude that the violation did not occur as the result of the company's unwarrantable failure to comply with the regulation and will modify the citation appropriately.

110(c) Violation

The Commission set out the test for determining whether a corporate agent has acted "knowingly" in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd*, 689 F.2d 623 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983), when it stated: "If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." The Commission has further held, however, that to violate section 110(c), the corporate agent's conduct must be "aggravated," *i.e.* it must involve more than ordinary negligence. *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1630 (August 1994); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992); *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (December 1987).

As has already been discussed in the section on "unwarrantable failure," I do not find that Stanley's conduct was aggravated or involved more than ordinary negligence. Therefore, I cannot conclude that he acted knowingly. Consequently, I will dismiss the case against him.

Civil Penalty Assessment

The Secretary has proposed a penalty of \$1,800.00 for this violation. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

With regard to the penalty criteria, the parties have stipulated that the penalty in this case will not adversely affect MMC's ability to remain in business. (Tr. 9.) The company's Assessed Violation History Report reveals that it did not receive any citations in the two years prior to this violation. (Govt. Ex. 3.) Thus, I find that MMC has an excellent violation history. I further find that MMC is a small company. (Govt. Ex. 4.) Finally, since the Secretary did not present any evidence to the contrary, I find that the Respondent demonstrated good faith in abating the violation.

Turning to negligence, the parties have stipulated that Stanley was a supervisor and an agent of MMC at the time of the violation. (Tr. 10.) As such, his negligence is attributable to the company. *Southern Ohio Coal Co.*, 4 FMSHRC 1456, 1464 (August 1982); *Nacco Mining Co.*, 3 FMSHRC 848, 850 (April 1981). As has already been indicated, I find that he was "moderately" negligent. Hence, I also find that MMC was "moderately" negligent.

Lastly, on the question of gravity, I find this to be a serious violation. There are few activities more dangerous in underground coal mining than working or traveling under unsupported roof.

Taking all of these criteria into consideration, I assess a penalty of \$300.00 for this violation.

Order

Docket No. VA 2001-42, the civil penalty proceeding involving Tony M. Stanley, is **DISMISSED**. With regard to Docket No. VA 2001-37, Citation No. 7305787 is **MODIFIED** by reducing the level of negligence from "reckless disregard" to "moderate," by deleting the "unwarrantable failure" designation and by making it a 104(a) citation, 30 U.S.C. § 814(a), instead of a 104(d)(1) citation. The citation is **AFFIRMED**, as modified, and Mine Management Consultants, Inc., is **ORDERED TO PAY** a civil penalty of **\$300.00** within 30 days of the date of this decision.


T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

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June 14, 2002

GEORGES COLLIERS, INCORPORATED, Applicant v.	:	EQUAL ACCESS TO JUSTICE PROCEEDING
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. EAJ 2002-2 Formerly CENT 99-178 Mine: Pollyanna No. 8

DECISION

Before: Judge Barbour

This case is before me on an Application for Award of Fees and Expenses under the Equal Access to Justice Act (EAJA), (5 U.S.C. § 504 (1996)), which provides for an award to a prevailing party against the United States or an agency thereof unless the position of the government was “substantially justified or that special circumstances make an award unjust” (5 U.S.C. § 504(a)(1)). Georges Colliers, Inc. (GCI) filed the application against the Secretary of Labor (Secretary) following the issuance of a decision in numerous consolidated civil penalty proceedings brought by the Secretary on behalf of her Mine Safety and Health Administration (MSHA) against GCI and three of its agents. The cases were filed pursuant to sections 105, 110(a), and 110(c) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §§ 815, 820(a) and 820(c); *Georges Colliers, Inc.* 23 FMSHRC 1346 (Dec. 2001); *see also Georges Colliers, Inc.*, 24 FMSHRC 51 (Jan. 2002). I heard the cases. Based upon the evidence and the parties’ stipulations, I found GCI violated all of the cited mandatory safety standards. I also held the Secretary established the agents were liable for several knowing violations. After considering the statutory civil penalty criteria, I levied penalties against the company and the agents.

In assessing the civil penalties, I concluded, among other things, that GCI established the penalties proposed by the Secretary would “adversely affect [the company’s] ability to continue in business” (23 FMSHRC at 1390) and that one of the agents (Kenneth Clark) established the penalties proposed would adversely affect his ability to meet his financial obligations (23 FMSHRC at 1389). In addition, I noted the parties’ stipulations that the agents had no history of previous violations (23 FMSHRC 1352, 95, 96, 97 and 98). In the aggregate, the penalties I assessed were approximately 23 percent of those proposed by the Secretary (23 FMSHRC at 1416; *see also* 24 FMSHRC at 52).

GCI argues the Secretary's proposed penalties and the positions she took during litigation regarding those penalties were "not substantially justified." The company views the "Secretary's demands . . . [as] substantially excessive, arbitrary, and capricious" (Appl. 1-2). GCI seeks a total of \$45,019.36 in fees and expenses (Amended Appl. 1).

I conclude no basis exists for an award.

STATUS OF THE APPLICANTS

The Commission's rules implementing the EAJA are found at 29 C.F.R § 2704. Rule 100 provides for the "award of attorneys fees and other expenses to eligible individuals and entities who are parties to certain . . . 'adversary adjudications' before [the] Commission" (29 C.F.R. § 2704.100).

To be eligible for an award, an applicant must be a "party" as that term is defined in 5 U.S.C. § 551(3). Section 551(3) states a "party" includes "a person or agency named or admitted as a party . . . in an agency proceeding." Under the Commission's rules, party status is accorded "[a] person, including the Secretary or an operator, who is named as a party" (29 C.F.R. § 2700.4(a)). The Commission's rules also state that the definitions of section 3 of the Mine Act apply. Section 3(f) defines "person" as "any individual, partnership, . . . corporation, . . . or other organization" (30 U.S.C. § 802(f)).

The underlying proceedings involved two types of cases: civil penalty cases filed by the Secretary against GCI and civil penalty cases filed by the Secretary against GCI's agents. The cases filed against GCI were brought pursuant to sections 105(a) and 110(a) of the Act (30 U.S.C. §§ 815(a), 820(a)). The cases filed against the agents were brought pursuant to section 110(c) of the Act (30 U.S.C. § 820(c)). In the 105(a)/110(a) proceedings the "person named . . . as a party" was the corporate operator. In the section 110(c) proceedings, the "person[s] . . . named as . . . part[ies]" were the individuals. However, when the cases were consolidated for hearing the two types of cases effectively became a single case, and both the company and agents became parties to the single case. Thus, while the application was filed solely by GCI, and while GCI clearly is authorized to bring an application for itself, it also is authorized to apply for the individual agents, who are subsumed in the application as parties to the consolidated case.

ELIGIBILITY

To be eligible for an award, GCI must meet certain specific requirements. The Commission's rules require a party corporation to have a net worth of not more than seven million dollars and to have not more than 500 employees (29 C.F.R. § 2704.104(b)(4)(iii)). The underlying decisions establish that the company meets these requirements (23 FMSHRC at 1389-1390; *see also* 24 FMSHRC at 51-52). In addition, for the agents to be eligible, each must have a net worth of not more than two million dollars (29 C.F.R. § 2704.104(b)(4)(i)). As stated in my findings regarding Clark and as was clear from the testimony of the agents and

others at the hearings, the agents meet this requirement.

The question then is whether the Secretary's positions were substantially justified.

SUBSTANTIAL JUSTIFICATION

The burden is on the Secretary to establish her positions both before and during litigation were "substantially justified." Neither the EAJA nor the Commission's rules define "substantial justification." However, the standard is directly adopted from federal civil litigation discovery, where the essence of "substantial justification" is whether "reasonable people could genuinely differ" (*See The Essentials of the Equal Access to Justice Act*, 56 La. L. Rev. 22 (1995)). When drafting the legislation, Congress stated, "where the Government [can] show that its case has a reasonable basis both in law and fact, no award [will] be made" (*Id.* 23). Moreover, as the Commission has noted, the Supreme Court echoed this statement by defining "substantially justified" as meaning the government's position "must have a reasonable basis both in law and fact" and that it was "justified to a degree that could satisfy a reasonable person" (*Pierce v. Underwood*, 487 U.S. 552, 565 (1988), *quoted in James M. Ray, employed by Leo Journagan Construction Co., Inc.*, 20 FMSHRC at 1014, 1021 (Sept. 1998)). The EAJA defines the "position of the agency" as "the position taken by the agency in the adversary adjudication [in addition to] the action . . . by the agency upon which the adversary adjudication is based" (5 U.S.C. § 504(b)(1)(E)). Finally, an EAJA application may be granted where the government's demand is "substantially in excess" of the relief awarded, that is where the demand is unreasonable when compared with the relief awarded (5 U.S.C. § 504(a)(4)).

MSHA'S POSITION PRIOR TO LITIGATION

In ruling on the merits of the application, the judge must keep in mind the essentials of what was at issue in the underlying disputes. All of the proceedings were cases in which the Secretary sought the assessment of monetary penalties for alleged violations of regulations promulgated pursuant to the Act.

The disputes between the parties commenced when citations alleging the violations were issued to GCI. Following the issuance of the citations, the Act required MSHA to propose penalties for the alleged violations. The company and the individuals then contested all or part of the allegations upon which the violations and proposed penalties were based. The proposed assessments represented the ultimate position of the agency prior to litigation.

The penalties proposed by the Secretary were the result of her application of regulations for determining the amount of "regular assessments" (30 C.F.R. § 100.3), "single penalty assessments" (30 C.F.R. § 100.4), and "special assessments" (30 C.F.R. § 100.5). The regulations codify MSHA's implementation of the statutory civil penalty criteria. There is no indication in the record (and it is a voluminous record) that in computing the proposed civil penalties MSHA did anything other than faithfully follow and properly apply the regulations it

was compelled to follow. Indeed, it is worth noting that during the litigation stage of the proceedings GCI stipulated to facts regarding its size and previous history that fully accorded with those MSHA previously used in its calculations (*see* 23 FMSHRC 1350, 1352).

It is the company's position that prior to litigation the Secretary did not properly consider the effect of the proposed penalties on its ability to continue in business (Appl. 6-7), but the record does not substantiate this claim. Throughout the course of the penalty proposal process, the burden was on the company, not on the Secretary, to come forward with information that the penalties proposed would adversely affect its ability to continue in business. The regulations state that the Secretary must presume initially the operator's ability to continue in business will not be affected by the penalties, but the operator may submit information to the District Manager concerning the business's financial status and if the information indicates that the penalty will adversely affect the ability to continue in business, the penalty may be adjusted (30 C.F.R. § 100.3(h)). At the hearing, the company offered numerous financial documents and detailed testimony from its president, Craig Jackson, explaining both the documents and the company's financial background. The record does not reveal that during the penalty proposal process GCI brought to the District Manager's attention all of the financial documents and Jackson's explanations, items I found compelling and persuasive during later litigation of the cases (*see* 23 FMSHRC at 1389-90).

