

JULY AND AUGUST 2009

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JULY AND AUGUST 2009

Review was granted in the following cases during the months of July and August 2009:

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Secretary of Labor, MSHA v. Dynamic Energy, Inc., Docket No. WEVA 2007-448-R. (Judge Bulluck, June 17, 2009)

Secretary of Labor, MSHA v. Nally & Hamilton Enterprises, Inc., KENT 2008-712. (Judge Feldman, June 23, 2009)

Review was denied in the following cases during the months of July and August 2009:

Vurnun Edwurd Jaxun v. Asarco, LLC, Docket No. WEST 2007-811-DM. (Chief Judge Lesnick, May 29, 2009)

Secretary of Labor, MSHA v. Walter Kuhl, Docket Nos. PENN 2008-112-M, PENN 2008-165-M. (Judge Melick, June 29, 2009)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

July 7, 2009

SECRETARY OF LABOR,	:	Docket No. KENT 2009-419
MINE SAFETY AND HEALTH	:	A.C. No. 15-18552-160177
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-420
v.	:	A.C. No. 15-18552-165855
	:	
ARMSTRONG COAL COMPANY	:	Docket No. KENT 2009-421
	:	A.C. No. 15-19217-165874

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On December 12, 2008, the Commission received from Armstrong Coal Company ("Armstrong") a letter seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

However, we have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2009-419, KENT 2009-420, and KENT 2009-421, all captioned *Armstrong Coal Company* and involving similar procedural issues. 29 C.F.R. § 2700.12.

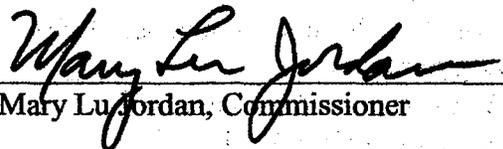
Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. See *Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

On August 13, 2008, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Assessment No. 000160177 for alleged violations occurring at Armstrong’s Big Run Mine. On October 15, 2008, MSHA issued Proposed Assessment Nos. 000165855 and 000165874 for alleged violations occurring at Armstrong’s Big Run and Midway Mines, respectively. In its letter, Armstrong asserts that it failed to contest the proposed penalty assessments because of a mistaken failure of communication between its Director of Safety and its Accounting Officer, who each believed that the other individual was sending in the contest forms. Along with its letter, Armstrong furnished evidence that it had paid proposed assessments that it did not intend to contest. The Secretary states that she does not oppose the reopening of the proposed penalty assessments.

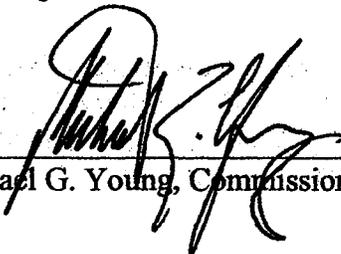
Having reviewed Armstrong's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



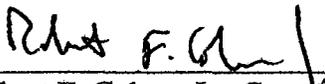
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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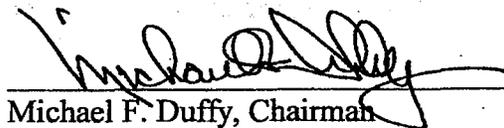
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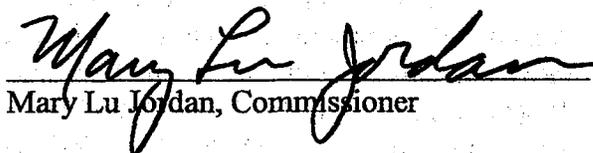
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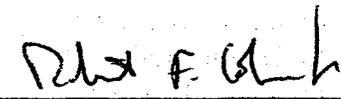
reopening. 31 FMSHRC at 397-98. Big River's renewed motion now includes copies of each assessment marked to indicate which penalties and related citations and orders Big River would contest if the assessments are reopened, as well as a statement that those penalties that it does not intend to contest have been paid.

Having reviewed Big River's motions and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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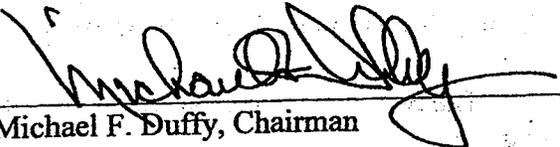
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

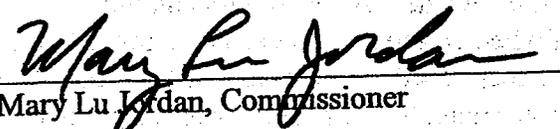
On January 13, 2009, MSHA issued proposed assessment No. 000174421 to Stacy Lynn. According to MSHA's records, this proposed assessment was delivered to the operator on January 31, 2009. Stacy Lynn states in its motion that it had not previously contested a citation or order and "simply did not get the procedures correct." Stacy Lynn adds that it had recently retained counsel but had not yet properly established proper communication procedures with counsel. The record from the Secretary indicates that Stacy Lynn has an excessive balance of delinquencies dating back to July of 2008.

The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

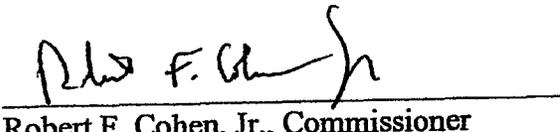
Having reviewed Stacy Lynn's request and the Secretary's response, in the interests of justice, we hereby remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Stacy Lynn's failure to timely contest the penalty proposal and whether relief from the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

On remand, the Chief Administrative should determine what Stacy Lynn actually did to attempt to contest the proposed assessment in this case (i.e., how it “simply did not get the procedures correct”), particularly in view of its record of unpaid assessments prior to the proposed assessment in this case.


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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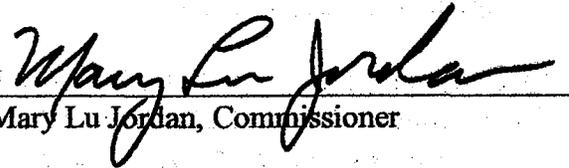
Chief Administrative Law Judge Robert J. Lesnick
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Coal River states that it had timely contested the citation underlying the penalty at issue but subsequently paid the penalty by mistake. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

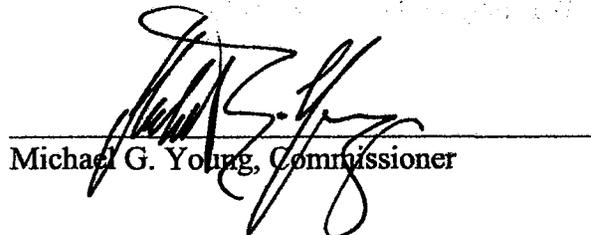
Having reviewed Coal River's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



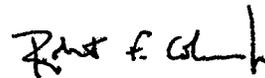
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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July 14, 2009

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

v.

DETROIT SALT COMPANY, LLC

Docket No. LAKE 2009-388-M
A.C. No. 20-00552-175661

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

ORDER

BY THE COMMISSION:

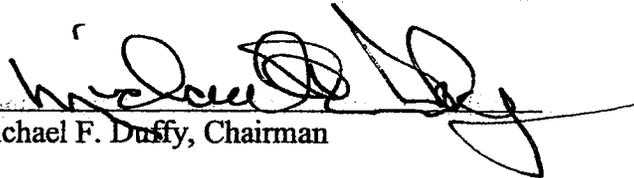
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On March 26, 2009, the Commission received from Detroit Salt Company, LLC ("Detroit Salt") a letter requesting to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

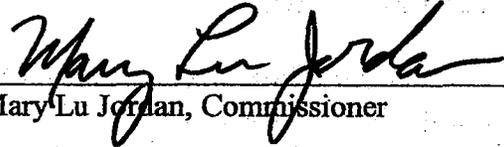
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

Detroit Salt states that it intended to contest two penalties and to pay the remaining penalties. It further states that its Accounts Payable Department paid the proposed penalties as intended but failed to mail the assessment form contesting two of the penalties. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

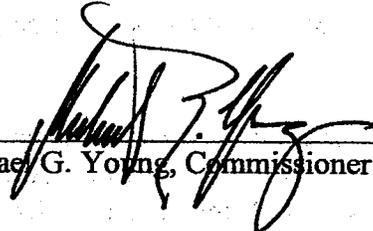
Having reviewed Detroit Salt's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



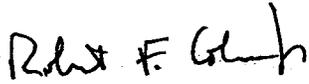
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Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



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601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

July 14, 2009

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

v.

OIL-DRI PRODUCTION COMPANY

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Docket No. SE 2009-293-M
A.C. No. 22-00035-167206

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On February 13, 2009, the Commission received a request to reopen a penalty assessment issued to Oil-Dri Production Company ("Oil-Dri") that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

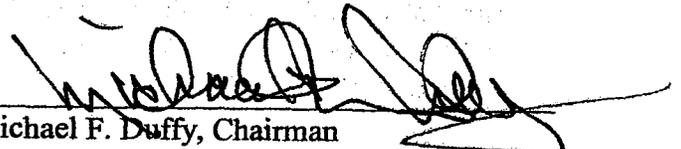
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On October 29, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000167206 to Oil-Dri, proposing penalties for 12 citations that had been issued to Oil-Dri in July and August 2008. After receiving no response, MSHA sent Oil-Dri a delinquency notification on or around January 26, 2009, for the assessment. Oil-Dri states that it intended to contest six of the penalties and pay the other six penalties, but never received the assessment. In its request to reopen the case, Oil-Dri also expressly denies having received the assessment even though MSHA had notified it that the assessment was signed for by a particular Oil-Dri employee.

The Secretary states in her response that she does not oppose the reopening of the assessment, but also states that her records indicate that a specific Oil-Dri employee did sign for the assessment on November 3, 2008.

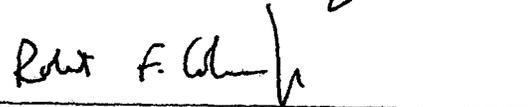
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

In a case like this, in which the operator is seeking to contest only some of the penalties contained in an assessment, it is incumbent upon the operator to include in its request to the Commission to reopen not only the basis for reopening, but also the specific penalties it wishes to reopen. Because Oil-Dri has not done so in this case, we deny its request to reopen without prejudice.¹ Should Oil-Dri file a new or renewed request to reopen, it should specifically indicate which penalties it wishes to contest upon reopening and that it has paid the other penalties. Moreover, Oil-Dri should include an affidavit from the particular employee who MSHA alleges signed for the assessment regarding his knowledge of events with respect to the assessment.


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ The words “without prejudice” mean that Oil-Dri may submit another request to reopen the case so that it can contest the specific citations and penalty assessments.

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July 17, 2009

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

Docket No. KENT 2009-9
A.C. No. 15-18267-157148

v.

MANALAPAN MINING COMPANY

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On May 13, 2009, the Commission received from Manalapan Mining Company ("Manalapan") a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). The Commission had denied without prejudice a previous request by Manalapan regarding the same assessment. *See Manalapan Mining Co.*, 31 FMSHRC 392 (Apr. 2009).

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

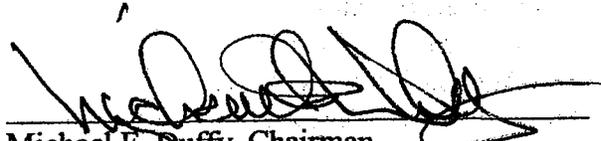
On July 16, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued proposed penalty Assessment No. 000157148 to Manalapan. In its original request to reopen, Manalapan asserted that it would be a great hardship for it to pay the total balance of outstanding penalty assessments shown on that assessment. The Commission denied the request to reopen because Manalapan had failed to explain why it had not contested Assessment No. 000157148 on a timely basis, and because its request was not based on any of the grounds for relief set forth in Rule 60(b). 31 FMSHRC at 394.

Manalapan's second request to reopen states that the original request was submitted by a former secretary for the company who had lost the assessment, and had prepared and filed the original request without the operator knowing she had lost the assessment. Manalapan asserts that it did not know about the assessment until it received the Commission's order denying the request on or about April 21, 2009.

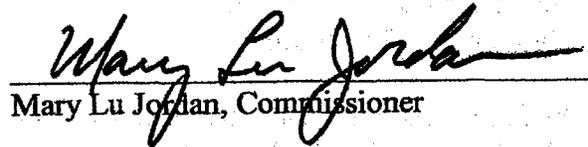
In response, the Secretary points out that the original request to reopen includes, in addition to the signature of Manalapan's secretary, the signature of its safety director, and that his signature appears to match the signature of that official on the operator's second request to reopen. The Secretary also argues that the safety director was served with the Commission's docketing statement for the original request, dated October 9, 2008.

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

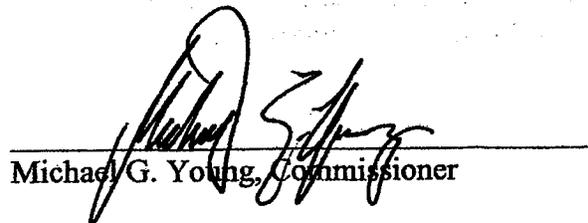
While Manalapan's second request to reopen includes an explanation for its failure to timely file a contest in response to the assessment – the contest form had been lost by the secretary – the second request otherwise fails to comply with the plain instructions the Commission included in its order regarding any renewed or amended request to reopen the assessment here. See 31 FMSHRC at 394 n.8. Moreover, the Secretary's response raises important credibility issues regarding Manalapan's filings in this proceeding. Accordingly, we again deny Manalapan's request to reopen, but this time with prejudice.



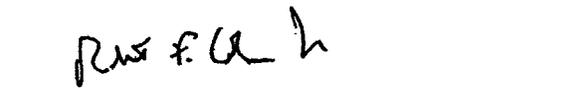
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

July 17, 2009

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

v.