Nor does it reveal that prior to litigation the agents came forward with information regarding the effect of the proposed penalties on their abilities to meet their financial obligations or with information indicating that other civil penalty criteria should be weighed in their favor. Included in the Secretary's assessment proposals were her consideration of the fact that the individuals had no prior histories of violations and the presumption the proposed penalties would not adversely effect the individuals' abilities to meet their financial obligations, presumptions the individuals did not then challenge. Thus, in assessing civil penalties against the individuals, the Secretary again properly followed her regulations (30 U.S.C. § 100.4(e)).

I am also compelled to observe that the penalties proposed for GCI ranged from \$55.00 to \$16,000.00 and those proposed for the agents ranged from \$600.00 to \$3,000.00. The proposals do not seem at all excessive when measured against the statutory limit of \$50,000 per violation (30 U.S.C. §§ 820(a), 820(c)).

Finally, there is no indication that the company or its agents were singled out or that the regulations were applied differently to them than they would have been to any other company or to any other agents in similar circumstances. Although GCI ascribes an unlawful motive to the Secretary's initiation and adjudication of the civil penalty proceedings (Appl. 1-2), there is not an iota of evidence to substantiate the charge, which I will not dignify by reciting. For these reasons, I find that the actions of the agency in proposing the penalties were substantially justified with regard to the cases against the company and its agents.

MSHA'S LITIGATION POSITION

The question now is whether the agency's actions were reasonable with regard to the positions it took during the litigation process, and I conclude that they were. GCI sees them as unreasonable because the Secretary did not officially compromise the proposed penalties. However, the record confirms that by insisting upon the proposed penalties, the Secretary proceeded both reasonably and strictly according to law.

With respect to the ability to continue in business civil penalty criterion, just as during the penalty proposal process, the burden was on the company, not on the Secretary, to come forward with information that any penalties assessed would adversely affect its continuation. The presumption that unless the company proves otherwise the penalties are assumed to have no adverse effect is one of the oldest in mine safety law (*see Buffalo Mining Co.*, 1 IBMA 226, 247-248 (Sept. 1973)). When a civil penalty petition is filed and Commission jurisdiction attaches, it becomes the duty of the judge to assess the penalties de novo based on the statutory penalty criteria (*Sellersburg Stone Co.*, 5 FMSHRC 287, 291-292 (Mar. 1983); *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984)). The impact of the proposed penalties on the company's ability to continue in business is based on the evidence of record, and the ultimate amounts assessed by the judge reflect the exercise of his or her discretion bound by all of the statutory penalty criteria.

In the cases filed by the Secretary against the company, I reduced the penalties from those proposed between 77.5 percent and 80.84 percent. Much of the reduction was based on my conclusion that imposition of the proposed penalties would have an adverse effect on the company. Although the company argues the magnitude of the reduction indicates the unreasonableness of MSHA's demands, the test for determining whether the proposed penalties were substantially in excess of those awarded can not be based solely on mathematical percentages. Rather, it must appear "the agency's . . . action did not represent a reasonable effort to match the penalty to the actual facts and circumstances of the case" (142 Con. Rec. 3242, 3244 (Mar. 29, 1996 (n. 4))).

GCI would have me judge the reasonableness of the Secretary's litigation position by the settlement negotiations and discussions which involved the company and the Secretary. The Secretary, too, would not object to using her settlement proposals as a basis for judging reasonableness, provided, of course, they are the proposals as she recalls them. For example, she states that on June 27, 2000, during the litigation stage of the proceedings, GCI provided some information regarding its financial condition and, in response, MSHA offered to "adjust the penalty by 50 %" (Sec's Opposition to Appl. 15). She also states at one point she was "willing to go as far as exploring a reduction of 90%" (*Id.* 16). In the Secretary's view, the test for determining whether MSHA's demand was substantially in excess of what I ultimately assessed should be based on the difference between the 50 percent offer and my assessments (*Id.* 15). GCI responds that the Secretary has the facts wrong, that she "never offered a ninety percent . . . settlement . . . [and] that the fifty percent . . . offer was discussed but was never memorialized with a specific amount" (GCI's Response 2).

I decline the parties' invitation to delve into their settlement discussions. Aside from the difficulty, indeed the nearly certain impossibility, of establishing the facts, it would be bad policy to require a judge to use the parties' shifting negotiations as a bench mark for gauging the reasonableness of the agency's demands. In most instances a judge can not be expected to reconstruct with certainty what may or may not have passed between the parties or to document the myriad motives that may have spawned their settlement proposals. This is especially true when, as here, definitive written proposals are lacking.¹ Rather than use the parties' settlement discussions, I will judge the reasonableness of the Secretary's litigation position by whether that which was revealed at trial was known, or reasonably should have been known, by the Secretary.

As I have noted, in large measure, the civil penalties I assessed against GCI were based on my conclusion the proposed penalties would adversely effect its ability to remain in business. In turn, that conclusion was based upon the documentary evidence the company produced as well as on the credibility of the company president's explanations of the company's financial position (*see* 23 FMSHRC 1289-1390). Even assuming that all of the documentary evidence presented at trial was available to the Secretary during the course of litigation, it was not unreasonable for the Secretary to maintain her insistence on the proposed penalties. The Secretary did not have Jackson's sworn explanations before her, nor did she have the prescience to anticipate my credibility determinations. It would be irrational, unreasonable, and contrary to precedent to expect the Secretary to obtain all of the evidence regarding the ability to continue in business criterion that GCI introduced at trial, and it would transpose the positions of judge and litigant to expect the Secretary to gauge the credibility of Jackson and to lower the proposed penalties so they did not vary substantially from those I assessed. In the end, the Secretary simply followed the law and required the company to prove its case, which is not a basis for awarding EAJA fees and expenses.

Finally, in the cases the Secretary brought against the individuals, it also was not unreasonable for the Secretary to adhere to the proposed penalties. Even though the individual litigants had no histories of prior violations, that was but one criterion dictating what penalties ultimately would be assessed. In every instance, the Secretary made reasonable arguments regarding the existence of the violations, their gravity, and the knowledge of the charged individuals. Although she was not successful in proving all of her allegations, none of her positions was so far outside the bounds of reason and logic a reasonable person would have found them without substance or a fair possibility of success. Nor was it unreasonable for the Secretary to insist the individuals establish the size of any penalties assessed would affect their abilities to meet their financial obligations. The law places the burden of proving that criterion upon the individuals, as one of them ultimately did (*see* 22 FMSHRC at 1387 - 89).

^{1/} This is not to state that a judge in the exercise of his or her discretion is barred from considering an undisputed, fully documented settlement proposal as an element of determining whether a demand is excessive. It is simply to hold in this instance, where the alleged proposals and considerations are neither fully documented nor undisputed, it would be unwise to do so.

ORDER

For the reasons set forth above, the application is **DENIED** and this proceeding is **DISMISSED**.


David F. Barbour
Chief Administrative Law Judge.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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Falls Church, Virginia 22041

June 28, 2002

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-228-DM
on behalf of	:	SC MD 01-14
TRACY ALLEN SANSOUCIE,	:	
Complainant	:	
	:	
v.	:	
	:	
VESSELL MINERAL PRODUCTS,	:	Mine ID 23-00221
	:	
Respondent	:	Vessell Mineral Products

DECISION

Appearances: John Rainwater, Esq. and Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner; Bradley S. Hiles, Esq. and Christopher T. Berg, Esq., Blackwell, Sanders, Peper, Martin, LLP., St. Louis, Missouri, for Respondent.

Before: Judge Bulluck

This proceeding is before me on a Complaint of Discrimination filed by the Secretary of Labor ("the Secretary") on behalf of Tracy Allen Sansoucie against Vessell Mineral Products ("Vessell"), under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C.

§ 815(c)(2).¹ The complaint alleges that Sansoucie was unlawfully discharged from employment in retaliation for having made safety complaints to the Department of Labor's Mine Safety and Health Administration ("MSHA"). The Secretary seeks reinstatement of Sansoucie to his former position with back pay and interest, employment benefits and seniority, expungement of Sansoucie's employment record of all references to the circumstances surrounding his discharge, and payment of a \$5,000.00 civil penalty.

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

A hearing was held in St. Louis, Missouri. The parties presented testimony and documentary evidence, and stipulated that "To the best of the Secretary's knowledge at [that] time, no official or employee of the Mine Safety and Health Administration called Vessell Mineral Products to warn of the Part 50 audit" (Tr. 6). Post-hearing briefs were filed. For the reasons set forth below, I find that Sansoucie failed to prove a violation of section 105(c) of the Act, and dismiss his Complaint of Discrimination.

I. FACTUAL BACKGROUND

Vessell Minerals is a plant that purifies lime for steel factories, employing 50 to 60 workers over three shifts in a 24-hour a day operation at its Bonne Terre, Missouri, quarry and kiln facility (Tr. 12-13). Royce Vessell has owned the corporation since January 1997, Flora Denton is vice-president and handles administrative functions such as personnel, accounting, and safety training, and Brad Bayless is plant superintendent.

Tracy Sansoucie first worked at Vessell in late 1998 in several areas, including special products and kiln, conveyor and elevator maintenance (Tr. 14). Sansoucie, whom Vessell knew to suffer from alcohol abuse resulting in legal problems, had very poor attendance and quit in January 2000, according to Vessell, in lieu of being fired (Tr. 21-27, 145, 476-80, 723; ex. G-2). Shortly thereafter, in mid-February 2000, Sansoucie seeking to be rehired, explained to Vessell that he had recently remarried and needed a job, and represented that he had gotten treatment for his alcoholism (Tr. 146, 181-82). According to Flora Denton, Sansoucie was viewed as a talented worker and, after consulting Royce Vessell and making it "very clear to [Sansoucie] that his past practices would not be tolerated," she rehired him (Tr. 482).

Vessell permitted Sansoucie to work the night shift and plenty of overtime, arranged his work schedule to accommodate incarceration on weekends and other legal obligations, and found his overall performance, including attendance, to be very good (Tr. 482-84). Sometime around June of 2000, Sansoucie became a burn floor supervisor of seven to ten employees, and reported directly to Brad Bayless (Tr. 14-16).² The only instance of an attendance infraction noted by

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The burn floor is the area from which the burn man (burner) controls the kiln. The supervisor checks on operation of the kiln and the back end where rocks are fed into the kiln (Tr. 17). Referring to Sansoucie's diagram at exhibit G-1, lime is processed as follows: starting at the hopper, product travels up the conveyor into a rock box, then falls down a feed tube into the back of the kiln (bigger rocks go to a raw crusher behind the cooler, into a shaker pan, then into an elevator); any spillage goes to a shaker pan and elevator that return it to the system; it takes approximately four hours for product to reach the opposite end of the kiln at the cooler floor (the cooler man empties the hoppers and ensures that product goes the right way to the silos, located beneath the kiln; product is then separated into various hoppers, then run to the silos (Tr. 18-21).