ROCK N ROAD QUARRY

:
:
: Docket No. WEST 2009-561-M
: A.C. No. 35-03702-167823
:
:

: Docket No. WEST 2009-562-M
: A.C. No. 35-03702-170734
:
:

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On February 25, 2009, the Commission received a request to reopen two penalty assessments issued to Rock N Road Quarry ("Rock N Road"), one or both of which may have become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

According to Rock N Road's request, the first Proposed Assessment at issue, No. 000167823, dated November 4, 2008, was not received because there was no one at its address to sign for it when it was delivered by Federal Express. Rock N Road asked for it to be resent, but never received it until the Department of Labor's Mine Safety and Health Administration ("MSHA") faxed it to the operator on February 24, 2009. Rock N Road's request includes a

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEST 2009-561-M and WEVA 2009-562-M, both captioned *Rock N Road Quarry* and involving similar procedural issues. 29 C.F.R. § 2700.12.

copy of the contest form indicating that it wishes to contest all 16 proposed penalties. The Secretary of Labor states that she does not object to reopening the assessments. Her response does not address the operator's allegation that MSHA failed to provide it a copy of Assessment No. 000167823 for over three months.

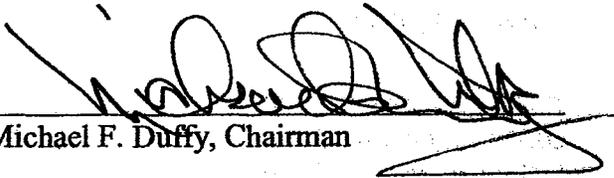
The operator also wishes to contest Assessment No. 000170304, issued on December 9, 2008, which proposes a single penalty for a previously issued order. The Secretary states that Assessment No. 000170734 was delivered to Rock N Road on December 18, 2008, and that the operator's contest was not mailed until January 21, 2009, which was four days late. The operator indicates that it was confused when, after contacting MSHA about not receiving Assessment No. 000167823 and waiting for a copy of this assessment, it then received another, different assessment.

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

Having reviewed Rock N Road's request and the Secretary's response, we conclude that Assessment No. 000167823 has not become a final order of the Commission. The operator first received the assessment by fax on February 24, 2009, and one day later filed its request to reopen. In its request it specified the individual penalties that it wishes to contest, and thus the motion may serve as the operator's timely notice of contest. *See Double Bonus Coal Co.*, 31 FMSHRC 358, 360 (Mar. 2009) (holding that statements in motions to reopen could serve as operator's notice of contest, and denying the motions as moot). Consequently, because the assessment never became a final order, reopening is not necessary. Accordingly, we deny the operator's request as to that assessment as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate, pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

In the interest of the efficient administration of justice, we also reopen Assessment No. 000170734 and remand it to the Chief Administrative Law Judge for further proceedings. The operator's justifiable confusion constitutes inadvertence for contesting this assessment four days late.

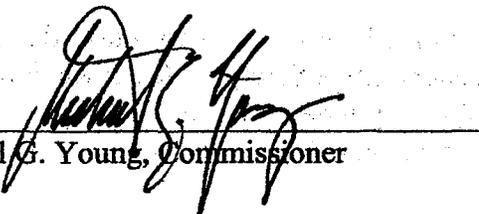
Consequently, and consistent with Rule 28, the Secretary shall file petitions for assessment of penalty in both of these dockets within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

July 20, 2009

SECRETARY OF LABOR,	:	Docket No. KENT 2009-573
MINE SAFETY AND HEALTH	:	A.C. No. 15-18987-147298
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-574
v.	:	A.C. No. 15-18987-154004
	:	
C.S.A. MINING INCORPORATED	:	Docket No. KENT 2009-575
	:	A.C. No. 15-18987-160184
	:	
	:	Docket No. KENT 2009-576
	:	A.C. No. 15-18987-162936

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On January 2, 2009, the Commission received a request to reopen four penalty assessments issued to C.S.A. Mining Incorporated ("CSA") that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

On April 16, 2008, June 18, 2008, August 13, 2008, and September 17, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment Nos. 000147298, 000154004, 000160184, and 000162936, respectively, to CSA,

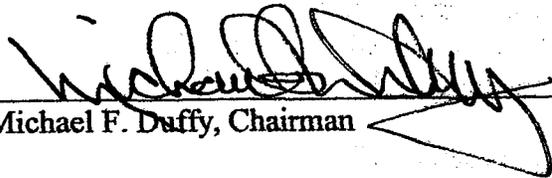
¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2009-573, KENT 2009-574, KENT 2009-575 and KENT 2009-576, all captioned *C.S.A. Mining Incorporated*, and involving the same factual and procedural issues. 29 C.F.R. § 2700.12.

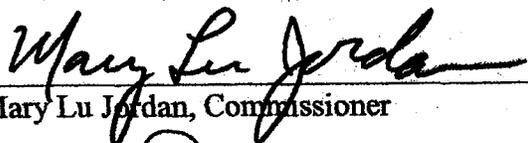
alleging multiple violations and proposing civil penalties in the sum of \$163,381. The president of CSA contends that the issuance of the citations and orders caused him financial and personal stress and that, consequently, CSA was unable to timely contest the proposed penalties.

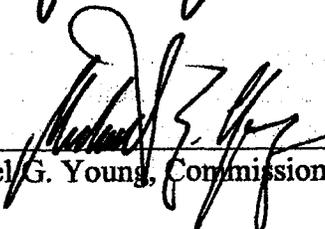
The Secretary opposes reopening on the ground that CSA's explanation for failing to timely file notices of contests in the four cases does not constitute the "exceptional circumstances" necessary to support reopening. The Secretary further states that reopening is unjustified here because CSA failed to identify facts which, if proven, would establish a meritorious defense. In addition, the Secretary contends that the operator fails to explain why, after it was informed that it had not contested the penalty assessments, it took as long as it did to request reopening. The Secretary explains that although MSHA sent CSA delinquency notices on July 10, 2008, September 11, 2008, November 6, 2008, and December 10, 2008, that Proposed Assessment Nos. 000147298, 000154004, 000160184, and 000162936, respectively, had become delinquent, the operator did not request reopening until January 2, 2009 – between one and six months after MSHA sent the letters.

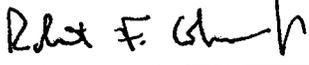
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the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

Having reviewed CSA's request to reopen and the Secretary's response thereto, we agree that CSA has failed to provide an adequate basis for the Commission to reopen the four penalty assessments. CSA's request for relief does not explain the company's failure to contest the proposed assessment on a timely basis, and is not based on any of the grounds for relief set forth in Rule 60(b). Furthermore, CSA has failed to explain the delay in responding to the delinquency notices. Accordingly, we hereby deny without prejudice CSA's request. *FKZ Coal Inc.*, 29 FMSHRC 177, 178 (Apr. 2007); *Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). The words "without prejudice" mean that CSA may submit another request to reopen the assessments so that it can contest the citations and penalty assessments.²


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

² If CSA submits another request to reopen, it must identify the specific citations, orders, and associated proposed penalties it seeks to contest. CSA must also establish good cause for not contesting the citations, orders, and associated proposed penalties within 30 days from the date it received the four proposed assessments from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking relief, or the discovery of new evidence, or fraud, misrepresentation, or other misconduct by the adverse party. CSA should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented CSA from responding within the time limits provided in the Mine Act, as part of its request to reopen. CSA should also submit copies of supporting documents with its request to reopen.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

July 20, 2009

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

v.

PETROLEUM FUELING, INC.

Docket No. WEVA 2009-1035-M
A.C. 46-07938-160952-F523

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On March 14, 2009, the Commission received from Petroleum Fueling, Inc. ("Petroleum") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

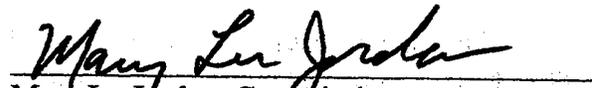
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

Counsel for Petroleum states that he confused the assessment and citations that Petroleum intended to contest with the assessment and citations that arose out of a similar incident involving a truck accident, and that he inadvertently submitted a notice of contest to MSHA on the incorrect assessment and citations. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

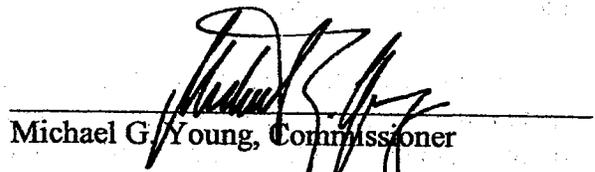
Having reviewed Petroleum's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



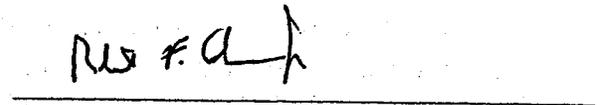
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 20, 2009

SECRETARY OF LABOR, : Docket No. KENT 2008-1111
MINE SAFETY AND HEALTH : A.C. No. 15-12564-125861
ADMINISTRATION (MSHA) :
v. : Docket No. KENT 2008-1181
LEFT FORK MINING COMPANY, INC. : A.C. No. 15-12564-127886
: Docket No. KENT 2008-1182
: A.C. No. 15-12564-130206

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) (“Mine Act”). On May 28, and June 20, 2008, the Commission received from Left Fork Mining Company, Inc. (“Left Fork”) a letter and motions seeking to reopen three penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). On January 9, 2009, the Commission denied the motions. *Left Fork Mining Co.*, 30 FMSHRC 8, 11 (Jan. 2009). On January 22, 2009, Left Fork filed a petition to reconsider the denial of its motions.

In August and October 2007, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Proposed Penalty Assessment Nos. 000125861, 000127886, and 000130206 to Left Fork, which listed proposed penalties for several citations. Left Fork failed to timely contest various penalties associated with those proposed penalty assessments as required by section 105(a) of the Mine Act. As a result, the proposed penalties were deemed final orders of the Commission.¹

¹ Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment

In November and December 2007, and January 2008, MSHA issued a Notice of Delinquency to Left Fork pertaining to each of the proposed penalty assessments. On May 13, 2008, counsel for MSHA sent Left Fork a letter pertaining to the delinquencies of all three proposed assessments, stating that the total unpaid delinquencies amounted to \$76,897.79, including statutory interest and administrative fees. MSHA further stated that unless payment was made by May 27, 2008, it would issue a citation under section 104(a) of the Mine Act charging Left Fork with a failure to comply with the Commission's final orders with the Mine Act. MSHA also stated that if Left Fork should fail to abate the section 104(a) citation, it would necessitate the issuance of a mine closure order.

On May 28 and June 20, 2008, the Commission received Left Fork's requests to reopen the penalty assessments that had become final Commission orders. In its requests to reopen, Left Fork's counsel had stated that, upon receipt of the subject proposed assessments, the assessment forms were marked to indicate Left Fork's intent to contest the penalties associated with several citations, and then forwarded to Left Fork's Brookside office, consistent with company policy. Counsel further stated that "[t]hrough inadvertence or mistake," the completed assessment forms were not timely returned to MSHA. Counsel attached to the pleadings affidavits by Tony Nelson, Jr., Left Fork's safety director, in which the safety director states in part that "[b]ecause of a misunderstanding, personnel formerly employed in the Brookside office paid the uncontested penalties but apparently did not return the assessment cards to MSHA as contested."

On July 2, 2008, the Commission received responses to Left Fork's pleadings from the Secretary. The Secretary opposed the requests on the basis that the operator's conclusory assertion was insufficient to establish exceptional circumstances that warrant reopening. She further stated that the operator failed to explain why, after it was sent the Notices of Delinquency in each of the three cases many months earlier, it took as long as it did to request the reopenings. In this regard, the Secretary noted the letter sent by her counsel on May 13, 2008. The Secretary maintained that the operator's filing of requests to reopen only when facing enforcement action did not demonstrate good faith.

On July 22, 2008, the Commission received a reply to the Secretary's responses from Left Fork. Left Fork asserted that it did, in fact, explain how or why a mistake occurred at the Brookside office. It stated that the explanation was set forth in the safety director's affidavit when he stated that he intended to contest the penalties but that "[f]or reasons unknown" the proposed assessment was not returned to MSHA. In addition, Left Fork contended that a delinquency notice is not proof of default. It explained that MSHA's May 13 letter listed two assessments (Nos. 000120903 and 000134705) which were not delinquent. It also stated that after it paid the subject proposed assessments, it received delinquency notices demanding payment.

is deemed a final order of the Commission. 30 U.S.C. § 815(a).

On January 9, 2009, the Commission issued its denial of Left Fork's requests, concluding that Left Fork failed to make a showing of circumstances that warrant reopening. 31 FMSHRC at 11. The Commission explained that Left Fork's statements that its failure to timely file its contest of the proposed penalty assessments due to "inadvertence or mistake" did not provide the Commission with an adequate basis to justify reopening. *Id.* at 10. It noted that even after the Secretary opposed Left Fork's motion on the grounds that it had set forth only a conclusory assertion in its attempt to justify relief, the operator merely responded that "[f]or reasons unknown, the proposed assessments were not returned as contested." *Id.* In addition, the Commission stated that Left Fork failed to explain its failure to act after receiving MSHA's delinquency notices. *Id.* It noted that Left Fork did not seek relief until it faced enforcement action, including potential mine closure. *Id.* at 10-11.