Vessell occurred during the week of November 13, 2000, when Sansoucic failed to report for two shifts without calling in (Vessel considers three consecutive shifts a "voluntary quit"); Sansoucic provided satisfactory explanation to Denton, however, and was permitted the entire week off to tend to personal, family-related matters (Tr. 483-86; ex. R-16).

Sansoucic worked without incident until he was injured on the night of December 28, 2000. According to Sansoucic, sometime around 9:30 or 10:00 p.m. when he noticed a hot spot on the kiln, he directed the burners to pull (extinguish) the fire, put the kiln on auxiliary power, then shut off the conveyor, elevator and shaker pan at the control building near the pump house. As he was leaving the area around 10:30 p.m., he slipped on a set of icy steps near the pump house and fell into a concrete ditch (Tr. 30-36; ex. G-1). Sansoucic went to the burn floor and advised maintenance supervisor Ed King of the accident, and called Brad Bayless at home (Tr. 37-40). Because Royce Vessell and Flora Denton were on vacation, Bayless was in charge of the mine. Sansoucic did not report to work the next day and, believing that he was simply sore from bruising, did not seek medical attention until January 2, 2001, from his family physician, Dennis Sumski (Tr. 40-41). Dr. Sumski referred Sansoucic to orthopedic surgeon William Harris, who diagnosed Sansoucic's injury as a first degree separation of his AC joint and a fracture of the distal clavicle, and restricted him from working until January 18, 2001 (Tr. 43-45). Sansoucic elected to have both doctor visits paid by his private insurance carrier, Blue Cross/Blue Shield, rather than worker's compensation (Tr. 41-42, 45-46).

In the meantime, upon return from vacation, Denton arranged for Sansoucic to come to the plant to discuss the accident and his medical status. It is unclear whether the meeting took place on January 4th or 8th ("January meeting"), but the parties agree that Sansoucic, Denton, Bayless and Royce Vessell were present, and that Sansoucic's accident was discussed (Tr. 51-52). According to Denton, she brought to the meeting the forms necessary for reporting the injury to Vessell, worker's compensation and MSHA, but Sansoucic declined to fill them out, explaining that he did not wish to get Vessell in trouble with MSHA (Tr. 55, 100, 419-22). There was some confusion, since Sansoucic claimed that the accident occurred on the job, as to why he had had his medical claims processed through his personal insurance carrier. Denton, angry that Sansoucic had not followed company procedures by filling out Vessell's report of work-related injury and going to the company doctor, told Sansoucic that he had given her enough reason to fire him; Sansoucic responded that Denton should "do what [she had] to do" (Tr. 52-54, 423, 426-27). The meeting ended with an agreement that Sansoucic get back to Vessell after he had given the matter further thought, as to how he wanted the claim to be handled (Tr. 53, 103-05, 426).

Instead of getting back to Vessell, however, Sansoucic called MSHA's Rolla, Missouri field office on January 9th and spoke with the office secretary, Steven Brill. Sansoucic complained of improperly stored oxygen and acetylene tanks at the plant, and he inquired as to whether he, a supervisor, was obligated to fill out his own accident report (MSHA form 7000-1) (Tr. 60-61, 348). As a result of Sansoucic's call, MSHA Inspector Donald Richards inspected Vessell the same day and found the tanks at various locations properly stored (Tr. 366, 371; ex.

G-5). Inspector Richards was unaware of the complainant's identity and at no time mentioned Sansoucic or any Vessell employee in connection with the hazard complaint (Tr. 367-71, 378, 388). Because the allegation of failure to report the accident did not involve an immediate safety hazard, MSHA assigned Inspector Ed Jewell to conduct a Part 50 audit later in the month (Tr. 350-51).

Sansoucic also called the Missouri Division of Workers' Compensation on January 16th and talked to Art Hinshaw (Tr. 60). Hinshaw called Denton shortly thereafter and told her that Sansoucic had accused Vessell of refusing to report his workers' compensation claim, and advised her, irrespective of any confusion as to where the accident occurred, to file the claim (Tr. 431). Denton and Royce Vessel then met with claims representative Mark Redick of Cincinnati Insurance (Vessell's workers' compensation carrier) and, based on his advice (employee Charles Herbert was also discussed), faxed the workers' compensation claim to the insurance carrier and mailed the Mine Accident, Injury and Illness Report (MSHA Form 7000-1) to MSHA on January 17th (Tr. 436-41; ex. R-3, R-4, G-6).

On January 19th, Denton required Sansoucic to be examined by the company doctor, David Mullen of Bonne Terre Medical Associates, and Dr. Mullen referred him to Dr. Harris, the same specialist to whom Dr. Sumski had referred Sansoucic (Tr. 46-47, 442). Denton was flexible in fashioning a work assignment for Sansoucic that would meet his physical limitations and transportation needs and, although Dr. Harris released him for 'light duty' on January 22nd, Sansoucic ultimately returned to a desk job in Vessel's office on January 24th (Tr. 56, 95-97, 131, 139, 450-51, 459-60).

Regarding MSHA's Part 50 audit of Vessell's injury reporting and filing over the prior three year period, Inspector Jewell, along with MSHA trainee Steve Thompson, interviewed Sansoucic at his home on January 22nd, and inspected the plant's paperwork from January 23rd through 25th. In order to keep Vessell from learning that a complaint had been made, Inspector Jewell deliberately misled Denton as to the reason for the audit by telling her that Vessell had been randomly selected (Tr. 496-97; ex. R-27, p. 33-40). Sansoucic's name did not come up during the audit (Tr. 497). Four citations were issued as a result of the audit, one of which involved late reporting of Sansoucic's accident by one day (Ex. G-8; R-27, p. 68, 71-72).

Sansoucic's attendance on light duty during late January was extremely irregular and abbreviated when he did report to work. Denton, having received authorization from Royce Vessell to fire Sansoucic (and Charles Herbert), went to Sansoucic's home accompanied by Curt Nickelson on February 2, 2001, and discharged Sansoucic from employment (Tr. 68; ex. R-25, p. 341).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act,³ a complaining miner bears the burden of establishing that 1) he engaged in protected activity and 2) the adverse action of which he complained was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (April 1998); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (April 1981); *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

The operator may rebut the *prima facie* case by showing that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC 2799-800. 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 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

Sansoucie has established that he engaged in protected activity by complaining to MSHA about storage of oxygen and acetylene tanks, and by reporting his accident of December 28, 2000. He has failed to show, however, that Vessel was 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 sub nom. Donovan v. Phelps Dodge Corp.*, 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). In *Chacon*, the Commission listed some of the more common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; (3) coincidence in time between

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Section 105(c)(1) of the Act provides that a miner cannot be discharged, discriminated against or interfered with in the exercise of his statutory rights because: (1) he "has filed or made a complaint under or related to this Act, including a complaint . . . of an alleged danger or safety or health violation;" (2) he "is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;" (3) he "has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;" or (4) he has exercised "on behalf of himself or others . . . any statutory rights afforded by this Act."

the protected activity and the adverse action; and (4) disparate treatment of the complainant. See also *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 530 (April 1991).

The Secretary identifies Sansoucie's statement at the January meeting-- that he did not want to get Vessell in trouble with MSHA-- as protected activity (Tr. 55, 422). I do not find that Sansoucie's reference to MSHA constituted activity that is protected by the Act but, in the overall context of the meeting, appears to be an attempt by Sansoucie to deflect attention from his own behavior and diffuse Denton's anger. Denton testified that her anger at Sansoucie for failing to follow well-known company procedures of filling out an internal accident report and seeking medical attention through Bonne Terre Medical Associates precipitated her comment to Sansoucie about firing him (Tr. 420-21, 423). She testified that conflicting versions of his accident by Sansoucie, coupled with his election to use his personal medical insurance rather than Vessel's insurance carrier, made her suspicious that the accident had not occurred at work (Tr. 429). In any case, she testified, she urged Sansoucie to assist in filling out the workers' compensation paperwork and he refused. Sansoucie, on the other hand, testified that he had not felt that his injuries were serious enough to report at the time of the accident (Tr. 98). He asserted that, because Denton had told him that she would like to fire him, he told Vessell that he did not believe that the accident should be treated as a workers' compensation claim (Tr. 99). Sansoucie, himself, puts Denton's comment in the context of frustration, rather than an actual intention to fire him, by testifying that "she was aggravated, yes. Because I had -- didn't follow - - they said I didn't follow procedures. Not filling out an accident report at the time of the accident" (Tr. 52, 180-82; see 710). Sansoucie also confirmed that Denton was angry that he had sought medical attention from his family physician, rather than Dr. Mullen (Tr. 52). I do not find credible any suggestion by Sansoucie that he feared losing his job. Denton's anger, then, was clearly rooted in Sansoucie's failure to follow company procedures, irrespective of any doubt about the circumstances surrounding the accident, and requesting that Sansoucie fill out a workers' compensation claim was entirely reasonable. Sansoucie's explanation for his lack of cooperation, "I had never been through anything like this before. I didn't know if I should do it or shouldn't do it. I don't know if it would hurt the company or it would help the company," puts his motivation in question, rather than Denton's, especially since he was instructed on-the-spot as to the proper procedures for work-related injuries. Sansoucie also stated that he was the first to mention filing of MSHA's mine accident report (Tr. 179, 183-84). His concern for the company at this point, however, is at least suspicious, viewed in the overall context of his refusal to cooperate. It bears noting that Sansoucie's taunting of Denton to "do . . . what she needed to do," in response to mention of firing him, was inappropriate for someone desirous of maintaining employment, and only served to fuel the antagonism between them (Tr. 53). This meeting is a benchmark in determining Denton's motivation for ultimately terminating Sansoucie, in that it is the first indication that Denton was very angry about Sansoucie's handling of his accident, and it establishes the reason for her anger as unrelated to Sansoucie's protected activity, which had not yet occurred.

While it is undisputed that Sansoucie's call to Steve Brill on January 9th is protected activity, there is no evidence that Royce Vessell or Flora Denton knew that the call had been

made or what had been discussed. The Secretary contends that Don Richard's hazard inspection of the oxygen and acetylene tanks so closely followed the January meeting as to make Vessell suspicious that it was precipitated by Sansoucie. The proximity in time standing alone, however, does not establish Vessell's knowledge. To the contrary, the evidence indicates that no one from MSHA disclosed Sansoucie's identity to anyone at Vessell, and that Denton's guesses to Inspector Richards as to the complainant's identity did not include mention of Sansoucie (Tr. 367-71, 378-81, 491-93, 694-95). Indeed, Sansoucie conceded that he did not believe that Vessell had knowledge of that complaint or that it played any role whatsoever in his discharge (Tr. 110-11).

The Secretary also attempts to establish Vessell's knowledge of Sansoucie's protected activity through testimony of Charles Herbert, that he observed Denton being "tipped off" about the impending Part 50 audit. Herbert was formerly a laborer at Vessell from September 2000 until he was terminated on February 2, 2001, the same day as Sansoucie, also for unexcused absences (Tr. 198-99). Herbert had been injured on the job on December 11, 2000, treated by Dr. Mullen, and assigned to full-time light duty in the main office, Mondays through Fridays, 6:00 a.m. to 2:00 p.m. (Tr. 189-94). At hearing, Herbert testified that Vessell's main office is small, containing three desks pushed next to each other (Tr. 194-95). According to Herbert, one morning when office worker Robin Parker and Flora Denton were also on duty, he overheard a telephone conversation during which Denton "said something about an MSHA audit and then she decided to put the--whoever she was talking to on hold and go back into the conference room and pick the phone up She met Royce in the hallway and told him that she had somebody on line about an MSHA audit and that they needed to do something about Tracy Sansoucie, that he had been becoming a nuisance and things were getting out of hand around there" (Tr. 195-96, 208). Herbert could not specify the date of the alleged conversation, the time it occurred, or the identity of the caller, although on cross-examination he narrowed down the date to January 22nd, sometime after 10:00 a.m. (Tr. 199-200, 203, 211-27). On cross, his testimony was shown to conflict with his statement to MSHA Investigator Ron Mesa, that Denton told Royce Vessell that "Tracy and his injury and myself and another guy, Mike Pierce I think his name was, had gotten injured, and it was just everything was getting out of hand, too many people getting hurt" (Tr. 228-31). Finally, Herbert claimed that he told Sansoucie about the telephone call at Sansoucie's house, before he was fired (Tr. 232). Lack of specificity in Herbert's rendition of events and gross inconsistencies in his testimony cast a broad shadow over his credibility, and it is abundantly clear that he has an axe to grind with Vessell for firing him (Tr. 233-36). Flora Denton testified that she had conducted eight hours of safety training for newly hired employees on January 22nd, and denied that the incident ever took place (Tr. 499-507; ex. R-7). Furthermore, Robin Parker testified credibly that she worked alone on January 22nd -- neither Denton nor Herbert reported to the office that day -- and that the telephone conversation alleged by Herbert never happened (Tr. 611-14; ex. R-9, R-22). Consequently, based on the parties' stipulation that no one from MSHA is known to have alerted Vessell to the impending audit, and substantial lack of credibility on the part of Charles Herbert, it is my finding that the incident never occurred. I further find that the inspectors were careful to characterize the surprise inspection as a "random audit" to protect the identity of the complainant, that they never

identified Sansoucie, and that no one at Vessell behaved as if they suspected Sansoucie's involvement (Tr. 691, 695).

The Secretary presented the testimony of Jason Cowsert to establish Denton's knowledge. Cowsert, a Vessell employee since July 1999, was a burn man, working the same shift as Sansoucie at the time of Sansoucie's accident (Tr. 253). Cowsert testified that, around the end of January 2001, he talked to Denton about moving him off the burn floor to maintenance. They discussed cooler man Darren Hooss replacing Cowsert, and Denton estimated that it would take her two weeks to arrange for Hooss to get up to the burn floor (Tr. 255-56, 283). Cowsert testified that he explained to Denton that he wanted a transfer because "just Royce was up there, and he's, you know, I can't stand working with him all the time, and then plus, it just [sic] I was tired of the 12-hour shifts, you know. I wanted something with 8-hour shift, and plus sometimes that shift will swing, and I didn't want to go on swing shift. I wanted to stay on a steady shift" (Tr. 257-58). Cowsert asserted that rumors had circulated around the plant that Sansoucie had been hurt and was going to sue the company, and that Denton stated during this meeting that "Tracy's [f_cking] us right now, but he's going to be the one getting [f_cked] in the long run" (Tr. 259, 261, 263-64, 328-29). According to Cowsert, he told Sansoucie about Denton's comment at some point when Sansoucie was on light duty in the office (Tr. 260). Cowsert reasoned that the discussion with Denton would have had to have occurred in late January because, according to burn log entries, he trained Hooss to burn on February 7th and 19th -- two weeks later, as Denton had promised (Tr. 285, 294, 305; ex. 13). On cross-examination, Cowsert acknowledged that Denton had been referring to "Tracy's lawsuit" when she talked about Tracy "f_cking" Vessell (Tr. 271-74). Denton acknowledged the conversation with Cowsert and readily admitted having made the statement, but attested to a completely different context and time frame. She testified that the discussion took place on March 13th, the day after Inspector Mesa had hand-delivered to her Tracy Sansoucie's discrimination complaint, and because, in her mind, this was tantamount to being sued, she ranted to Cowsert about "Tracy's lawsuit" the following day (Tr. 508-12). She testified that the week before, Inspector Mesa had delivered Charles's Herbert's discrimination complaint to her, and she was very angry when presented with Sansoucie's, especially upon reading the false allegations (Tr. 509). Viewing all the evidence, the only reasonable context in which Denton could have referenced "Tracy's lawsuit" was Sansoucie's discrimination complaint. The burn log does not support Cowsert's recollection that the discussion took place in January and Hooss was trained on two dates in early February, because it is highly implausible that a burner could have been trained over two partial workdays. Cowsert, by his own testimony that "everybody" assumed that Sansoucie had made the complaint that prompted the Part 50 audit "just because he had got hurt, and he had been fired" places the rumors in the post-discharge time frame. The record indicates that, in mid-February, well after Sansoucie's discharge, Royce Vessell replaced Brad Bayless by assuming total supervision of the burn plant and retraining the burners, in response to losing a major customer and product quality issues (Tr. 514-18, 664-70, 698; ex. R-14, R-15). Vessell witnesses Ed King, Brett Gobble, Randy Nickelson and Royce Vessell all testified that, after taking over control of the burn plant, Royce Vessell trained all burners, including Hooss (Tr. 623-26, 642-44, 699-704). The burn log establishes that Hooss became "Burnmaster" on April 11th and, therefore supports Vessel's

position that he was trained between March 19th and mid-April (Tr. 519-21, 638-39, 669). I credit Denton's rendition of events, especially because, in his March 11th interview with Ron Mesa, Sansoucie never mentioned Denton's comment to Cowsert. Sansoucie claims that "he had forgot about having that conversation with Jason, and it really didn't mean nothing" (Tr. 168-70; ex. R-19). A more plausible explanation for Sansoucie's memory lapse is that the MSHA interview preceded the Denton-Cowsert conversation. Therefore, I find that Flora Denton's declaration of war on Sansoucie occurred in March, on the heels of notice of Sansoucie's discrimination complaint, clearly after Sansoucie had been discharged.

The record clearly indicates that Flora Denton is assertive, outspoken and, by her own admission, uses profanity. In retrospect, she would have been well-advised not to have spoken candidly to Cowsert about Sansoucie's lawsuit, but considering the magnitude of her outrage at that juncture, it is hard to conceive of her not speaking her mind if she thought that Sansoucie had called MSHA. The Secretary points to Denton's animus toward MSHA as evidence of her knowledge of Sansoucie's protected activity. All accounts of Denton's contempt for MSHA, however, involved general agitation at being "picked on" by the inspectors, without any specific link to Sansoucie or any other miner.

Finally, the Secretary's reliance on Vessell's toleration of Sansoucie's prior attendance deficiencies, as indication that its legitimate reason for firing Sansoucie is pretextual, is misplaced. While Vessell admits to poor attendance on the part of Sansoucie during his first year of employment, the company contends that Sansoucie would have been fired had he not quit in January 2000, and that when he was rehired that February, Vessell made it clear that regular attendance was expected of him. Vessell considered Sansoucie's work and attendance to be satisfactory until his December 2000 accident. Vessell distinguishes between Sansoucie's prior attendance record and the period that he was assigned light duty. Flora Denton described Vessell's light duty/return to work program as a win-win situation that redefines job duties to fit injured workers' medical restrictions, employing them full-time at 100% of their regular pay (workers' compensation pays 66%), while the company benefits by keeping down its insurance premiums and lost time days (Tr. 424-26). Likewise, Royce Vessell testified that the light duty program returns the employee to his permanent job as quickly as possible and helps the workers' compensation rate for the company (Tr. 692-94). He explained that, by blatantly missing time without doctor's excuses, and making statements like "fire me," Sansoucie and Herbert had set a bad example for other workers and undermined the light duty program (Tr. 696-97). Moreover, he testified that, because of the program's importance to the company, he would have fired Sansoucie even if he had known that Sansoucie had complained to MSHA (Tr. 697).

It is clear that Flora Denton was furious with Sansoucie, as early as the January meeting when she told him that she would like to fire him for failure to follow Vessell's work-related injury procedures (Tr. 177). It is also evident that Denton's anger and frustration escalated when she learned that Sansoucie had contacted the Missouri Department of Workers' Compensation himself, and accused Vessell of refusing to report his claim. Despite the difficulties in dealing with Sansoucie, however, Denton afforded him the utmost flexibility in selecting his light duty

assignment. There is no dispute that Sansoucie's attendance while on light duty was poor--characterized by failures to report to duty, work full days, call-in absences, obtain medical excuses, and notify Denton of early departures. Moreover, Denton's claim that Sansoucie invited her to fire him on three occasions between the January meeting and February 1st, the day before his discharge, was essentially unchallenged (Tr. 426, 461-62, 466). Denton testified credibly that on the second occasion she had cautioned Sansoucie that his job was in jeopardy and that if he continued to tell her that, she was "going to go through with it," and the third time, she knew that she needed to talk to Royce Vessell because the company had a serious problem (Tr. 466-67, 470-71). When it became clear to Denton and Royce Vessell that Sansoucie had no intention of cooperating with the light duty program, Denton fired him (471-72). There is no indication from the record that Denton or Royce Vessell knew of Sansoucie's protected activity. They treated him the same as similarly situated employee Charles Herbert, also a flagrant violator of the light duty program, but not a participant in protected activity. Furthermore, despite Sansoucie's testimony that Denton fired him without an explanation, I am persuaded that she told Sansoucie that he had been missing too many days on light duty (Tr. 474-75; 153-56; ex. R-18).

Based on the record in its entirety, I conclude that Sansoucie has failed to establish a *prima facie* case. Assuming, *arguendo*, that Vessell knew of Sansoucie's complaints to MSHA, Vessell has proven that, based on Sansoucie's flagrant lack of compliance with its light duty program, it would have terminated him for his unprotected activity alone.