In its petition for reconsideration, Left Fork offers to further explain the circumstances related to its failure to contest the proposed penalty assessments and its delay in seeking relief. The operator states that its safety director had requested that a clerical employee return the assessments as contested, but that "apparently" this did not happen. Left Fork states that "the precise reasons are not known, but it was apparently an oversight." It notes that the clerical employee also believed that the penalties had been contested, as evident in her letter to MSHA dated January 18, 2008, indicating that the assessments had been contested. In addition, Left Fork explains that it did not seek relief after receiving the delinquency notices because it has previously received incorrect delinquency notices from MSHA, and that delinquency notices do not necessarily mean that payments have not been made or that matters have not been properly contested. It also refers to MSHA's May 13 letter which it states "cites several penalties which were not delinquent." Left Fork asserts that it was only when it received a notice threatening to shut down Left Fork's mine did it become apparent that the assessments had not been properly contested. Left Fork attached additional evidence to its petition.

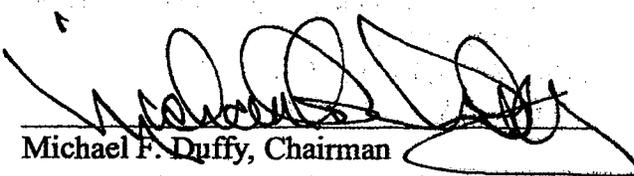
The Secretary opposes Left Fork's petition for reconsideration. She argues that Left Fork has advanced no reasons justifying reconsideration. The Secretary submits that a petition for reconsideration may not be used to relitigate old matters, raise arguments, or present evidence that could have been raised prior to the entry of judgment. She contends that Left Fork identifies no material factual or legal issue that could not have been fully considered by the Commission at the time Left Fork filed its motions to reopen. Accordingly, the Secretary requests that the Commission deny Left Fork's petition for reconsideration.

The Commission has recognized that petitions for reconsideration under Commission Procedural Rule 78 "ought, at the very least, to bring to the Commission's attention facts or legal arguments the petitioner believes were overlooked or misapprehended, or point to a change in controlling law." *Island Creek Coal Co.*, 23 FMSHRC 138, 139 (Feb. 2001) (citations omitted). The Commission stated that such petitions "should also not merely raise arguments the Commission has already considered, or attempt to raise new legal arguments." *Id.* (citations omitted). Courts have recognized that the basis for a motion for reconsideration must not have been available at the time the first motion was filed. *Servants of the Paraclete v. Does*, 204 F.3d

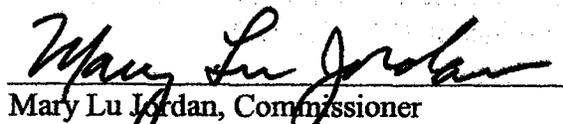
1005, 1012 (10th Cir. 2000). In other words, a motion for reconsideration must fail when the motion merely advances “new arguments, or supporting facts which were available at the time of the original motion.” *Id.*

Here, Left Fork has failed to set forth reasons justifying reconsideration. In arguing that it has previously received incorrect delinquency notices and that delinquency notices do not necessarily mean that proposed penalties have not been contested, Left Fork essentially raises an argument that the Commission considered in disposing of Left Fork’s motions to reopen.² In addition, although Left Fork presents more detailed information concerning its failure to timely contest the proposed penalty assessments and its delay in filing the motions to reopen, there is no indication that such evidence was not also available at the time that Left Fork filed its motions to reopen.

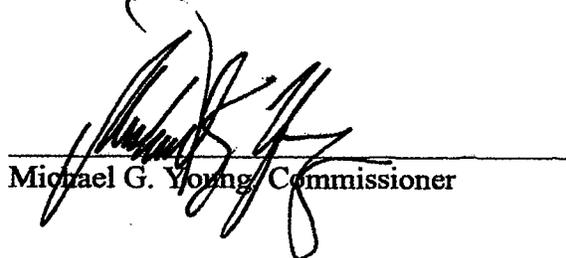
Accordingly, for these reasons, Left Fork’s petition for reconsideration is denied.



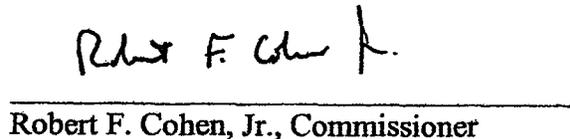
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

² We note that Proposed Assessment Nos. 000120903 is referred to as paid in a “Civil Penalty Collection Report” attached to MSHA’s May 13 letter.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 20, 2009

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

v.

SPARTAN MINING COMPANY, INC.

Docket No. WEVA 2009-764
A.C. No. 46-08808-166004

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On June 8, 2009, the Commission received from Spartan Mining Company, Inc. ("Spartan") an amended motion by counsel seeking to reopen a penalty assessment that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On October 15, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued an assessment to Spartan proposing \$208,985 in penalties for 163 citations and orders previously issued at Spartan's Ruby Energy Mine. In its initial request to reopen filed on January 29, 2009, Spartan alleged that it did not receive the Federal Express envelope containing the proposed assessment and requested that the assessment be reopened as to the citations and orders marked on the copy of the proposed assessment it attached to the motion. However, none of the citations or orders was marked on the attached copy. Consequently, the Commission denied Spartan's request without prejudice, and specified information that Spartan should include to further clarify matters in the event it decided to refile its motion. See *Spartan Mining Co.*, 31 FMSHRC ___, ___, slip op. at 2-3 (May 20, 2009).

Spartan filed an amended motion on June 8, 2009, which includes an assessment form marked to show that Spartan would contest 73 proposed penalties upon reopening of the assessment. The amended motion also includes a copy of the Federal Express Tracking Report for the delivery package containing the assessment that MSHA provided to Spartan. The report shows that the delivery company twice tried to deliver the package, both times unsuccessfully. Spartan explains that it is understandable that the first attempt was unsuccessful, because it was made after business hours, but cannot understand why the second attempt also failed, given that it occurred at a time that its office was fully staffed. Spartan states that because of problems with deliveries it has changed its mailing address to a more centralized delivery location.

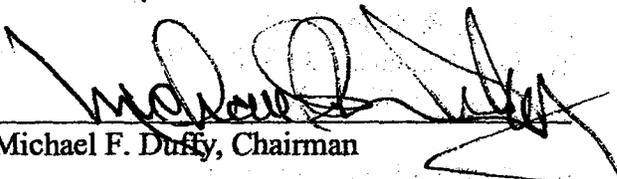
The Secretary did not oppose Spartan's original request for reopening, and did not respond to its amended motion.¹

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

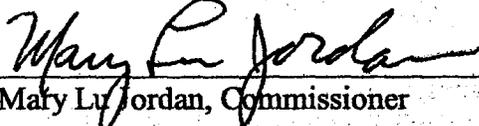
Having reviewed Spartan's amended motion, we conclude that the proposed assessment at issue has not become a final order of the Commission. We deny the motion as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate, pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Spartan's submission of its completed contest form with its amended motion to reopen serves as its notice of contest. Consequently, and consistent with Rule 28, the Secretary shall file petitions

¹ We consider the Secretary's position in this case in light of the provisions of the "Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor – MSHA – Attorneys Regarding Matters Involving Massey Energy Company Subsidiaries" dated September 13, 2006. Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000-179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within a reasonable time. Thus, we assume that the Secretary is not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion is filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary's position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator's proffered excuse.

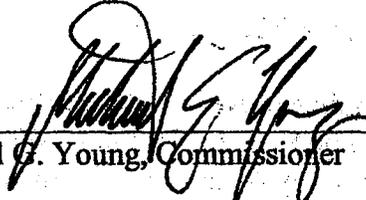
for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28. See *Double Bonus Coal Co.*, 31 FMSHRC 358, 360 (Mar. 2009).



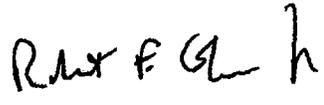
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Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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July 20, 2009

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

v.

MORRIS, INC.

Docket No. CENT 2009-1

A.C. No. 39-01381-152957

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On October 1, 2008, and June 12, 2009, the Commission received from Morris, Inc. ("Morris") requests to reopen a penalty assessment that became a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On June 1, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Assessment No. 000152957 to Morris, proposing penalties for two citations that MSHA had previously issued to Morris. According to the Secretary, any contest of those penalties was due on July 17, 2008. However, the Secretary's records show that Morris did not file a contest until July 25, 2008, when it contested one of the two proposed penalties. Because Morris' original request to reopen did not explain the reason for the late filing, the Commission denied the request without prejudice. *See* 31 FMSHRC ____, ____, slip op. at 2-3 (May 6, 2009).

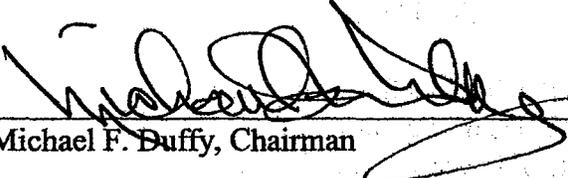
Morris filed a second request to reopen on June 12, 2009. It explains that on July 2, 2008, well within the 30-day time limit, internal communications indicated that one of the penalties should be paid and the other contested. When it learned on July 17, 2008, that the

instructions had not been carried out, Morris then submitted the check and contest form. Morris includes copies of the assessment showing the internal communications. Morris further states that it has established a new process to ensure that all future notices of contest are submitted in a timely manner.

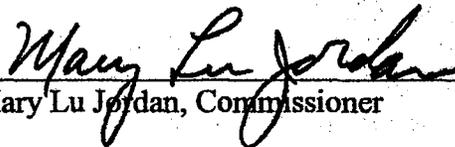
The Secretary did not oppose Morris' original request for reopening, and did not respond to its second request.

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

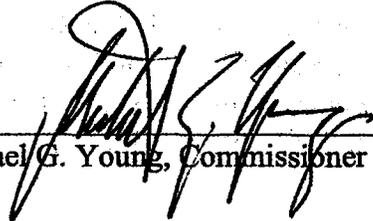
Having reviewed Morris' requests and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



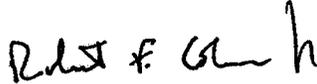
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

July 20, 2009

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

v.

LEHIGH NORTHEAST CEMENT
COMPANY

Docket No. YORK 2009-83-M
A.C. No. 30-00070-140110

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On February 6, 2009, the Commission received a motion by counsel to reopen a penalty assessment issued to Lehigh Northeast Cement Company ("Lehigh Northeast") that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

Lehigh Northeast states that in December 2007 the Department of Labor's Mine Safety and Health Administration ("MSHA") issued it 28 citations, all of which were designated as involving high negligence. Lehigh Northeast explains that it requested and was granted a conference with MSHA on the citations. Lehigh Northeast states that it was eventually told by MSHA that the changes it requested would be made, and that it learned that a neighboring operator had been successful as well in reducing negligence findings on similar citations it had been issued.

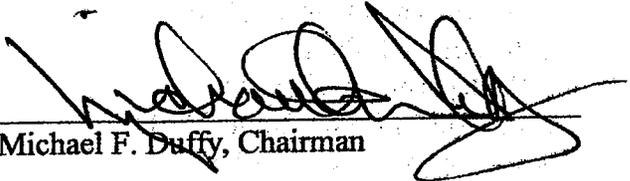
However, MSHA subsequently issued Assessment No. 000140110 to Lehigh Northeast, proposing penalties for the 28 citations based on the high negligence allegations. Lehigh Northeast states it was under the impression that revised proposed penalties would issue, based on the reduction in negligence, but that turned out not to be the case. Lehigh Northeast, now represented by new counsel, subsequently learned that the MSHA database showed the continued delinquency of the assessment and directed that the motion for reopening be filed. After initially opposing Lehigh Northeast's request to reopen, the Secretary subsequently filed a response stating that she does not oppose reopening here.

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

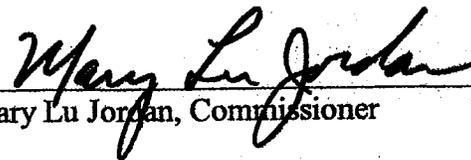
Having reviewed Lehigh Northeast's request and the Secretary's response, we conclude that, on balance, this case merits reopening. Lehigh Northeast clearly showed an intent to contest proposed penalties predicated on allegations of high negligence, and was apparently told by MSHA that the citations would be changed to show a lesser degree of negligence. Given that, it is understandable why Lehigh Northeast believed that it was unnecessary to contest the initial proposed assessment.¹

¹ We grant reopening even though Lehigh Northeast did not move to reopen the assessment until over ten months had passed since the assessment had become a final order. Operators should be aware that, in general, a delay of such length decreases the likelihood that the Commission will look favorably upon a request to reopen. In this case we are willing to grant reopening because it appears that MSHA has concluded that the original citations were incorrect as to the degree of negligence, which would necessarily reduce the amount of the penalties.

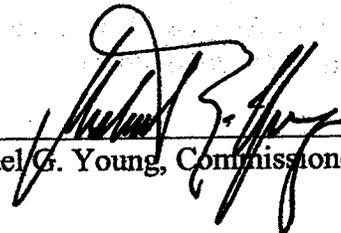
In the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



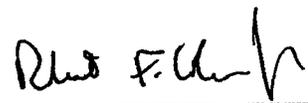
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 21, 2009

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

v.

ASH GROVE CEMENT COMPANY

:
:
:
: Docket No. CENT 2008-786-M
: A.C. No. 14-00034-159579
:
:

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On September 22, 2008, the Commission received from Ash Grove Cement Company ("Ash Grove") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

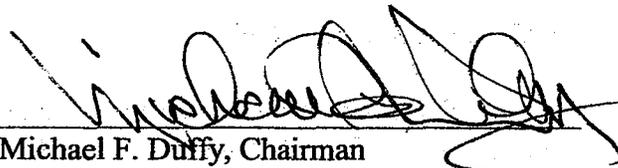
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

On August 7, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000159579 to Ash Grove, proposing civil penalties for nine citations. Ash Grove states that, on August 26, the company's safety manager contacted its counsel and indicated that he would forward the proposed assessment to counsel's office to process the hearing request. On August 27, counsel received the proposed assessment by email. Counsel failed to contest the proposed assessment due to work commitments and related travel, which is described with specificity in an attached affidavit.