ORDER

Accordingly, inasmuch as the Secretary has failed to establish, by a preponderance of the evidence, that Sansoucie was discharged for engaging in activity protected under the Act, it is **ORDERED** that the Complaint of Discrimination of Tracy Allen Sansoucie against Vessell Mineral Products, under section 105(c) of the Act, is **DISMISSED**.


Jacqueline R. Bulluck
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 29, 2002

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2002-114-D
on behalf of Jimmy Caudill and	:	BARB CD 2001-11
and Jerry Michael Caudill,	:	
Complainants	:	
v.	:	
	:	
LEECO, INC., and BLUE DIAMOND	:	No. 75
COAL COMPANY,	:	
Respondents	:	

ORDER DENYING RESPONDENTS' MOTION FOR SUMMARY DECISION

This case is before me on a complaint of discrimination filed by the Secretary of Labor on behalf of Jimmy Caudill and Jerry Michael Caudill pursuant to Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(c). Respondents have moved for summary decision, advancing several arguments. The most significant issue raised by the motion is whether a miner, or applicant for employment as a miner, may assert a claim of discrimination based upon the protected activity of a third party, in this case the miner's father. For the reasons set forth below, I hold that the allegation that Jimmy Caudill suffered adverse action as a result of protected activity by his father, Jerry Caudill, states a cause of action under section 105(c) of the Act. I also reject the other arguments raised by Respondents and deny the motion for summary decision.

Facts

For purposes of this motion, the facts alleged in the complaint, as clarified and expanded by the motion's papers, are assumed to be accurate. On or about February 15, 2001, Jimmy Caudill applied for a position as a roof-bolter at a mine operated by Respondent, Leeco, Inc. He was told to complete experienced miner training and report for duty at 2:15 p.m. He attended the training at the mine site and was subsequently paid for the time he spent in training. When he reported for work at about 2:10 p.m., however, he was told that another miner had decided to come back to work, and that he would not be working for Leeco. The miner that performed the roof bolting duties that day, however, was a current employee who had been assigned to maintain conveyor belts, not a miner returning to employment with Leeco. On February 26, 2001, Caudill filed a discrimination complaint with MSHA, alleging that he "was fired because of [his] family history of Safety and Discrimination Complaints." The Secretary maintains that shortly before

Jimmy Caudill reported for work, another miner discussed his family's history of making safety complaints with the mine superintendent, and it was that information that prompted Leeco to refuse to allow him to start work.

The "family history" Jimmy Caudill was referring to was that of his father, Jerry Michael Caudill. Jerry Caudill had worked as a miner for Leeco in the past, during which time he actively asserted rights under the Act. He became the first miners' representative at Leeco and made safety complaints to MSHA. He was discharged from Leeco in 1997, and initiated a discrimination action against Leeco, alleging that his discharge was motivated by his protected activity. An application for temporary reinstatement was successfully prosecuted on his behalf by the Secretary, and a subsequent discrimination complaint pursuant to section 105(c)(2) was settled. Jerry Caudill last worked for Leeco in 1997, and has not sought employment with, or worked for, either Respondent since that time. Jerry Caudill continued his activism for miners' rights after leaving Leeco. A subsequent termination from another mine operator in the area was also the subject of a discrimination complaint. At the time of the alleged discrimination against Jimmy Caudill, Jerry Caudill was employed as a miner with Gin Coal, which is not affiliated with either Respondent.

Jimmy Caudill does not claim to have filed safety complaints or engaged in any other activity protected by the Act, prior to submitting his complaint to MSHA. Jerry Caudill did not file a complaint of discrimination with MSHA regarding the allegedly discriminatory action against his son.

The discrimination complaint in this case was filed on behalf of both Jimmy Caudill and Jerry Caudill and names as Respondents Leeco, Inc., and Blue Diamond Coal Company, Leeco's corporate affiliate currently operating the subject mine. Respondents answered the complaint and moved for summary decision pursuant to Commission Procedural Rule 67, 29 C.F.R. § 2700.67.

The Motion

Respondents advance several arguments in support of their contention that, as a matter of law, a cause of action cannot be maintained on behalf of either miner under section 105(c) of the Act. Respondents contend that: 1) Jimmy Caudill did not engage in protected activity and cannot base his claim on the protected activity of a third party; 2) any protected activity was too remote in time from the allegedly discriminatory act to support causation; 3) Jerry Caudill's failure to file a complaint of discrimination with MSHA is fatal to his claim; 4) Jerry Caudill is not a miner as to Respondents; and 5) Jerry Caudill suffered no adverse action.

Jimmy Caudill's Reliance upon Jerry Caudill's Protected Activity

The central issue raised by the motion is whether a discrimination action can be maintained on behalf of Jimmy Caudill based upon his father's protected activity. Section

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

No person shall discharge or in any manner discriminate or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, . . . or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

Respondents argue that the plain meaning of the statute, principally the phrase “because such miner,” requires that the protected activity prompting the unlawful motive must be that of the miner complaining of adverse action, not that of a third party. They rely on *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561 (3d Cir. 2002), where the court rejected a claim of discrimination under similar provisions of the Americans with Disabilities Act (“ADA”) and the Age Discrimination in Employment Act (“ADEA”) brought by a son, claiming unlawful retaliation for his father’s protected activity.

The Secretary counters that the Commission and courts have rejected strict literal interpretations of section 105(c)(1) that are inconsistent with the legislation’s purpose, and that refusing to allow Jimmy Caudill’s claim of retaliation based upon protected activity by his father would nullify some of the most important protections intended by Congress. The Secretary also points out that similar anti-discrimination provisions in Title VII, the Equal Pay Act and the Occupational Safety and Health Act, as well as the National Labor Relations Act, have been interpreted so as to allow a cause of action for retaliation based upon the protected activity of a third party.

Discussion

As the Commission stated in *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (April 1996):

The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron [U.S.A. v. Natural Resources Defense Council, Inc.]*, 467 U.S. 837, 842 (1984)]. If a statute is clear and unambiguous, effect must be given to its language. *Id.* at 842-43. Deference to an agency’s interpretation of the statute may not be applied “to alter the clearly expressed intent of Congress.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including

examination of a statute's text and legislative history, may be employed to determine whether "Congress had an intention on the precise question at issue," which must be given effect. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C.Cir. 1989) (citations omitted). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart*, 486 U.S. at 291. (citations omitted). . . .

If the statute is found to be ambiguous or silent on the specific issue in dispute "[a] court must defer to the agency's interpretation so long as it is reasonable, consistent with the statutory purpose, and not in conflict with the statute's plain language. . . ." *Coal Employment Project*, *supra*, 889 F.2d at 1131. Under the statutory scheme of the Mine Act, the Commission is required to accord deference to the Secretary's reasonable interpretations of the law. *RAG Cumberland Res. LP v. FMSHRC*, 272 F.3d 590, 595 (D.C.Cir. 2002).

Ambiguity

Neither the Secretary, nor Respondents, have cited any provision in the statute or the legislative history revealing Congressional intent with respect to the specific issue presented here, whether to permit or preclude a cause of action like that urged on behalf of Jimmy Caudill. It is doubtful that Congress considered the question of such claims. While, as Respondent argues, a strictly literal reading of section 105(c)(1) would suggest that a miner complaining of discrimination must, himself, have engaged in protected activity, the determination of whether a particular statutory provision is ambiguous entails more than an examination of the specific statutory language. As noted above, the design of the statute as a whole and the available legislative history should also be consulted to determine whether Congress had an intention on the precise issue presented.

The primary purpose of the Mine Act was to protect mining's most valuable resource - the miner, and Congress intended the Act to be liberally construed. *See, e.g., Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1423, 1437 (D.C.Cir. 1989) (citing cases). It is also clear that the Act's anti-discrimination provisions were deemed critical to the enforcement scheme and that Congress specifically intended that section 105(c)(1) be "construed expansively to assure that miners will not be inhibited in any way from exercising any rights afforded by the legislation." *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 960 (D.C.Cir. 1984) (quoting legislative history); *see also, e.g., Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480 (Aug. 1982), *aff'd*, 770 F.2d 168 (6th Cir. 1985) (table).

In *Moses*, the Commission held that "discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)." 4 FMSHRC at 1480. The Commission explained that:

Section 105(c)(1) prohibits discharge, discrimination or interference "because" of "a miner's exercise of any statutory right afforded by [the] Act." While a literal

interpretation of this provision might require the actual or attempted exercise of a right before the protection of section 105 comes into play, we reject such a reading for two reasons. First, such an interpretation would frustrate Congressional intent that miners fully exercise their rights as participants in the enforcement of the Mine Act. Second, that approach would also wrongly fail to redress or deter situations where an operator, with the intent of frustrating protected activity, takes adverse action against an innocent miner.

Id.

The court, in *Donovan*, also rejected a literal interpretation of section 105(c)(1) which would have been inconsistent with the expressed congressional intent:

Although a literal reading of the statute might indicate that a discharge is illegal only if the employee has testified or is about to testify against the employer, we decline to adopt such a hypertechnical and purpose-defeating interpretation. Instead, we hold that an employee's refusal to agree to provide MSHA investigators with testimony that the employee in good faith believes to be false is protected activity, regardless of whether the employee eventually happens to be asked for a statement.

732 F.2d at 959.

Considering the statutory language and the intent of Congress as to the Mine Act and the specific provision at issue, I find, section 105(c)(1) ambiguous when applied to the claim asserted on behalf of Jimmy Caudill.

Deference to Secretary's Interpretation

The Commission is "required to accord deference to the Secretary's reasonable interpretations of the language of the Mine Act." *RAG Cumberland, supra*, 272 F.3d at 596. It appears beyond dispute that construing the statutory language as permitting a discrimination action by Jimmy Caudill, based upon his father's protected activity, would be reasonable and far more consistent with the statute's purpose than the contrary interpretation urged by Respondents. Even in *Fogleman*, the case relied on by Respondents, it was recognized that interpreting the similar anti-discrimination provisions of the ADA and the ADEA so as to preclude such a cause of action would be "at odds with the policies animating those provisions." 283 F.3d at 568. As the court noted:

There can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their protected rights. Indeed, as the Seventh Circuit sagely observed, "To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations."

NLRB v. Advertisers Mfg. Co., 823 F.2d 1086, 1088 (7th Cir. 1987). Allowing employers to retaliate via friends and family, therefore, would appear to be in significant tension with the overall purpose of the anti-retaliation provisions, which are intended to promote the reporting, investigation, and correction of discriminatory conduct in the workplace. See *DeMedina [v. Reinhardt*, 444 F.Supp. 573, 580 (D.D.C. 1978)] (concluding that “tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their rights under Title VII”).

Id. at 568-69.