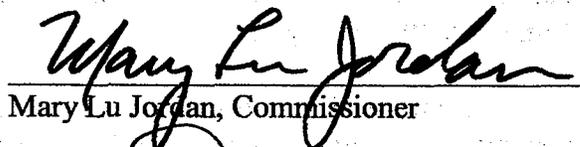
The Secretary states that she does not oppose the request to reopen the proposed assessment. However, she urges the operator to take all steps necessary to ensure that, in the future, any penalty assessments are contested in a timely manner.

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

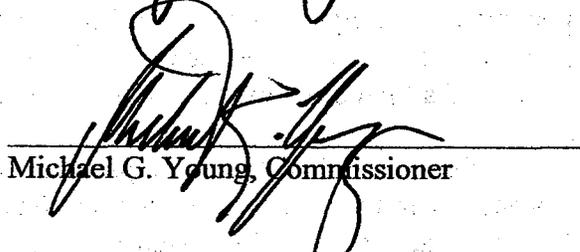
Having reviewed Ash Grove’s request and the Secretary’s response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



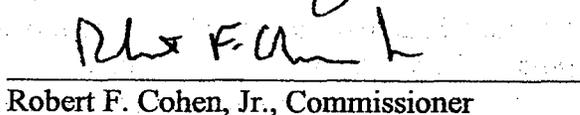
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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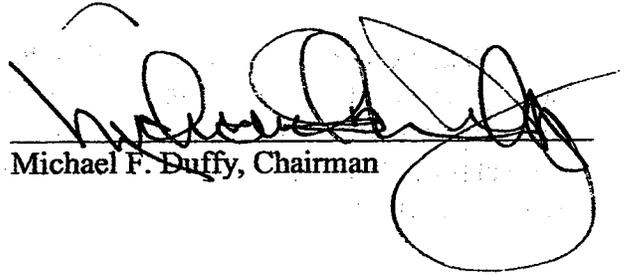
Chief Administrative Law Judge Robert J. Lesnick
Federal Mine Safety & Health Review Commission
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

Quality states that, following its receipt of the proposed assessment on or about January 12, 2009, its safety director, who was responsible for reviewing the document, was out of the office on vacation for a week. Following his return, the safety director was generally away from Quality's home office on training and other work duties during the next eight days. Quality further states that on February 3, 2009, it received a letter from MSHA dated January 23, 2009 which vacated two citations that were included in the proposed assessment. Quality asserts that its safety director mistakenly believed that he would receive another assessment that would reflect the vacated citations.

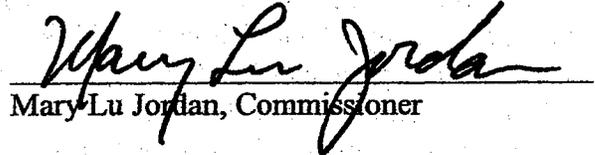
The Secretary opposes reopening the proposed penalty assessment, maintaining that Quality has failed to establish the existence of "exceptional circumstances." Specifically, the Secretary contends that for the period up to February 3, 2009, Quality's "inadequate or unreliable internal procedures" do not justify reopening. The Secretary is silent as to the period beginning February 3, 2009.

We find that the reasons advanced by Quality for not contesting the proposed assessment between January 12 and February 3, 2009 are essentially irrelevant. As of February 3, 2009, when the safety director had focused on the proposed assessment, Quality still had 11 days within which to contest it. Thus, the issue is whether the safety director's mistaken belief that he would receive another proposed assessment, reflecting the amended citations, was reasonable. In this regard, we note that in the letter dated January 23, 2009, MSHA clearly indicated the total amount of the assessment, both before and after the two citations were vacated.

Having reviewed Quality's request and the Secretary's response, in the interests of justice, we remand this matter to the Chief Administrative Law Judge for a determination of whether good cause exists for Quality's failure to timely contest the penalty and whether relief from the final order should be granted.¹ If it is determined that relief from the final order is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. § 2700.



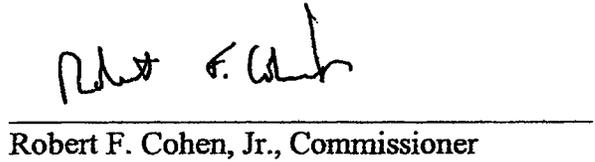
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

¹ On remand, the judge should consider whether Quality has met the standard for relief under Rule 60(b) because of its mistaken belief that it was going to receive a revised assessment after two citations on the assessment were vacated.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

July 24, 2009

SECRETARY OF LABOR,	:	Docket No. VA 2009-46
MINE SAFETY AND HEALTH	:	A.C. No. 44-03088-151516 GTY
ADMINISTRATION (MSHA)	:	
	:	Docket No. VA 2009-47
	:	A.C. No. 44-07087-144483 GTY
	:	
	:	Docket No. VA 2009-48
v.	:	A.C. No. 44-07069-148351 GTY
	:	
	:	Docket No. VA 2009-49
	:	A.C. No. 44-07069-144482 GTY
BRESEE TRUCKING CO., INC.	:	
	:	Docket No. KENT 2009-190
	:	A.C. No. 15-17165-136968 GTY

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) (“Mine Act”). On November 5, 2008, the Commission received from Bresee Trucking Co., Inc. (“Bresee”) motions by counsel seeking to reopen five penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers VA 2009-46, VA 2009-47, VA 2009-48, VA 2009-49, and KENT 2009-190, all captioned *Bresee Trucking Co., Inc.*, and involving similar procedural issues. 29 C.F.R. § 2700.12.

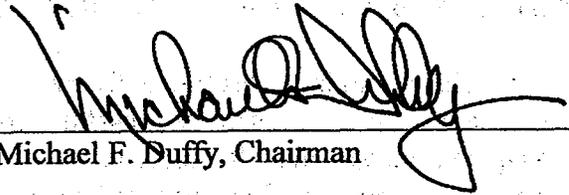
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a)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

The record indicates that delivery of the proposed penalty assessments was attempted at several addresses but was not successful. Upon learning that the proposed assessments were delinquent, the operator filed these requests to reopen. The Secretary states that she does not oppose the reopening of the proposed penalty assessments but urges the operator to make sure that it keeps MSHA informed of its current address of record.

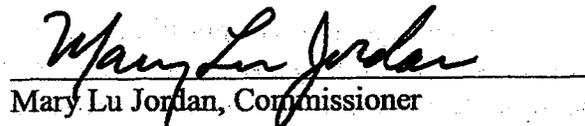
It is an operator’s responsibility to file with MSHA the address of a mine and any changes of address. 30 C.F.R. §§ 41.10, 41.12. Operators may request service by delivery to another appropriate address provided by the operator. 30 C.F.R. § 41.30.

It is unclear from the record whether MSHA mailed the proposed assessment to Bresee’s official address of record at the time of assessment and whether Bresee maintained its correct address with MSHA. If MSHA sent the proposed assessment to Bresee’s official address of record, grounds may exist for denying Bresee’s request for relief. Cf. *Harvey Trucking*, 21 FMSHRC 567, 568-69 & n.1 (June 1999) (stating that operator is required to notify MSHA of changes of address). If, however, MSHA mailed the proposed assessment to an incorrect address, the proposed assessment may not have become a final Commission order and Bresee’s request may be moot.

Having reviewed Bresee's motions, we remand this matter to the Chief Administrative Law Judge for a determination of whether the proposed assessments became final orders and, if so, whether the final orders should be reopened. We ask the Chief Judge, in considering the matter, to resolve the dispute over whether MSHA sent the proposed assessment to Bresee's official address of record at the time of assessment. The Judge shall order further appropriate proceedings based upon that determination in accordance with principles described herein, the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



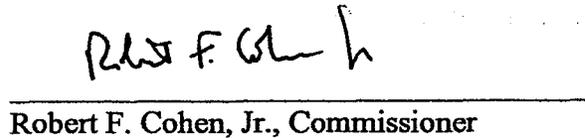
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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The Secretary opposes Newmont's request to reopen Proposed Assessment No. 000130423. She asserts that the penalty assessment became a final Commission order on December 7, 2007, and that the request to reopen was not received by the Commission until January 13, 2009. The Secretary maintains that because the operator filed its request more than one year after the assessment became a final order, the request should be denied. The Secretary further notes that on January 23, 2008, MSHA sent a delinquency notice to Newmont informing the operator that it had failed to timely contest the proposed penalty. The Secretary contends that Newmont failed to explain why, after it was informed that it had not contested the proposed penalty, it took so long to request reopening.

We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect.¹ See 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also held that a Rule 60(b) motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.² *Celite Corp.*, 18 FMSHRC 105, 106 (Apr. 2006) (citations and quotations omitted).

Here, we have been presented with Newmont's failure to timely contest Proposed Assessment No. 000130423 due to its mistake in sending its contest to an incorrect address, followed by a communication between Newmont and counsel in charge of the collection action

¹ Rule 60(b) provides that a court may relieve a party from a final judgment, order, or proceeding for the following reasons:

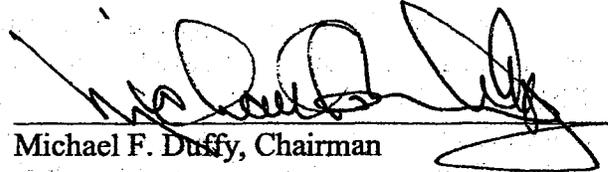
- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence . . . ;
- (3) fraud . . . ;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

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

² Rule 60(c) provides that "[a] motion under Rule 60(b) must be made within a reasonable time – and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding. Fed. R. Civ. P. 60(c).

where both apparently failed to realize that the only remedy available to Newmont was for the Commission to reopen the order that had gone final, and then only for good cause and subject to the time limits set forth in Rule 60(c). This misunderstanding falls squarely within the ambit of Rule 60(b)(1). *See Celite*, 18 FMSHRC at 107.

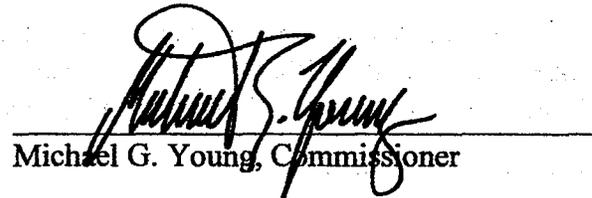
Because Newmont waited over a year to request relief with regard to Proposed Assessment No. 000130423, its motion is untimely. *J S Sand & Gravel, Inc.*, 26 FMSHRC 795, 796 (Oct. 2004). Accordingly, we deny Newmont's request to reopen.



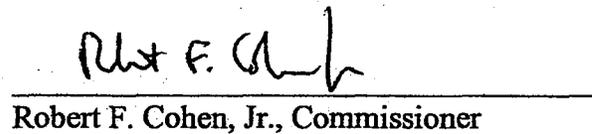
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



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Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 31, 2009

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

v.

MICHAEL WILL, employed by
CHEMICAL LIME CO. OF ALABAMA

Docket No. SE 2009-550-M
A.C. No. 01-00003-175599A

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On May 14, 2009, the Commission received from Michael Will, employed by Chemical Lime Company of Alabama ("Will"), a motion by counsel in which Will seeks to reopen a penalty assessment under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

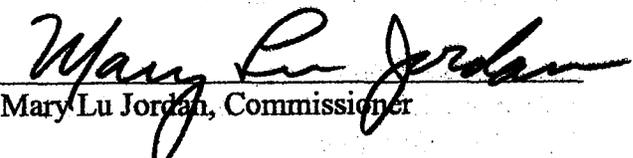
Under the Commission's Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

Will states that he never received Proposed Assessment No. 000175599A. The Secretary confirms that the proposed assessment was never received by Will and was returned to MSHA as undelivered. The Secretary submits that in order to achieve proper service, she will mail the proposed assessment to the address provided in Will's request to reopen, and that Will, thereafter, will have 30 days after receipt to either pay or contest the proposed assessment.

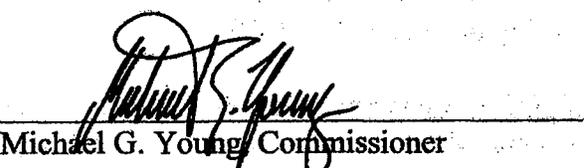
Having reviewed Will's request and the Secretary's response, we deny Will's request to reopen as moot. The Secretary may proceed as she has outlined in her response, and, if the proposed penalty is contested by Will, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. See *Lehigh Cement Co.*, 28 FMSHRC 440, 441 (July 2006).



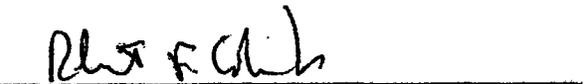
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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July 31, 2009

SECRETARY OF LABOR,	:	Docket No. KENT 2009-1128
MINE SAFETY AND HEALTH	:	A.C. No. 15-15138-171766
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-1129
v.	:	A.C. No. 15-18250-171772
	:	
McCOY ELKHORN COAL CORP.	:	Docket No. KENT 2009-1130
	:	A.C. No. 15-18721-171781
	:	
	:	Docket No. KENT 2009-1131
	:	A.C. No. 15-18775-171784

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) (“Mine Act”). On May 26, 2009, the Commission received requests to reopen four penalty assessments issued to McCoy Elkhorn Coal Corporation (“McCoy”) that may have become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

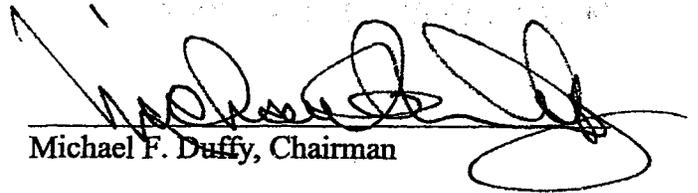
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

McCoy states that it never received Proposed Assessment Nos. 000171766, 000171772, 000171781 and 000171784. The Secretary states that Federal Express attempted delivery without success on December 26, 2008, for all four proposed assessments. She suggests that it is

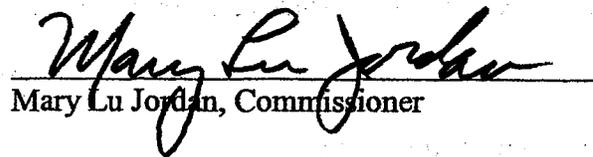
¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2009-1128, KENT 2009-1129, KENT 2009-1130, and KENT 2009-1131, all captioned *McCoy Elkhorn Coal Corp.*, and involving the same factual and procedural issues. 29 C.F.R. § 2700.12.

possible that the mine offices were closed for the holidays: The Secretary submits that in order to achieve proper service, she will re-serve the proposed assessments by Federal Express at the address of record, and that McCoy will then have 30 days after receipt to either pay or contest the proposed assessments.

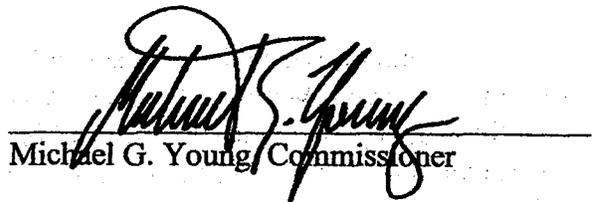
Having reviewed McCoy's requests and the Secretary's response, we deny McCoy's requests to reopen as moot. The Secretary may proceed as she has outlined in her response, and, if any of the proposed penalties are contested by McCoy, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. See *Lehigh Cement Co.*, 28 FMSHRC 440, 441 (July 2006).



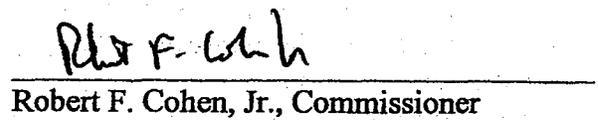
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 4, 2009

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

v.

EASTERN ASSOCIATED COAL, LLC

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Docket No. WEVA 2009-1562

A.C. No. 46-09152-177347

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

ORDER

BY THE COMMISSION:

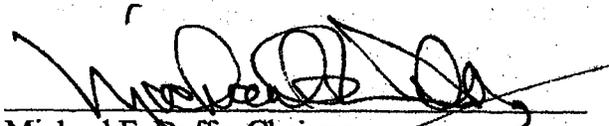
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On June 11, 2009, the Commission received from Eastern Associated Coal, LLC ("Eastern") a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

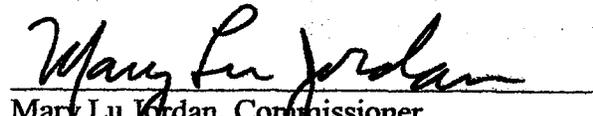
However, we have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

Eastern states that its safety director received the assessment at issue, but shortly thereafter developed health problems and ultimately never returned to his position. Eastern explains that the safety director was the only official at the mine who knew of the assessment until the mine received a delinquency notice regarding the assessment. The Secretary states that she does not oppose reopening in this instance, and her response included a copy of the late-filed assessment that Eastern marked to show which penalties it wishes to contest, as well as information indicating that Eastern paid the uncontested penalties.

Having reviewed Eastern's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

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August 6, 2009

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

Docket Nos. SE 2006-148-M
SE 2006-163-M

v.

SCP INVESTMENTS, LLC

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

DECISION

BY THE COMMISSION:

In these civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"), Judge Jerold Feldman vacated all 11 citations and the one order at issue. 30 FMSHRC 544 (June 2008) (ALJ). The judge did so as a sanction for the Department of Labor's Mine Safety and Health Administration ("MSHA") inspector's refusal to permit a representative of the operator to accompany him on the inspection that occurred in connection with the issuance of the citations and order, an exclusion which the judge determined to be contrary to section 103(f) of the Mine Act, 30 U.S.C. § 813(f).¹

¹ Section 103(f) of the Mine Act states in pertinent part:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. . . . Compliance with this subsection shall not be a

The Commission subsequently granted the Secretary of Labor's petition for discretionary review. This case poses the question of whether the judge erred in dismissing the order and citations because the operator was not permitted to accompany the MSHA inspector on his first inspection of this mine.

Commissioners Young and Cohen, with Chairman Duffy concurring, affirm the judge's finding that the mine operator's walkaround rights were violated in this instance. Commissioner Jordan does not reach the issue. However, because of the jurisdictional language of the last sentence of section 103(f), all Commissioners agree that the judge erred as a matter of law when he vacated the Secretary's citations and dismissed these proceedings. Accordingly, the judge's decision is vacated.

On remand, the judge is permitted to consider the effect of the improper denial of the operator's walkaround rights on the operator's ability to present its case. Commissioners Young and Cohen would apply an exclusionary rule. Under their formulation, the judge should determine what prejudice, if any, resulted from the denial of the operator's walkaround rights. The judge could then exclude evidence resulting from the inspection, where the operator demonstrated the existence of prejudice as a result of not being present during the inspection. Chairman Duffy would have the judge exercise his discretion to decide whether the Secretary established a violation and (if so) the appropriate penalty, taking into account that the failure to permit the walkaround may have prevented the operator from offering probative evidence to support its case. Commissioner Jordan believes that the inspector's exclusion of the owner-operator from the inspection has no effect on the trial of this case.

The separate opinions of the Commissioners follow.

jurisdictional prerequisite to the enforcement of any provision of
this Act.

30 U.S.C. § 813(f).

Opinion of Commissioners Young and Cohen:

This case involves the relationship of MSHA with a new and very small operator. And, as Judge Feldman recognized, fundamentally this case involves how our government relates to its citizens.

I.

Factual and Procedural Background

Although the opinions in this case focus on legal issues, it is very important to understand the facts out of which the case arises.¹ SCP Investments took over and began operating the Old County Limestone Quarry in Crab Orchard, Tennessee, in September 2005. Show Cause Order, 30 FMSHRC at 341. It had three employees, including the owner-operator, Pat Stone. SCP Show Cause Reply at 1. According to information provided by Mr. Stone, in September 2005 SCP purchased county property in Cumberland County, Tennessee, that included an existing limestone quarry that had been used for 50 years in connection with county road work. *Id.* at 1. There is no record evidence of when the county ceased operating the quarry or regarding MSHA regulation of the quarry's operations, if any. SCP eventually commenced rock crushing operations at the site, which it called the Old County Quarry. *Id.*; 30 FMSHRC at 544.

Mr. Stone has stated in the record that he has a construction background but no mining experience. He was not at all familiar with MSHA, nor with legal requirements of the Mine Act. On December 13 or 14, 2005, an MSHA inspector, Jeff Phillips, arrived to inspect the Old County Quarry, which at that point had been operating for about three months. Upon learning that the quarry did not have an MSHA identification number, Mr. Phillips had Mr. Stone fill out an application, and Mr. Phillips obtained the identification number. Then Mr. Phillips asked Mr. Stone about the employees' mining experience and their training under MSHA's training

¹ Because of the procedural history, the record in the case is sparse. Our description of the facts is based on the judge's Order to Show Cause, 30 FMSHRC 341 (Mar. 2008) (ALJ), and the submissions of the parties, both to the judge and on review. The operator has not been represented by counsel at any point, and its submissions have been in the form of letters from its owner, Pat Stone. There are factual assertions in the letters to the judge from Mr. Stone which are neither confirmed nor denied by the Secretary. The most detailed letter by Mr. Stone is dated April 30, 2008. In the letter (hereinafter referred to as "SCP Show Cause Reply"), he replied to the Secretary's response to the judge's show cause order (which required the Secretary to explain why the citations should not be vacated because of the inspector's refusal to permit Mr. Stone to accompany him during the inspection). Since Judge Feldman issued a Further Order to Show Cause on May 8, 2008, 30 FMSHRC 563 (May 2008) (ALJ), which acknowledged Mr. Stone's letter, and since the Secretary responded to Judge Feldman's Further Order to Show Cause on May 29 and did not dispute the factual representations in Mr. Stone's April 30 letter, we are relying on some of Mr. Stone's factual representations, as well as the Secretary's, when they are not inconsistent.

regulations (set forth in Part 46 of Title 30 of the Code of Federal Regulations). Mr. Stone explained that one of his employees had worked for him for eight years, the other had worked for him for six years, and that they were both excellent employees. However, Mr. Stone was not aware of the training requirements of Part 46.

At this point, Mr. Phillips issued a section 104(g)(1) withdrawal order and escorted Mr. Stone off the premises.² S. Br. at 2; SCP Show Cause Reply at 1. The violation was designated significant and substantial (“S&S”).³ He had Mr. Stone contact his employees on the radio and direct them to leave the premises also. Mr. Phillips then told Mr. Stone that he was going to inspect the pit and the equipment. Mr. Stone asked Mr. Phillips if he could accompany the inspector.⁴ Mr. Phillips refused to allow Mr. Stone to accompany him. The reason for Mr. Phillips’ refusal apparently was that Mr. Stone did not have 24 hours of new miner training pursuant to 30 C.F.R. § 46.5(a). This is the basis set forth in the section 104(g)(1) order issued by Mr. Phillips. Mr. Phillips refused to allow Mr. Stone to re-enter the mine site to retrieve keys which were left in several loaders.

Following the inspection, Mr. Phillips issued 11 more citations. He informed Mr. Stone that he and his employees could not return to the mine until they were trained. Mr. Phillips

² Section 104(g)(1) provides:

If, upon any inspection or investigation pursuant to section 103 of this Act, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

30 U.S.C. § 814(g)(1).

³ 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.”

⁴ We assume that Mr. Stone was not specifically familiar with his “walkaround rights” under section 103(f) of the Mine Act, 30 U.S.C. § 813(f), but was simply requesting the opportunity to accompany a government official who was inspecting his property.

indicated that the training must include 16 hours of classroom training and 8 hours of training on the job. SCP Show Cause Reply at 1-2.

Mr. Stone contacted the Tennessee Department of Labor, and made arrangements for classroom training for himself and his employees at a mine safety school on December 19 and 20. To obtain the on-the-job training, Mr. Stone contacted several mines in the area which agreed to provide the training. However, Mr. Phillips would not accept this training, apparently because it would have been at a different kind of quarry. The only other possible quarry was Mr. Stone's direct competitor, Franklin Limestone, and the competitor refused to provide the training to Mr. Stone and his employees. Mr. Stone then asked Mr. Phillips to provide the training. At this point, it appears that Mr. Phillips agreed to let Mr. Stone provide the training for his employees. *Id.* In any event, Mr. Phillips terminated the section 104(g)(1) order on December 21, 2005. The other violations were terminated the next day, presumably after Mr. Stone and his employees had returned to the quarry and fixed the problems.

A couple of points emerge from the factual pattern in this case. As shown by his letters, Mr. Stone was very angry. But significantly, he obeyed all of Mr. Phillips' orders, obtained the required training for himself and his employees, and promptly abated the violations identified by Mr. Phillips. The record before us indicates that Mr. Stone was in no way a rogue operator. Prior to Mr. Phillips' inspection, Mr. Stone was not aware of his legal responsibilities. Upon finding out what he was required to do, he complied with the law.

MSHA issued a penalty assessment in February 2006 and another the next month, proposing penalties totaling \$1,087. SCP subsequently contested all 12 of the proposed penalties.

After reviewing the case, Judge Feldman issued an Order to Show Cause on March 31, 2008. 30 FMSHRC at 341. He was concerned that the MSHA inspector had not permitted Mr. Stone to accompany him on the inspection. *Id.* at 342. The judge recognized that under section 103(f) and our case law, the right of the operator to accompany the inspector during an inspection is an important right which may only be curtailed by the Secretary's regulations.⁵ Thus, Judge Feldman issued an order requiring the Secretary to show cause why the citations should not be vacated because the MSHA inspector violated section 103(f). The judge specifically directed the Secretary to respond to particular questions relating to the possible denial of Mr. Stone's rights under section 103(f). *Id.*

The Secretary responded to the Order on April 16, 2008. S. Resp. to Show Cause Order. Basically, the Secretary argued that the purpose of the section 103(f) walkaround rights is to

⁵ Section 103(f) of the Mine Act grants both operators and representatives of miners what are known as "walkaround" rights. See 30 U.S.C. § 813(f). These rights include the qualified rights to accompany MSHA personnel during their inspection of a mine and to participate in conferences at the mine both before and after the inspection. *Id.*

assist the inspector in his inspection, that the inspector has discretion to limit who may accompany him on an inspection, that section 115 of the Mine Act, 30 U.S.C. § 825, requires training of new miners, and that even if there was a violation of section 103(f), it should not affect any citations and penalties issued as a result of the inspection. *Id.* at 2-9. The Secretary did not respond to Judge Feldman's specific questions.