Several comparable statutory provisions have also been held to allow such causes of action. See *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543-44, n.1 (6th Cir. 1993) (Title VII, 42 U.S.C. § 2000e-3(a)); *Brock v. Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985) (Equal Pay Act, 29 U.S.C. § 215(a)(3)); *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir. 1994) (Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(c)).¹

Conclusion

Respondents have submitted a well-written and persuasive argument that the plain meaning of the statute precludes Jimmy Caudill’s cause of action. While they concede, as did the court in *Fogleman*, that there is no consensus in the cases deciding the issue under other statutes, they have attempted to distinguish, with some success, the cases adverse to their position. Ultimately, however, I find that the absence of statutory language or legislative history on the precise issue presented, and the clearly expressed intent of Congress for a broad interpretation of the anti-discrimination provision, cannot support a conclusion that the statutory language constitutes a clear an unambiguous Congressional intent to preclude such causes of action.²

¹ The Secretary also relies upon cases decided under the NLRA, although, as noted in *Fogleman*, 283 F.3d at 570-71, that statute contains another provision, 29 U.S.C. § 158(a)(1), that has been viewed by the courts as more expansive than provisions more comparable to the Mine Act’s anti-discrimination language.

² While not essential to the analysis, it appears that there are more compelling reasons to allow such a cause of action under the Mine Act than under more broadly applicable employment statutes. Mining typically takes place in a rural environment, where employment opportunities are less diverse and employment of multiple family members and relatives as miners may not be unusual. The interpretation urged by Respondents would leave the family members of a miner who engaged in protected activity without recourse under the Mine Act and subject to blatantly retaliatory conduct. It would be hard to imagine a result more repugnant to the statutory scheme.

The reasons expressed by the Commission for rejecting a literal reading of § 105(c)(1) in *Moses*, are equally applicable here – a contrary interpretation would “frustrate the enforcement of the Mine Act . . . [and] would also wrongly fail to address or deter situations where an operator, with the intent of frustrating protected activity, takes adverse action against an innocent miner.” 4 FMSHRC at 1480.

For the above-stated reasons, I find that the allegations made by the Secretary on behalf of Jimmy Caudill state a claim upon which relief can be granted under § 105(c)(1).

Jerry Caudill’s Claim

Respondents advance several arguments in opposition to the claim asserted on behalf of Jerry Caudill: that he failed to submit a claim of discrimination to MSHA, that he is not a miner as to them, and that he suffered no adverse action.

Section 105(c)(2) of the Act specifies, in pertinent part:

Any miner * * * who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. . .

The filing of an administrative complaint of discrimination with MSHA within the time frame specified in section 105(c)(2) is not jurisdictional. *Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21 (Jan. 1984); *Herman v. IMCO Services*, 4 FMSHRC 2135 (Dec. 1982). The provision is primarily designed to assure fairness to the opposing party by apprising it of the substance of the allegation and potential scope of relief. *Id.* at 2138-39. In *Sec’y of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1016-18 (June 1997), the Commission reversed an ALJ’s determination that a complaint of discrimination filed by the Secretary was limited to allegations on behalf of the miner who filed the initial complaint with MSHA. The Commission found that the Act was ambiguous on the issue of whether the Secretary was “limited to the bare allegations of the initiating complaint to MSHA in drawing up her complaint to the Commission” and that the Secretary’s interpretation that it was the “scope of the Secretary’s investigation, rather than the initiating complaint, that governs the permissible ambit of the complaint filed with the Commission,” was entitled to deference. *Id.* (emphasis in original). The Commission held that the Secretary’s complaint may include not only miners represented by the complainant, but other miners’ representatives affected by discrimination who were not named in the complaint submitted to MSHA. It went on to observe that, in that case, the complaint filed by the Secretary “alleged the same discriminatory conduct [that had been] alleged . . . in the initiating complaint filed with MSHA” and the “addition of the unnamed miners [changed] neither the relief sought nor the basis of the charge as originally filed.” *Id.*

Pontiki directly decides the issue raised by Respondents. Jimmy Caudill's complaint to MSHA, which prompted the investigation, clearly identified the act of discrimination and the grounds for the complaint. There is no contention, at present, that his reference to "my family history of Safety and Discrimination Complaints" was misleading or could have been construed as anything other than a reference to his father's activities, which were well-known to Leeco. The addition of Jerry Caudill as a named complainant changes neither the basis of the charge as originally filed nor, in any meaningful way, the relief sought. The Secretary's investigation, of necessity, included Jerry Caudill's protected activity and the alleged unlawful motivation of Leeco resulting from it. Respondent's challenge to the claim brought on behalf of Jerry Caudill, based upon the fact that he did not personally file a complaint of discrimination with MSHA, is rejected.

Respondents also argue that the complaint on behalf of Jerry Caudill should be dismissed because he was not "a miner as to them," i.e., was not employed by them on the date of the alleged discrimination. However, the Mine Act specifies that "No person shall . . . in any manner discriminate . . . or otherwise interfere with the exercise of the statutory rights of any miner." The legislative history of the Act makes clear that the anti-discrimination provisions of the statute are to be broadly interpreted and that it applies "not only to the operator but to any other person directly or indirectly involved." S.Rep. No 95-181, at 36 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978). Jerry Caudill was a miner employed by Leeco at the time that he engaged in substantial protected activity. He was also a miner at the time of the alleged discrimination. The Act does not require Jerry Caudill to have been employed by Respondents at the time of the alleged discrimination.

Jerry Caudill clearly suffered adverse action within the meaning of the Act, which, as explained in the legislative history, was "intended to protect miners against not only the common forms of discrimination such as discharge, suspension, demotion, reduction in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal." *Mosley*, 4 FMSHRC at 1478 (quoting legislative history). Here, it is alleged that Leeco actually engaged in a reprisal against Jerry Caudill for the exercise of his rights under the Act. The Amended Complaint, at para. 9, alleges that Jerry Caudill suffered adverse action, in that he was discriminated against and the exercise of his rights under the Act were interfered with by Leeco's discharge of, or failure to hire, his son. As noted in *Mosley*, such actions may "chill the exercise of protected rights by the directly affected miners, [and] may also cause other miners, who wish to avoid similar treatment, to refrain from asserting their rights." *Id.* at 1479.

Respondents challenges to the claim made on behalf of Jerry Caudill must also be rejected.

Causation

Respondents argue that Jerry Caudill's protected activity while employed by Leeco

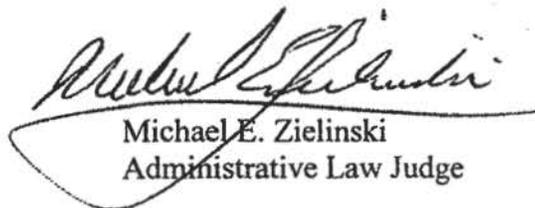
extended no further than the end of 1997 and, as a matter of law, that protected activity could not be found to be a causative factor in the adverse action complained of. While it is true that there is a gap in time exceeding three years between Jerry Caudill's protected activity directed at Leeco and the instant actions complained of, proximity in time is only one of the considerations involved in evaluating circumstantial evidence of discriminatory motive. *Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510-11 (Nov. 1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C.Cir. 1983).

The cases relied upon by Respondents do not command a different result, and are distinguishable in that there was no ongoing employment relationship between Jerry Caudill and Leeco during the three year period. Where the complaining miner has an ongoing employment relationship, opportunities for retaliatory action are presented daily. As time passes following the protected activity, any inference that adverse action was prompted by the protected activity logically diminishes. Here, however, Jerry Caudill's employment relationship with Leeco ended in 1997, and, on the present record, there were no opportunities for Leeco to take actions in retaliation for that protected activity until Jimmy Caudill sought employment. In any event, the Secretary does not rely solely on past protected activity to establish unlawful motive. It is alleged that Jerry Caudill's protected activity was discussed directly with the mine superintendent immediately before the apparent reversal of Leeco's intention to have Jimmy Caudill work as a roof-bolter on the second shift.

Respondents did not support their causation argument with affidavits, or otherwise attempt to establish the absence of a genuine issue as to any fact material to the unlawful motive issue. It would be most inadvisable and inappropriate to decide that issue virtually at the pleadings stage of this proceeding.

ORDER

For the reasons stated above, Respondents' motion is **DENIED**.


Michael E. Zielinski
Administrative Law Judge

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June 6, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-80-M
Petitioner	:	A. C. No. 41-00009-05555
v.	:	
	:	Mine: Fairland Plant & Quarries
CACTUS CANYON QUARRIES OF	:	
TEXAS INCORPORATED,	:	
Respondent	:	

ORDER DENYING SECRETARY'S MOTION FOR EXTENSION OF TIME
ORDER DENYING MOTION TO DISMISS
ORDER OF ASSIGNMENT

Before: Judge Barbour

Procedural Posture

On June 27, 2001, the Mine Safety and Health Administration ("MSHA") issued a citation against the Respondent, Cactus Canyon Quarries ("Cactus Canyon") alleging that Cactus Canyon failed to complete and mail MSHA's Quarterly Employment and Production Report for the first quarter of 2001 in a timely manner. Subsequently, on December 14, 2001, approximately 5 ½ to 6 months after the citation was issued, MSHA assessed a proposed penalty of \$55.00 for the alleged violation.¹ Cactus Canyon, thereafter, timely filed its Notice of Contest.²

The Secretary, subsequently, filed her penalty petition on February 12, 2001. Cactus Canyon did not answer the petition, and on April 10, 2002, I ordered Cactus Canyon show cause why it should not be held in default for failing to answer. On April 8, 2002, Cactus Canyon filed

^{1/} Cactus Canyon contends that the penalty assessment was postmarked January 4, 2002, 21 days after the date of assessment. The company has not submitted the postmarked envelope, however, even if the envelope is dated as alleged, the 21 days between December 14 and January 4, will not effect the outcome of this order.

^{2/} Commission Rule 26 provides: "[a] person has 30 days after receipt of the proposed penalty assessment within which to notify the Secretary that he contests the proposed penalty." 29 C.F.R. § 2700.26. The record does not indicate the date Cactus received the propose penalty assessment, but a representative of Cactus dated Exhibit A of the proposal, January 11, 2002. Cactus then returned the form indicating it wished to contest the citation, and MSHA received the form on January 14, 2002.

a motion to dismiss and an answer to the petition. The Secretary filed a response to the motion. Cactus Canyon then filed a Brief in Support of Dismissal in which it seeks the dismissal of the subject case and three other cases pending before the Commission, Docket Nos. CENT 2001-285-M, CENT 2001-286-M, and CENT 2001-379-M.³ Finally, the Secretary filed an Entry of Appearance and Substitution of Counsel on May 3, 2002, and on May 17, 2002, she filed a Motion for Extension of Time to Respond to Respondent's Motion to Dismiss.

For the reasons articulated below, I deny the Secretary's motion for extension of time. I deny the Respondent's motion to dismiss, and I assign this case to Judge Schroeder who will proceed with its adjudication.

Motion for Extension of Time

In her motion for an extension of time, the Secretary asserts that, upon review of this matter, newly assigned attorney, Thomas Paige, proposed a settlement conference with Cactus Canyon in a letter dated May 13, 2002. Sec. Mot. for Ext. of Time at 1. The Secretary expects to meet with Cactus Canyon by June 28, 2002, and, therefore, she seeks to extend the time to respond to the motion to dismiss until July 15, 2002. *Id.* at 3. Should the parties reach settlement, she asserts, her response to the motion will be unnecessary. *Id.*

The Commission's rules govern when responsive pleadings must be filed. A party may file a statement in opposition to a motion within 10 days after service of the motion. 29 C.F.R. § 2700.10(d). When the motion is served by mail, an additional 5 days are added to the time allotted for filing an opposition. 29 C.F.R. § 2700.8. If a party seeks an extension of time to file a document, the request must be filed no later than 3 days before the expiration of time allowed for the filing or serving of the document. 29 C.F.R. § 2700 9(a). Finally, a motion for an extension of time is effective upon receipt. 29 C.F.R. § 2700.5(d).

Cactus Canyon filed its Brief in Support of Dismissal on April 26, 2002. Therefore, the Secretary had until May 13, 2002, to file her response. The Commission did not receive her motion until May 17, 2002. While the Secretary's counsel did not undertake this case until May 3, Counsel had 10 days to file a motion for an extension of time before the time for rebuttal expired. The days lapsed without the Secretary taking any action. In her motion the Secretary offers no reason for her inaction.

Accordingly, the Secretary's motion is **DENIED**.

^{3/} Docket No. CENT 2001-285-M and CENT 2001-286-M are assigned to Administrative Law Judge Irwin Schroeder, and CENT 2001-379-M shortly will be assigned to him. Judge Schroeder will rule on the motion as it pertains to those cases.

Motion to Dismiss

Section 105(a) of the Mine Act (“the Act”) requires the Secretary to notify an operator of a proposed civil penalty “within a reasonable time after the termination of such inspection or investigation.” 30 U.S.C. § 815(a). Although the Act gives no guidance regarding the duration of “a reasonable time,” MSHA has provided some direction in its Program Policy Manual, defining “reasonable time” as “normally . . . within 18 months of the issuance of a citation or order.” The manual further provides, however, that “[c]itations and orders not associated with a serious accident, fatality, or other special circumstance should be assessed within 31 days of the issuance date.” *Program Policy Manual*, Part 100, at 6(f) (2002).

Cactus Canyon moves for dismissal because the Secretary failed to assess a penalty for the subject citation within 31 days. Resp. Mot. to Dis. at 1. In support of its argument, Cactus Canyon cites a decision in which Administrative Law Judge August Cetti ruled a 15-month delay unreasonable where the case was “uncomplicated.” *United Metro Materials*, 23 FMSHRC 1085, 1088 (Sept. 2001)(ALJ). Judge Cetti concluded that the Secretary had failed to demonstrate adequate cause for the delay because her explanation was general and vague, and she failed to expound upon the specific circumstances which caused the delay. *Id.*

There is no strict definition for “reasonable time” within the meaning of Section 105(a) of the Mine Act. The “31-day” stipulation in the PPM is not a hard and fast rule, as evidenced by the language “*should be assessed within 31 days.*” Moreover, the Senate Committee, when drafting the Mine Act, commented on the broad concept of “reasonable time” when it stated, “there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does *not* expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding.” S. Rep. No. 181, 95th Cong., 1st Sess. 34 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978) (emphasis added). In light of the Senate Committee’s reluctance to establish a specific time frame for notifying the operator of the proposed penalties, the Commission has stated that Section 105(a) does not prescribe time periods within which the Secretary must issue penalty proposals. *Steele Branch Mining*, 18 FMSHRC 6, 14 (Jan. 1996). Rather, if a proposal is delayed the judge must consider (1) the reason for the delay, and (2) whether the operator is prejudiced by the delay, the identical test used when scrutinizing the Secretary’s delay in filing the penalty petition. *Id.*

The Secretary contends that the assessment of proposed penalty was delayed for two reasons. First, the citation was not assessed until after a Safety and Health Conference was held, which resulted in a 1 month delay. Sec. Response to Mot. to Dis. at 2-3. Second, she maintains that due to a backlog of cases and a personnel shortage, the information was not forwarded to MSHA’s Assessment Office until December 2001. *Id.* at 3. The Secretary cites to a decision, also by Judge Cetti, in which Judge Cetti found an unusually high caseload and lack of clerical personnel adequate cause for the delay. *Art Beavers Const. Co.*, 16 FMSHRC 2361, 2365-66 (Nov. 1994)(ALJ).

I conclude that the Secretary has demonstrated adequate cause for the delay. MSHA's guidelines suggest that penalties not be assessed until after the Safety and Health Conference. *PPM*, Part 100, at 6 (2002). If Cactus Canyon requested a conference - and it does not deny having done so - the conference would have delayed the assessment of penalty until after any alterations were made to the citation as a result of the conference. In addition, an unusually high caseload and lack of clerical personnel have been considered adequate cause for late filed penalty petitions, and are likewise a sufficient reasons for the late assessment of civil penalties. See *Salt Lake Co. Road Dep't.*, 7 FMSHRC 1714 (July 1981); *Medicine Bow Coal*, 4 FMSHRC 882 May (1982); and *Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089 (Oct. 1993), *aff'd* 57 F.3rd 92 (10th cir. 1995). Moreover, while administrative law judge decisions and orders are not binding precedent, I do note that the present matter is more analogous to *Art Beavers* than to *United Metro*. In *United Metro*, Judge Cetti observed that the Secretary did not offer specific reasons for the delay, while, in *Art Beavers*, she did so. In the present matter, she, likewise, has offered specific reasons, which I have concluded, constitute adequate cause.

Regarding prejudice, Cactus asserts that the delay was unreasonable and has hurt its ability to bring forth witnesses with clear memories. Resp. Mot. to Dis. at 1. I find Cactus Canyon's contentions unconvincing. The inspection occurred in June 2001. This is not such a long time ago as to assume memories of the events at issue have diminished irrevocably. Also, Cactus Canyon was aware of the Secretary's duty to assess a civil penalty for the citation. It could have memorialized the events at issue through other means — e.g., through sworn statements.

Accordingly, Cactus Canyon's Motion to Dismiss is **DENIED**.

Assignment

This case is hereby assigned to Administrative Law Judge Irwin Schroeder, who will rule on all pending motions relating to the actual adjudication of this case.

All future communications regarding this case should be addressed to Judge Schroeder at Federal Mine Safety and Health Review Commission, Office of Administrative Law Judges, Two Skyline Center, Suite 1000, 5203 Leesburg Pike, Falls Church, Virginia 22041. Telephone No. (703) 756-5232 and Facsimile No. (703) 756-6201.



David Barbour

Chief Administrative Law Judge

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June 17, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-379-M
Petitioner	:	A. C. No. 41-00009-05554
v.	:	
	:	Mine: Fairland Plant & Quarries
CACTUS CANYON QUARRIES OF	:	
TEXAS INCORPORATED,	:	
Respondent	:	

ORDER DENYING MOTION TO DISMISS
ORDER OF ASSIGNMENT

Before: Judge Barbour

This case is before me pursuant to an order of the Commission dated March 28, 2002, directing me to consider whether the operator, Cactus Canyon Quarries ("Cactus Canyon") was prejudiced by the Secretary of Labor's ("Secretary") 364-day delay in assessing the proposed penalties for the citation and order at issue in this case in addition to her 15-day delay in filing her penalty petition. In my December 13, 2001 order, I rejected Cactus Canyon's assertion that the 15-day delay was prejudicial and accepted the Secretary's late-filed petition.

The Mine Safety and Health Administration ("MSHA") issued the order and citation that are the subject of this case on August 14, 2000. Order No. 7896162 was issued because it is alleged that an employee, observed in the raised bed of a tractor trailer, was not wearing a safety belt and line. Citation No 7896127 was issued because it is alleged that the handrail on the walkway next to the Jam Crusher had been removed. The Secretary did not assess proposed penalties until August 13, 2001.¹

For the reasons articulated below, and in light of the Commission's order, I conclude the Secretary's delay in assessing the proposed penalties was reasonable, and Cactus Canyon was not prejudiced by the delay.

¹/ Cactus Canyon contends the penalty assessment was postmarked August 20, 2001, 7 days after the date of assessment. Assuming the company is covert, the 7 day period between August 13, 2001 and August 20, 2001 does not effect the outcome of this order.

Discussion

1. Reasonableness of the Delay

Section 105(a) of the Mine Act (“the Act”) requires the Secretary to notify an operator of a proposed civil penalty “within a reasonable time after the termination of such inspection or investigation.” 30 U.S.C. § 815(a). Although the Act gives no guidance regarding the duration of “a reasonable time,” MSHA has provided some direction in its Program Policy Manual, defining “reasonable time” as “normally . . . within 18 months of the issuance of a citation or order.” The manual further provides, however, that “[c]itations and orders not associated with a serious accident, fatality, or other special circumstance should be assessed within 31 days of the issuance date.” *Program Policy Manual*, Part 100, at 6(f) (2002).

Cactus Canyon argues that MSHA’s delay in assessing the penalties was unreasonable, and, in fact, the penalties should have been assessed within 31 days of the issuance of the citation and order. Resp. Suppl. To Mot. to Dis. at 1. In support of its argument, Cactus Canyon cites a decision in which Administrative Law Judge August Cetti ruled a 15-month delay unreasonable where the case was “uncomplicated.” *United Metro Materials*, 23 FMSHRC 1085, 1088 (Sept. 2001)(ALJ). Judge Cetti concluded the Secretary had failed to demonstrate adequate cause for the delay because her explanation was general and vague, and she failed to expound upon the specific circumstances which caused the delay. *Id.* Cactus Canyon further contends the Secretary offered no reason for the delay in response to discovery requests. Resp. Suppl. To Mot. to Dis. at 1; *see also* Resp. Exhibits A, B, and C.