Judge Feldman issued a Further Order to Show Cause on May 8, 2008, noting the generalities of the Secretary's response to his first Order. 30 FMSHRC at 563. He stated, correctly in our view, that the discretion of MSHA inspectors in conducting inspections must be "balanced with the fundamental right of a mine operator to be present during an inspection." *Id.* at 564. He set forth five specific questions for the Secretary to respond to, including the identification of specific regulations, Interpretive Bulletins, and Memoranda which supported the denial of Mr. Stone's right to accompany the inspector; the specific training that must be completed before a mine operator or miners' representative is permitted to accompany an inspector; and the hazards to which Mr. Stone would have been exposed if he had accompanied Mr. Phillips. *Id.* at 565. Additionally, Judge Feldman recognized that dismissal of the citations and order is a harsh sanction. Therefore, he asked the Secretary to identify, assuming that the operator's section 103(f) rights were violated, lesser sanctions which could be imposed. *Id.*

The Secretary responded to this Order on May 29, 2008. S. Resp. to Further Order to Show Cause. In response to the judge's final question, the Secretary argued that dismissal is an impermissible sanction. *Id.* at 5-6. The less drastic remedy offered by the Secretary was to have the judge adjudicate the case on the merits, but take into consideration that Mr. Stone was unable to observe the conditions at the time that the inspector observed them. *Id.* at 6-7. Thus, the "less drastic remedy" suggested by the Secretary would, in effect, hobble the operator in making his defense at trial after being denied his right to accompany the inspector.

Following receipt of the Secretary's response, Judge Feldman issued his Dismissal Order on June 24, 2008. 30 FMSHRC at 544. He found that MSHA had abused its discretion in refusing Mr. Stone's request to accompany the inspector. *Id.* at 550. He further noted that the cited violative conditions had been terminated, and thus there were no continuing unresolved safety issues. In order to deter future unwarranted denials of a mine operator's walkaround rights, Judge Feldman dismissed the order and citations. *Id.*

II.

Disposition

The Secretary argues that the plain meaning of section 103(f) prohibits a judge from vacating citations and orders as a sanction for the issuing inspector's failure to accord walkaround rights. S. Br. at 8-10. The Secretary states that even if the judge were authorized to so sanction the Secretary and MSHA, it was not appropriate in this case, because the failure to permit the exercise of walkaround rights did not prejudice the operator, and the lesser sanction of

taking the failure into account in his decision on the merits of citations and order was available to the judge. *Id.* at 11-15. The Secretary also takes issue with the judge's conclusion that Mr. Phillips could have permitted Mr. Stone to accompany him on the inspection under section 46.11(f) of MSHA's hazard training regulations. *Id.* at 18-21. The operator, which has acted pro se throughout this case, did not file a response brief.

A. Mr. Stone's Walkaround Rights Under Section 103(f)

The first question to consider is whether Judge Feldman correctly determined that Mr. Stone's rights under section 103(f) were violated. At the outset, we must recognize that the statutory language is mandatory: "Subject to regulations issued by the Secretary,⁶ a representative of the operator . . . shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a)" 30 U.S.C. § 813(f) (emphasis added). In *Consolidation Coal Co.*, 16 FMSHRC 713, 719 (Apr. 1994), the Commission noted that "[t]he right of a miner's representative to accompany the inspector on all section 103 inspections has been consistently recognized by the Commission and the courts." Moreover, the Commission has recognized the critical role that section 103(f) plays in the overall enforcement scheme of the Act, and has cautioned that "[w]e are not prepared to restrict the rights afforded by that section absent a clear indication in the statutory language or legislative history of an intent to do so, or absent an appropriate limitation imposed by Secretarial regulation." *Consolidation Coal Co.*, 3 FMSHRC 617, 618 (Mar. 1981). We agree with the judge that Mr. Stone's walkaround rights were violated, although we differ somewhat in our reasoning.

The Secretary's position to the contrary is not convincing. She relies on a 1978 Interpretive Bulletin which states that the inspector has discretion in conducting the inspection, and that the purpose of the section 103(f) walkaround rights is to aid the inspection. S. Br. at 15-16. It is certainly true that the walkaround rights under section 103(f) are "for the purpose of aiding such inspection." 30 U.S.C. § 813(f). Section 103(f) of the Mine Act is essentially identical to section 8(e) of the Occupational Safety and Health Act ("OSH Act"), which similarly contains language that the OSH Act "walkaround right" is "for the purpose of aiding such inspection." 29 U.S.C. § 657(e).⁷ In *Chicago Bridge & Iron Co. v. OSHRC*, 535 F.2d 371, 376

⁶ The "regulations" referred to in section 103(f) include any of the Secretary's regulations which may be implicated by the exercise of walkaround rights.

⁷ Section 8(e) of the OSH Act, 29 U.S.C. § 657(e), contains wording similar to the Mine Act's walkaround provision:

Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical

n.12 (7th Cir. 1976), the court interpreted this language to mean that when representatives of the operator and employees accompany the inspector, factual disputes can often be resolved on the site, thus avoiding the expense of trying such issues. The Secretary's limited view of the walkaround rights in this case diminishes the role of the operator and employee representatives in "aiding" the inspection. S. Br. at 16.

In discussing the inspector's discretion in limiting walkaround rights, the Secretary cites our decision in *Secretary of Labor on behalf of Wayne v. Consolidation Coal Co.*, 11 FMSHRC 483, 489 (Apr. 1989), in which we found that an inspector did not abuse his discretion in excluding a miners' representative from a post-inspection meeting when there were already three members of the union safety committee and one representative of the union international in attendance. S. Br. at 16-17. Certainly there is a huge difference in refusing to permit a fifth representative of miners to be present compared with excluding a single owner-operator.

The Secretary next argues that the inspector did not actually exclude Mr. Stone based on his lack of section 46.5 new miner training, 30 C.F.R. § 46.5.⁸ S. Br. at 17. This is a strange argument given that the Secretary, in her Response to Further Order to Show Cause, specifically relied on section 46.5, as well as section 46.11 of her training regulations, 30 C.F.R. § 46.11,⁹ in

inspection of any workplace under subsection (a) of this section for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

⁸ Section 46.5(a) requires that operators

provide each new miner with no less than 24 hours of training as prescribed by paragraphs (b), (c), and (d). Miners who have not yet received the full 24 hours of new miner training must work where an experienced miner can observe that the new miner is performing his or her work in a safe and healthful manner.

30 C.F.R. § 46.5(a). Section 46.5(b) addresses seven aspects of training that must be provided before a miner can begin work, section 46.5(c) requires two other areas of training that must be provided within 60 calendar days after a new miner begins working, and the balance of the 24 hours of training must be provided within 90 calendar days, according to section 46.5(d). 30 C.F.R. § 46.5(b)-(d).

⁹ Section 46.11 provides:

(a) You must provide site-specific hazard awareness training before any person specified under this section is exposed

justifying Mr. Phillips' refusal to permit Mr. Stone to accompany him on the inspection. S. Resp. to Further Order to Show Cause at 1-3. Additionally, Mr. Phillips relied on section 46.5 in the 104(g)(1) order. Order No. 6122908. The Secretary states that the judge confused the section 104(g) order with the decision to exclude Mr. Stone from the inspection. S. Br. at 17. It is hard to understand how the Secretary can suggest that the judge was confused when the Secretary had previously told him that section 46.5 was indeed part of the basis for excluding Mr. Stone.

More troubling, however, is the Secretary's further argument: "The decision to exclude Mr. Stone from the inspection, however, was not documented by an order or citation – and was not required to be." S. Br. at 17. While it is true, strictly speaking, that the inspector did not have to issue an order or citation documenting the basis for excluding Mr. Stone, common decency compels the conclusion that Mr. Stone be given something in writing providing him the legal basis for his exclusion from the inspection, particularly when the one written record actually issued by Mr. Phillips made reference solely to section 46.5. When the government excludes a citizen from exercising a statutory right, the government ought to document its reasons in writing at some point prior to being ordered to do so in a judge's Order to Show Cause.

to mine hazards.

(b) You must provide site-specific hazard awareness training, as appropriate, to any person who is not a miner as defined by § 46.2 of this part but is present at a mine site, including:

(d) Site-specific hazard awareness training is information or instructions on the hazards a person could be exposed to while at the mine, as well as applicable emergency procedures. The training must address site-specific health and safety risks

(e) You may provide site-specific hazard awareness training through the use of written hazard warnings, oral instruction, signs and posted warnings, walkaround training, or other appropriate means that alert persons to site-specific hazards at the mine.

(f) Site-specific hazard awareness training is not required for any person who is accompanied at all times by an experienced miner who is familiar with hazards specific to the mine site.

30 C.F.R. § 46.11.

In any event, as the Secretary now apparently concedes, section 46.5 is not a proper basis for excluding Mr. Stone. Section 46.5 specifically refers to training which a new miner must have before he or she can "work" at a mine. As noted by Judge Feldman, 30 FMSHRC at 548, by its terms section 46.5 does not relate to inspections of the mine. This conclusion is supported by our case law, in which we have held that a non-miner may be a representative of miners and participate in an inspection under section 103(f). *See, e.g., Emery Mining Corp.*, 10 FMSHRC 276 (Mar. 1988), *aff'd in pertinent part and rev'd on other grounds sub. nom. Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447 (10th Cir. 1990).

This leaves section 46.11 as the sole basis for excluding Mr. Stone from the inspection. Section 46.11 requires the mine operator to provide site-specific hazard training to any person who is not a miner but is present at the mine site. It further provides, in subsection (f), that site-specific hazard training is not required for a person "who is accompanied at all times by an experienced miner who is familiar with hazards specific to the mine site." 30 C.F.R. § 46.11(f). Judge Feldman addressed this issue by finding that Mr. Phillips, as an experienced mine safety official well aware of mine safety issues, was an "experienced miner" within the meaning of section 46.11(f). 30 FMSHRC at 549. In her brief, the Secretary argues that an MSHA inspector can never constitute an "experienced miner" under section 46.11(f) because the inspector is not a "miner" within the meaning of section 46.2(g)(1), i.e., the inspector is not working "in mining operations." S. Br. at 18. This begs the point. Mr. Phillips, as a former miner and an experienced inspector, has at least as much knowledge of safety hazards generally as an experienced miner.

The Secretary's next argument relative to section 46.11 is that the judge's finding that Mr. Stone could accompany Mr. Phillips as an "experienced miner" defeats the purpose of section 103(f) in that the walkaround rights are for the purpose of aiding the inspection. S. Br. at 19. This overlooks the fact that Mr. Stone had been working at the quarry for three months and supervising the work of the other miners, while it was the first visit for Mr. Phillips. He was far more familiar with the mine site than Mr. Phillips and, in that respect, certainly could have aided him.

The Secretary's final argument is that the ALJ's interpretation of section 46.11 would have made Mr. Phillips the "guardian of Mr. Stone's safety during the inspection." *Id.* at 19. This is probably the Secretary's best argument, and, in the abstract, has some attraction. However, it overlooks a critical fact in this case. Based on Mr. Stone's letter of April 30, 2008, which has not been contradicted by the Secretary, it appears that after Mr. Stone obtained the classroom training for himself and his employees, Mr. Phillips permitted Mr. Stone to provide the on-the-job safety training to his employees. SCP Show Cause Reply at 2. If Mr. Stone had the ability to provide on-site safety training, he certainly would have been able to accompany Mr. Phillips on his inspection without Mr. Phillips having to become his "guardian."

Section 103(f) provides that a representative of the operator "shall" be given the opportunity to accompany an MSHA inspector, subject to regulations issued by the Secretary. It

is clear that the reasons advanced by the Secretary to justify the exclusion of Mr. Stone from the inspection are not valid, viewed within the context of the Secretary's regulations.

B. The Judge's Vacature of the Citations and Order

While the inspector's denial of Mr. Stone's walkaround rights was improper in this instance, we conclude that vacature of the citations and order was not a remedy that was available to the judge.¹⁰ In section 103(f), Congress spoke directly to the issue of whether an inspector's failure to adhere to section 103(f) can impact MSHA's ability to use that inspection to enforce the terms of the Mine Act. Section 103(f) concludes by stating that "[c]ompliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." 30 U.S.C. § 813(f). That provision must be read as a statement that MSHA's failure, either intentionally or unintentionally, to permit any of the specified walkaround rights under section 103(f), even if contrary to the terms of section 103(f), does not prevent MSHA from taking an enforcement action.

The language covers the issuance of citations and orders for violations of the Mine Act, as occurred in this instance. Section 103(a) of the Mine Act, referenced in section 103(f), authorizes mine inspections for, among other purposes, "determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act." 30 U.S.C. § 813(a). Consequently, the language of section 103(f) plainly means that any citation or order issued in connection with an inspection in which walkaround rights were not granted is valid, regardless of whether the failure to grant the walkaround rights was proper or not.

The legislative history of section 103(f) confirms this interpretation. In considering the legislation that eventually became the Mine Act, the Senate Committee responsible for drafting it stated that, with regard to walkaround rights, the legislation

contains a provision based on that in the [Federal Coal Mine Health and Safety] Act [of 1969 ("Coal Act")] requiring that representatives of the operator and miners be permitted to accompany inspectors in order to assist in conducting a full inspection. *It is not intended, however, that the absence of such participation vitiate any citations and penalties issued as a result of an inspection.*

S. Rep. No. 95-181, at 28 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 616 (1978)

¹⁰ All Commissioners agree that the judge's vacature of the order and citations was not permissible under the Mine Act and must be reversed.

(emphasis added).¹¹ “[A]bsence . . . of participation,” of course, can occur not only when walkaround rights are voluntarily not exercised, but also when the inspector refuses or otherwise fails to permit their exercise.