There is no strict definition for “reasonable time” within the meaning of Section 105(a) of the Mine Act. The “31-day” stipulation in the PPM is not a hard and fast rule, as evidenced by the language “*should* be assessed within 31 days.” Moreover, the Senate Committee, when drafting the Mine Act, commented on the broad concept of “reasonable time” when it stated, “there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does *not* expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding.” S. Rep. No. 181, 95th Cong., 1st Sess. 34 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978) (emphasis added). In light of the Senate Committee’s reluctance to establish a specific time frame for notifying the operator of the proposed penalties, the Commission has stated that Section 105(a) does not prescribe time periods within which the Secretary must issue penalty proposals. *Steele Branch Mining*, 18 FMSHRC 6, 14 (Jan. 1996). Rather, if a proposal is delayed, the judge must consider: (1) the reason for the delay, and (2) whether the operator is prejudiced by the delay, the identical test used when scrutinizing the Secretary’s delay in filing the penalty petition. *Id.*

The Secretary contends the penalty assessment was delayed for two reasons. First, the citation and order were not assessed until after a Safety and Health Conference was held, which resulted in the modification of both the citation and order. The conference was held 1 month after the citation and order were issued. *Sec. Response to Resp. Suppl. to Mot. to Dis.* at 4. Second, due to a backlog of cases and a personnel shortage, necessary information regarding the citation and order was not entered into MSHA's Management Information System ("MIS") and forwarded to the Assessments Office until May of 2001. *Id.* at 5. Between May 2001 and August 14, 2001, the Secretary further submits, the office was short staffed and concentrating on a high caseload involving fatalities. *Id.* The Secretary cites to a decision, also by Judge Cetti, in which Judge Cetti found an unusually high caseload and lack of clerical personnel adequate cause for the delay. *Art Beavers Const. Co.*, 16 FMSHRC 2361, 2365-66 (Nov. 1994)(ALJ).

I conclude the Secretary has demonstrated adequate cause for the delay. MSHA's guidelines suggest that penalties not be assessed until after the Safety and Health Conference. *PPM*, Part 100, at 6 (2002). If Cactus Canyon requested a conference - and it does not deny having done so - the conference delayed the assessment of penalty until after any alterations were made to the citation and order as a result of the conference. However, it is the Secretary's case load and personnel shortage that I find most persuasive. An unusually high caseload and shortage of clerical personnel have been considered adequate cause for late-filed penalty petitions and in my view they are, likewise, sufficient reasons for the late assessment of civil penalties. *See Salt Lake Co. Road Dep't.*, 7 FMSHRC 1714 (Jul. 1981); *Medicine Bow Coal*, 4 FMSHRC 882 May (1982); and *Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089 (Oct. 1993), *aff'd* 57 F.3rd 92 (10th cir. 1995). Moreover, while administrative law judge decisions and orders are not binding precedent, I note that the present matter is more analogous to *Art Beavers* than to *United Metro*. In *United Metro*, Judge Cetti observed that the Secretary did not offer specific reasons for the delay, while, in *Art Beavers*, she did. In the present matter, she, likewise, has offered specific reasons, which I have concluded, constitute adequate cause.

2. Prejudice

Even though the Secretary has demonstrated adequate cause, Cactus Canyon still could prevail if she was prejudiced by the delay. The company asserts the delay has hindered its case because witnesses' memories have faded and witnesses have moved beyond subpoena range and to unknown locations. *Resp. Suppl. to Mot. to Dis.* at 2. It further contends that the "inspectors have no independent recollection of the citations." *Id.*

The Secretary, to the contrary, notes that when this case was before me originally, Cactus Canyon did not claim prejudice from the 365-day delay. *Sec. Response to Resp. Suppl. to Mot. to Dis.* at 3. Hence, the Secretary suggest, the company's claim of prejudice is more one of convenience than substance. *Id.*

I find Cactus Canyon's contentions unconvincing. The inspection was not so long ago that memory of the events have faded irretrievably. Moreover, Cactus Canyon yet has time to find witnesses and, if necessary, to memorialize their testimony.

Further, although Cactus Canyon claims the inspectors have no independent recollection of the events in question, Inspector Danny Ellis stated in a deposition taken in December of 2001 - a portion of which was submitted by Cactus Canyon - that he does have an independent recollection of the inspection. Resp. Exhibit E at 35. However, even if he does not have a recollection of the events independent from his notes, as Inspector Ralph Rodriguez asserts in his deposition, the purpose of an inspector taking notes and photographs of an inspection is to memorialize the event and to jog the memory of the inspector in any future proceeding. See Resp. Exhibit E at 23.

Accordingly, Cactus Canyon's Motion to Dismiss is **DENIED**.

ORDER OF ASSIGNMENT

This case is hereby assigned to Administrative Law Judge Irwin Schroeder, who will rule on all pending motions relating to the actual adjudication of this case.

All future communications regarding this case should be addressed to Judge Schroeder at the following address:

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David Barbour
Chief Administrative Law Judge

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June 17, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-124-M
Petitioner	:	A. C. No. 41-00009-05556
v.	:	
	:	Mine: Fairland Plant & Quarries
CACTUS CANYON QUARRIES OF	:	
TEXAS INCORPORATED,	:	
Respondent	:	

ORDER OF PARTIAL DISMISSAL
ORDER OF ASSIGNMENT

Before: Judge Barbour

PROCEDURAL POSTURE

On March 29, 2001 and September 20, 2001, the Mine Safety and Health Administration ("MSHA") issued Citation Nos. 6207831 and 6209922, respectively, against the Respondent, Cactus Canyon Quarries ("Cactus Canyon"). Citation No. 6207831 was issued because it is alleged that a foreman was standing on top of the head pulley at the number 4 conveyor belt without any fall protection. Citation No. 6209922 was issued because it is alleged that the back-up alarm on the Komatsu Track Hole was inoperable. Although the citations were issued in March and September of 2001, the proposed penalties were not assessed until February 12, 2002, approximately 13 months after the issuance of Citation No. 6207831 and 5 months after the issuance of Citation No. 6209922.

Cactus Canyon, subsequently, timely filed its notice of contest.¹ The Secretary of Labor ("Secretary") then filed her penalty petition on April 15, 2002.² Cactus Canyon filed a motion to

^{1/} Commission Rule 26 provides: "[a] person has 30 days after receipt of the proposed penalty assessment within which to notify the Secretary that he contests the proposed penalty." 29 C.F.R. § 2700.26. The record does not indicate the date Cactus Canyon received the proposed penalty assessment, but a representative of Cactus Canyon dated Exhibit A of the proposal, February 28, 2002. Cactus Canyon then returned the form indicating it wished to contest the citation, and MSHA received the form on March 6, 2002.

^{2/} Cactus Canyon states that it does not know why Citation No. 6209922 was included with the penalty petition because it was not contested. However, the Notice of Contest clearly indicates that Cactus Canyon sought to contest both citations in this case.

dismiss, on April 26, 2002, which was followed by the Secretary's Entry of Appearance and Substitution of Counsel on May 3, 2001, and her Motion For an Extension of Time to Respond to Respondent's Motion to Dismiss on May 24, 2001.

For the reasons articulated below, I deny the Secretary's motion for extension of time, I grant in part Cactus Canyon's motion to dismiss and I assign the case for further proceedings.

MOTION FOR EXTENSION OF TIME

In her motion for an extension of time, the Secretary asserts that she filed a similar motion for extension for time in Docket No. CENT 2002-80-M - another case involving Cactus Canyon - on May 13, 2002, and she intended to do the same in the instant case. Sec. Mot. For Ex. of Time to Respond to Resp. Mot. to Dis. at 1. However, Counsel forgot to do so. *Id.* She further states that Administrative Law Judge Irwin Schroeder has set a hearing on Cactus Canyon's motion to dismiss in Docket Nos. CENT 2002-80-M, CENT 2002-285-M, CENT 2002-286-M, and CENT 2002-379-M.³ *Id.* She seeks additional time to respond until July 15, 2002, to avoid any duplicative work.

The Commission's rules govern when responsive pleadings must be filed. A party may file a statement in opposition to a motion within 10 days after service of the motion. 29 C.F.R. § 2700.10(d). When the motion is served by mail, an additional 5 days are added to the time allotted for filing an opposition. 29 C.F.R. § 2700.8. If a party seeks an extension of time to file a document, the request must be filed no later than 3 days before the expiration of time allowed for the filing or serving of the document. 29 C.F.R. § 2700.9(a). Finally, a motion for an extension of time is effective upon receipt. 29 C.F.R. § 2700.5(d).

Cactus Canyon filed its motion to dismiss on April 26, 2002. Therefore, the Secretary had until May 13, 2002, to file her response. The Commission did not receive her motion for an extension of time to respond until May 24, 2002. While the Secretary's counsel did not undertake this case until May 3, Counsel had 10 days to file a motion for an extension of time before the time for rebuttal expired. The days lapsed without the Secretary taking any action. Counsel's excuse as having forgotten to file the motion is unacceptable.

Accordingly, the Secretary's motion is **DENIED**.

MOTION TO DISMISS

Section 105(a) of the Mine Act ("the Act") requires the Secretary to notify an operator of a proposed civil penalty "within a reasonable time after the termination of such inspection or

³/ The Secretary is wrong regarding Docket Nos. CENT 2002-80-M and CENT 2002-379-M. They are not assigned to Judge Schroeder. Therefore, he does not have jurisdiction to hear arguments on motions to dismiss those cases.

investigation.” 30 U.S.C. § 815(a). Although the Act gives no guidance regarding the duration of “a reasonable time,” MSHA has provided some direction in its Program Policy Manual, defining “reasonable time” as “normally . . . within 18 months of the issuance of a citation or order.” The manual further provides, however, that “[c]itations and orders not associated with a serious accident, fatality, or other special circumstance that are recommended for a special assessment should be assessed within 75 days of the issuance date.” *Program Policy Manual*, Part 100, at 6(f) (2002).

Cactus Canyon moves for dismissal of Citation No. 6207831 because the Secretary failed to assess a penalty for the citation within 75 days. Resp. Mot. to Dis. at 1. In support of its argument, Cactus Canyon cites a decision in which Administrative Law Judge August Cetti ruled a 15-month delay unreasonable where the case was “uncomplicated.” *United Metro Materials*, 23 FMSHRC 1085, 1088 (Sept. 2001)(ALJ). Judge Cetti concluded that the Secretary had failed to demonstrate adequate cause for the delay because her explanation was general and vague, and she failed to expound upon the specific circumstances which caused the delay. *Id.*

The Commission has held that if a penalty proposal is delayed, the judge must consider (1) the reason for the delay, and (2) whether the operator is prejudiced by the delay, the identical test used when scrutinizing the Secretary’s delay in filing the penalty petition. *Steele Branch Mining*, 18 FMSHRC 6, 14 (Jan. 1996). The Secretary bares the burden of showing the reason for the delay. I am unable to evaluate the Secretary’s position because she has failed to set forth any reason for her delay in assessing the penalty for Citation No. 6297831. Accordingly, in the interest of justice, I must grant Cactus Canyon’s motion to dismiss with respect to that citation.⁴

ORDER OF ASSIGNMENT

The Secretary’s petition and her allegations remain extant with respect to Citation No. 6209922, and I assign this case to Administrative Law Judge Irwin Schroeder for trial and decision. Judge Schroeder will rule on any pending motions. All future communications regarding this case should be addressed to Judge Schroeder at the following address:

Mine Safety and Health Review Commission
Office of Administrative Law Judges
Two Skyline Place, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

^{4/} It is unnecessary to evaluate whether Cactus Canyon was prejudiced by the delay as the first part of the test has not been satisfied.

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Chief Administrative Law Judge

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