In his order dismissing the proceeding, the judge did not address the legislative history explaining section 103(f), and only indirectly addressed the pertinent last sentence of that provision. He cited the provision’s qualified requirement that representatives of the operator and of the miners are to be given the opportunity to accompany an MSHA inspector on his inspection, and stated that:

Section 103(f) does not mandate that an inspector must be accompanied by a mine operator during an inspection. Thus, I am cognizant that the failure of a mine operator to accompany an inspector is not a jurisdictional bar to the issuance of citations for violations of the Secretary’s mandatory safety standards observed during the inspection. However, section 103(f) provides the “opportunity” for the mine operator to exercise its right to be present during an inspection. This right cannot arbitrarily be denied. In other words, jurisdiction to enforce does not provide a license to abuse.

30 FMSHRC at 548 n.3 (citing *Emery*, 10 FMSHRC at 289).

The judge thus read section 103(f) to accord to an operator the qualified right to accompany the inspector on an inspection, and the last sentence of section 103(f) to mean only that when an operator does not exercise that right, the inspector could still inspect the mine and issue citations and orders for what he found during his unaccompanied inspection. The judge apparently found that the purpose of the last sentence was to make it clear that an operator’s failure to exercise its walkaround rights could not be used to defeat an inspector’s right to take enforcement actions as a result of the inspection in which the operator did not participate to the extent to which section 103(f) permitted it to participate.

Such a reading misstates the purpose of the final sentence of section 103(f). There is nothing in either section 103(f) or the remainder of the Mine Act that indicates that an operator would have the extraordinary power to essentially nullify an inspection by refusing to participate in it. Rather, the meaning of the final sentence of section 103(f) is found by reading it in the context of the entire subsection.

¹¹ Section 103(h) of the Coal Act provided only for the right of a representative of miners to accompany an inspector during his inspection, and was otherwise silent on the other subjects addressed by section 103(f) of the Mine Act. See 30 U.S.C. § 813(h) (1976).

Section 103(f) states that “[c]ompliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.” 30 U.S.C. § 813(f) (emphasis added). In the absence of a statutory definition or a technical usage of a term, the Commission applies the ordinary meaning of a word in the Mine Act. See *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff’d*, No. 96-1205, 1997 WL 159436 (D.C. Cir. Mar. 3, 1997); *Twentymile Coal Co.*, 30 FMSHRC 736, 750 (Aug. 2008). The term “[c]ompliance” is invariably defined to mean required adherence or obligation, particularly with respect to a statute or other legal provision.¹²

In order to understand how the term “compliance” is used in section 103(f), it is necessary to look at the remainder of the provision. See *Twentymile*, 30 FMSHRC at 750-51 & n.7 (stating that in order to discern a statutory or regulatory standard’s plain meaning, it is necessary to read it in context). “Compliance with this subsection” can only be read in reference to the obligations that section 103(f) imposes.

With regard to a mine operator’s representative accompanying an MSHA inspector or participating in a pre- or post-inspection conference, nothing in section 103(f) can be read to indicate that the operator’s representative is required or obligated to do so. Rather, what section 103(f) clearly does with regard to operators vis-a-vis MSHA and its inspectors is grant a qualified right: “Subject to regulations issued by the Secretary, a representative of the operator . . . shall be given an opportunity to” 30 U.S.C. § 813(f) (emphasis added). A “right” is not something that is “[c]ompli[ed]” with; rather, a right is something that is exercised.

Thus, there is no question that the final sentence can only mean “compliance” by MSHA and its representatives. In an instance such as this, the only party that could prevent an operator’s representative from exercising walkaround rights, and thus the only party that could potentially fail to “compl[y]” with that portion of section 103(f), is the inspector. Moreover, it is MSHA, acting through the inspector, that enforces the Mine Act. Therefore, in the case of an operator’s representative being improperly denied walkaround rights, the last sentence can only mean that the denial does not prevent enforcement actions from being taken by the inspector, the only party that can fail to comply with section 103(f) in such an instance.¹³

¹² See *Webster’s Third New Int’l Dictionary Unabridged* 465 (1993) (“conformity in fulfilling formal or official requirements . . . cooperation promoted by official or legal authority or conforming to official or legal norms”); *The Random House Dictionary of the English Language Unabridged* 419 (2d ed. 1987) (“the act of conforming, acquiescing, or yielding . . . conformity, accordance . . . cooperation or obedience”); *American Heritage Dictionary of the English Language* 272 (New College ed. 1976) (“[a] yielding to a wish, request, or demand; acquiescence”).

¹³ To be sure, section 103(f) also imposes obligations upon operators to permit miners’ representatives to participate in the MSHA inspection process, so there also can be a question of an operator’s “compliance” with section 103(f). Operators can be cited for improperly

Accordingly, we conclude that the judge erred as a matter of law in using the failure to allow walkaround rights as the basis to vacate the citations and order in this case. The final sentence of section 103(f) plainly provides that enforcement actions otherwise properly taken by MSHA cannot be vacated due to the failure of an inspector to comply with any of section 103(f)'s requirements.¹⁴

C. The Impact of the Denial of Mr. Stone's Rights on the Evidence Obtained by the Secretary

This leaves the question of whether a remedy exists for the infringement of Mr. Stone's walkaround rights. We are extremely troubled by the fact that the operator's statutory right to accompany the inspector on the inspection of Mr. Stone's own mine was violated, and MSHA essentially suggests that he has no legal remedy. Our government, represented by MSHA in the one instance and by this Commission in the other, should not take the position that a citizen's rights can be violated, leaving the citizen without any legal remedy. This idea is contrary to our fundamental belief in ordered liberty, and to the development of Anglo-American law since the Magna Carta nearly 800 years ago.

There is a remedy in this case, consistent with the jurisdictional language of section 103(f). In other contexts, we are familiar with the use of an exclusionary rule. If the government violates a citizen's legal rights by, for example, conducting an illegal search, then the fruits of the illegal search or other violation may be excluded from evidence at trial. This is not a new concept. The Supreme Court applied an exclusionary rule to illegally-obtained evidence 95 years ago in *Weeks v. United States*, 232 U.S. 383 (1914).

An exclusionary rule is properly rooted in at least two important policy considerations. First there is "the imperative of judicial integrity." *Elkins v. United States*, 364 U.S. 206, 222 (1960). The Court in *Elkins*, quoting Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 485 (1928), explained that

"[i]n a government of laws, . . . existence of the government will be imperiled if it fails to observe the law scrupulously. . . . For good or for ill, [the government] teaches the whole people by its example. . . . If the government becomes a lawbreaker, it breeds

interfering with a miner representative's walkaround rights. See 43 Fed. Reg. 17,546, 17,547 (Apr. 25, 1978). That, however, is an entirely different situation than the one presented here.

¹⁴ The only possible basis to overcome the statutory language would have to be constitutional in nature, such as a violation of the Due Process Clause. This complex issue has not been presented to us.

contempt for law; it invites every man to become a law unto himself; it invites anarchy.”¹⁵

364 U.S. at 223.

The second policy consideration is deterrence of official misconduct. While this principle did not appear in the early Supreme Court cases such as *Weeks*, it emerged in cases such as *Elkins and Mapp v. Ohio*, 367 U.S. 643 (1961), and has become the dominant rationale for the exclusionary rule. See, e.g., *United States v. Leon*, 468 U.S. 897, 916 (1984); *Terry v. Ohio*, 392 U.S. 1, 12 (1968) (stating that the “major thrust [of the exclusionary rule] is a deterrent one”); see also *Trant*, 1981 Duke L.J. at 683-87.

The use of an exclusionary rule to suppress evidence obtained in violation of a statutory mandate is not a novel concept. The Occupational Safety and Health Review Commission (“OSHRC”) and courts of appeals reviewing that Commission’s decisions have, for at least the past 30 years, acknowledged that evidence may be excluded when the walkaround provision of the OSH Act¹⁶ is violated, when the employer can demonstrate prejudice. See, e.g., *Frank Lill & Son, Inc. v. Sec’y of Labor*, 362 F.3d 840, 846 (D.C. Cir. 2004); *Pullman Power Prods., Inc. v. Marshall*, 655 F.2d 41, 44 (4th Cir. 1981); *Marshall v. Western Waterproofing Co.*, 560 F.2d 947, 951-52 (8th Cir. 1977); *Hartwell Excavating Co. v. Dunlop*, 537 F.2d 1071, 1073 (9th Cir. 1976); *Chicago Bridge*, 535 F.2d at 376; *Accu-Namics, Inc. v. OSHRC*, 515 F.2d 828, 833-34 (5th Cir. 1975).

OSHRC, after originally finding that section 8(e) of the OSH Act confers a substantive walkaround right, the violation of which by OSHA entitled an employer to relief, now holds, in response to the decisions of the courts in *Accu-Namics* and *Western Waterproofing*, that evidence obtained in violation of an employer’s walkaround rights may be excluded when the employer can demonstrate prejudice in the preparation or presentation of its defense. See *Titanium Metals Corp. of America*, 7 O.S.H. Cas. (BNA) 2172 (Jan. 1980); *Laclede Gas Co.*, 7 O.S.H. Cas. (BNA) 1874 (Oct. 1979); *Able Contractors, Inc.*, 5 O.S.H. Cas. (BNA) 1975 (Oct. 1977).

Use of an exclusionary rule by our Commission when statutory walkaround rights are abridged would result in several differences from the approach taken by Judge Feldman. First, the remedy is not dismissal of the citation, but exclusion of evidence obtained by virtue of the illegal action. Thus, this remedy does not raise an issue relating to the last sentence of section 103(f). An exclusionary rule does not implicate Congress’ admonition that compliance with the

¹⁵ As noted in Charles E. Trant, “*OSHA and the Exclusionary Rule: Should the Employer Go Free Because the Compliance Officer Has Blundered?*”, 1981 Duke L.J. 667, 680-85 (1981), judicial integrity has fallen out of favor as a basis for enforcing an exclusionary rule. We agree with Trant that this development is unfortunate for our society.

¹⁶ See note 7, *supra*.

walkaround rights subsection shall not be a jurisdictional prerequisite to the enforcement of the Act. Under an exclusionary rule, the Secretary could issue citations, require abatement of unsafe conditions (which, as Judge Feldman noted, is central to the safety of miners), and propose penalties. The Secretary could only lose the ability to use evidence at trial resulting from the illegal action. This remedy does not affect the “jurisdictional prerequisite” language of the statute. Indeed, it gives full effect to all of the provisions of section 103(f), which is a goal of statutory construction. Norman J. Singer, 2A Sutherland Statutory Construction, § 46.6 (7th ed. 2007).

Second, this remedy would in no way affect citations which did not arise in connection with the denial of the walkaround rights. Thus, in the present case, the section 104(g)(1) order would be completely unaffected because inspector Phillips learned of the absence of training separate from his inspection of the mine site. There could be other citations in this case which would also be unaffected by exclusion of evidence from the inspection itself. This would have to be determined by the judge.

Exclusionary rules are rules of evidence and are historically judge made. This Commission has the authority to promulgate rules of evidence which apply in hearings before our administrative law judges. We can do this either in rulemaking or in our decisions. Hence, there is no legal principle which would prevent us from promulgating an exclusionary rule in this case.

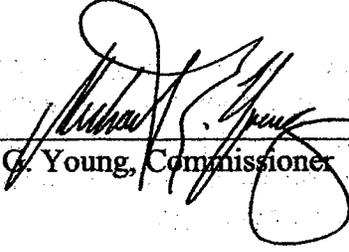
Chairman Duffy does not specifically endorse application of the exclusionary rule for violations of walkaround rights under the Mine Act. He suggests that a judge can “take into account” an improper denial of walkaround rights in considering whether a violation occurred or when setting a penalty for a violation. Slip op. at 19. However, our colleague proposes no standards for an administrative law judge to apply. This approach is not sufficient, and provides inadequate guidance. With an exclusionary rule, a Commission judge would apply a two-step process in a situation where an operator contends that its representative was not permitted to participate in an MSHA inspection under section 103(f). Based on evidence adduced in a suppression hearing or otherwise, the judge first would determine whether the operator’s walkaround rights were indeed violated.¹⁷ If so, the judge would then determine what prejudice,

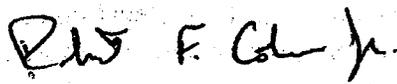
¹⁷ Contrary to Chairman Duffy’s suggestion, we would not mandate a separate suppression hearing. Slip op. at 19. The determination of whether an operator’s walkaround rights were violated could be made in a number of ways. If the relevant facts alleged in a motion to exclude evidence were essentially uncontested, a ruling could be made based on the pleadings. A suppression hearing would only be necessary if material facts relating to exercise of the walkaround rights are disputed. The point where we differ from our colleague, in addition to urging that the Commission provide its judges with standards to apply in these situations, is that we believe that the issue should be addressed prior to hearing.

if any, resulted from the violation.¹⁸ Depending on the outcome of these determinations, the judge could exclude none, some, or all of the evidence resulting from the inspection.

Commissioner Jordan states that the failure of an MSHA inspector to permit a representative of the operator to accompany him on an inspection “does not curtail the inspector’s right to enter and inspect the mine.” Slip op. at 22. We fully agree. As stated *supra*, with an exclusionary rule, the inspector is in no way prevented from entering a mine and ordering the operator to take such action as is necessary to ensure the safety of miners. Commissioner Jordan also states that “[a]dopting a policy designed to deter official misconduct implies that the officials in question have an incentive to skirt the law’s requirements.” *Id.* at 23. We are not implying in any way that MSHA inspectors have an incentive to skirt the law’s requirements, or that such is anything but a very unusual occurrence.

In summary, on remand we would instruct the judge to determine what, if any, evidence proposed for admission by the Secretary should be excluded because of prejudice to the operator. Thereafter, the judge should proceed to trial.


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹⁸ In all of the OSH Act cases cited herein, the courts found that employers either did not allege, or did not establish, prejudice. However, these cases generally involved situations where the courts also found that the OSHA inspectors “substantially complied” with the walkaround requirements of section 8(e) of the OSH Act and/or found that the employers did not assert walkaround rights at the time of the inspection. For example, after the inspection in *Western Waterproofing*, the OSHA compliance officers asked the employer’s representatives if they wanted to accompany the compliance officers back to the site of the inspection, and the employer’s representatives declined the invitation. 560 F.2d at 951. In the present case, Mr. Stone was totally excluded from the Old County Quarry for about a week after the MSHA inspection, and could not have viewed the site as Mr. Phillips had viewed it at the time of the inspection.

Opinion of Chairman Duffy:

I agree with my colleagues, Commissioners Young and Cohen, that MSHA's training regulations did not provide a basis by which Phillips could exclude Stone from the inspection. Even though Stone at the time lacked the required training to work at the mine, there is no disputing that walkaround rights under section 103(f) may be exercised by non-miners.

Further, my colleagues correctly dismiss the Secretary's contentions that Phillips could have also forbade Stone from accompanying Phillips on his inspection because Stone lacked the site-specific hazard training generally required of non-miners by 30 C.F.R. § 46.11. Nothing in the record indicates that Phillips even considered that Stone may have had a right, as SCP's representative, to be included on the inspection as a non-miner; rather, Phillips appears to have viewed the section 104(g) withdrawal order as entirely dispositive of Stone's right to be at the mine in any capacity. Moreover, what little evidence there is shows that not only had Stone been supervising operations at the mine for some time, but when MSHA needed someone to train the other miners at the mine the next week, it looked to Stone to provide that training. For the Secretary to now claim that Phillips could have properly refused Stone's walkaround request because Stone lacked the training required of non-miners makes little sense.¹

I also agree with my colleagues that the plain meaning of the final sentence of section 103(f) prevents a judge from vacating citations and orders issued as the result of an inspection in which the operator was not permitted to participate in contravention of section 103(f). Where I part company with my colleagues is in the proposed "remedy" for an inspector's impermissible failure to grant walkaround rights.

To be sure, an operator's right to observe an inspection, while not inviolable, may be key to its ability to effectively contest an allegation contained in a citation or order. That is particularly the case where the only evidence supporting the allegation is based on an inspection conducted by MSHA from which an operator's representative was absent. In a case in which an operator's representative was improperly denied walkaround rights, it would be unfair to the operator to necessarily accord the inspector's observations the same evidentiary weight they would be accorded if the inspector had been accompanied on his inspection by an operator's representative. In the latter instance, the operator would be able at hearing to contest, or corroborate, any or all of the inspector's account.

¹ I note that my colleagues do not address the judge's determination that section 46.11 training was not required in this instance because of the subsection 46.11(f) exception. See 30 FMSHRC at 549. I believe the judge in so doing misinterpreted section 46.11. By employing the term "you" in multiple instances, the regulation clearly directs *operator* action with regard to site-specific hazard training. It thus would be inconsistent to interpret its final subsection, subsection (f), as contemplating that *an MSHA inspector* could serve as the "experienced miner" that would accompany around mine property any person that had not received the otherwise required training.

While the Secretary in her brief touches upon this subject and comes to the conclusion that the operator was not prejudiced by the denial of walkaround rights in this case (*see* S. Br. at 13-14), the extent to which the citations and orders depend on what the inspector found during his unaccompanied inspection can only be determined after a factual record in this case is developed. It appears that the withdrawal order and some of the citations were issued on the basis of what Phillips learned from speaking with Stone. Thus, any failure by Phillips to permit Stone to accompany him on his inspection should be irrelevant to determining whether the violations alleged in that order and those citations actually occurred, and the appropriate penalties if they did occur.

Other citations, however, contain allegations of violations derived from the inspection of the mine property itself. In those instances, the judge may find during the hearing that the inspector's improper denial of walkaround rights is preventing the operator from presenting probative evidence in support of its contest. If he so finds, I believe the judge, in deciding whether the Secretary established the violation and, if so, the appropriate penalty for that violation, has the discretion to take into account the fact that the operator was so handicapped in its defense.

I believe this approach is much simpler than that of my colleagues, who would have a judge in an instance such as this hold a separate suppression hearing on any evidence obtained as the result of an inspection from which an operator has been excluded in violation of section 103(f). Slip op. at 14-17. Given that this issue so rarely arises, I do not see the need for Commission judges to conduct separate suppression hearings.

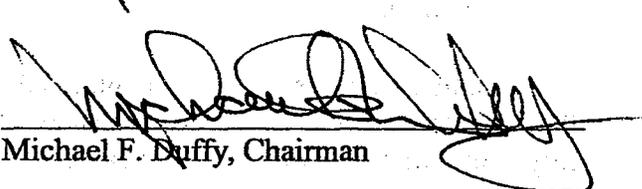
Moreover, as my colleagues admit, evidence would only be excluded if the operator could establish prejudice to its defense from the inspector's refusal to grant a walkaround rights request. *Id.* at 16-17. I believe the existence and extent of such prejudice is best determined during the hearing on the merits of the violation, not in a separate pre-hearing proceeding.²

Further, I believe that, in the end, Commission judges are in the best position to accord weight to evidence, including that which was obtained during an inspection in which walkaround rights were improperly denied. I would thus not prevent them from considering such evidence, but rather entrust them with taking the circumstances of the inspection into account in reaching their decisions on violations and penalties.

Finally, I cannot help but think that the acrimony that appears to have developed in this case between MSHA and the operator could have been avoided if MSHA and Inspector Phillips had handled the matter differently. Although it is up to MSHA to determine its inspection

² While my colleagues suggest that a separate proceeding on suppression may not be necessary, and that the issue can simply be addressed through pleadings (slip op. at 16 n.17), I am inclined to doubt that a judge would want to rule on the essentially factual question of prejudice without a hearing.

techniques, the goals of the Mine Act clearly would have been better served if Phillips' first visit to the Old County Quarry had been carried out as less of a Mine Act enforcement effort and more as an opportunity to educate a new operator regarding its obligations under the Mine Act. In my opinion, MSHA and Phillips could have done so while keeping well within both the letter and the spirit of the Mine Act.



Michael F. Duffy, Chairman

Opinion of Commissioner Jordan:

I agree that the judge erred as a matter of law when he vacated the citations and order issued by the Mine Safety and Health Administration (“MSHA”) inspector who, the judge concluded, had erroneously deprived the operator of its right, under section 103(f) of the Mine Act, to accompany the inspector.¹ I therefore join my colleagues in vacating the judge’s dismissal order and remanding these penalty cases for further proceedings. I write separately, however, because I disagree with the views expressed by my colleagues regarding the ability of the Secretary to present her case on remand.

My colleagues hold the view that SCP was wrongly deprived of its right to accompany Inspector Phillips,² and that the deprivation of this statutory right should impact the Secretary’s ability to present evidence in support of the citations and order that were issued by the inspector. Specifically, Commissioners Cohen and Young believe the Commission should apply an exclusionary rule to the evidence the inspector obtained during his inspection. Slip op. at 14-17.

In promulgating the walkaround rights in section 103(f), Congress pointedly stated that “compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act.” My colleagues agree that this language bars the outright dismissal of the inspector’s citations and order, but they maintain that excluding evidence obtained during the inspection “does not raise an issue relating to the last sentence of section 103(f).” Slip op. at 15. The evidence is appropriately excluded because, in their view, it was obtained “by virtue of the illegal action.” *Id.* I disagree. Unlike in Fourth Amendment cases, to which my colleagues cite, the health and safety violations observed by Inspector Phillips do not constitute evidence obtained by virtue of an illegal action.

¹ In section 103(f), Congress provided in relevant part that:

Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant the provisions of subsection (a) for the purpose of aiding such inspection and to participate in pre-or post-inspection conferences held at the mine.

30 U.S.C. § 813(f).

² My colleagues engage in an extensive discussion of why the inspector was not justified in denying SCP the opportunity to accompany him. Slip op. at 11-14, 18. Because it is not relevant to my analysis, I do not address those arguments.

The Secretary's evidence regarding the health and safety hazards at issue here was obtained during the course of a valid inspection. The inspector's right to enter and inspect the mine flows from section 103(a), which provides in pertinent part:

Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. . . . For the purpose of making any inspection or investigation under this Act, the Secretary . . . with respect to fulfilling his responsibilities under this Act, . . . shall have a right of entry to, upon, or through any coal mine.

30 U.S.C. § 813(a).

Despite the mandatory language of the walkaround provision ("shall be given an opportunity"), an inspector's failure to provide an opportunity to accompany him does not curtail the inspector's right to enter and inspect the mine. There is no language in section 103(a) that makes the inspector's right to enter the mine, or to conduct an inspection and cite conditions that violate mandatory standards, contingent upon the inspector's compliance with the walkaround provision under section 103(f). Indeed Congress made that fact clear when it stated: "Compliance with this subsection [103(f)] shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." 30 U.S.C. § 813(f).

In contrast, evidence obtained in violation of the Fourth Amendment's protection from unreasonable searches is information obtained by virtue of an illegal action. The failure to comply with the Fourth Amendment's probable cause or warrant requirement necessarily makes the ensuing search illegal and unreasonable. When a United States Marshal invades a house without a warrant, he acts without the sanction of law. *Weeks v. United States*, 232 U.S. 383 (1914). If the Marshal obtains evidence of a crime, that evidence has been obtained at the expense of the suspect's Fourth Amendment rights. Had that Marshal complied with the Constitution's requirements, the Marshal would not have been able to enter the house and would not have obtained the evidence.

This is not the case with MSHA inspections, even ones that fail to comply with the walkaround right. Despite his refusal to let the mine owner accompany him, Inspector Phillips was acting within the sanction of the law when he conducted his inspection. Section 103(a) authorized his entry upon and his inspection of the mine. Moreover, unlike the U.S. Marshal who fails to comply with the Constitution's requirements, Inspector Phillip's compliance with section 103(f) would not have restricted his ability to enter the mine, nor would it have limited his inspection in any way. His compliance with section 103(f), in other words, would have resulted in the same inspection and would have allowed him to view the same conditions that led

to the citations and order at issue here. Thus, contrary to my colleagues' claim, the evidence relied on by the Secretary is not properly characterized as evidence obtained by virtue of an "illegal action," or "in violation of a statutory mandate." Slip op. at 15. Because the evidence here was obtained as a result of the inspector conducting a valid, legal inspection authorized by section 103(a), we do not face the issue confronting the courts in Fourth Amendment cases: whereby to admit the evidence would be to sanction the use of illegally obtained information against the individual whose rights have been violated. *United States v. Leon*, 468 U.S. 897, 928 (1984) (Brennan, J., dissenting). Some Supreme Court Justices have described such action as jeopardizing the integrity of the courts themselves. *Id.* at 933; 468 U.S. at 976-78 (Stevens, J., concurring and dissenting).

However, even if the Commission need not be concerned that admitting the evidence obtained as a result of Inspector Phillip's inspection would make it complicit in an illegal act, my colleagues point out that policy considerations favor an exclusionary rule as a deterrence of official misconduct. I question whether the deterrence rationale is even relevant here. Inspector Phillips' refusal to allow Mr. Stone to accompany him does not appear to be an example of official misconduct. Rather, it appears that the inspector was acting according to what he believed the law required. Before inspecting the mine's physical plant, Inspector Phillips asked Mr. Stone about the training of the miners working there. When Phillips learned that neither Mr. Stone nor SCP's other two miners had received the 24 hours of training MSHA requires of new miners under 30 C.F.R. §46.5(a), Phillips issued a withdrawal order, pursuant to section 104(g) of the Mine Act, 30 U.S.C. § 814(g)(1). The Mine Act requires that such order be issued when the inspector determines that a miner has not received the requisite training. The miner is considered to be a hazard to himself and to others and the statute requires the immediate withdrawal of the miner. Once withdrawn, the miner is "prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act." *Id.* As the Supreme Court has noted, the deterrence factor is not appropriately applied in situations where the government official had a good faith reasonable belief that he or she was acting in accordance with the law. *Leon*, 468 U.S. at 919. Given the prohibitory language of section 104(g), it appears quite likely that Inspector Phillips considered he had no choice but to refuse Mr. Stone's request that he be allowed to remain at the mine and accompany the inspector.

Adopting a policy designed to deter official misconduct implies that the officials in question have an incentive to skirt the law's requirements. In Fourth Amendment cases, that incentive is obvious. Skirting the Constitution's requirements allows the police to get evidence they would not otherwise have obtained. As discussed above, that is not the situation under the Mine Act. Avoiding the walkaround requirement of section 103(f) does not provide the MSHA inspector with any greater access to information regarding health and safety violations. In fact, it would be more appropriate to say that the inspector is deprived of information: the information that would have been supplied to him by the representative of the owner or the representative of the miner who should have been allowed to accompany him.

Under the procedure proposed by my colleagues Cohen and Young, prior to excluding any evidence, the judge should determine what prejudice, if any, resulted from the inspector's violation of section 103(f). As my colleagues note, slip op. at 15, the Occupational Safety and Health Review Commission ("OSHRC") follows a policy whereby evidence obtained in violation of an employer's walkaround right may be excluded when the employer can demonstrate prejudice in the preparation or presentation of its defense. It is worth noting that the Occupational Safety and Health Act's walkaround right, 29 U.S.C. § 657(e), does not include the admonition contained in the last sentence of section 103(f), to wit: that "[c]ompliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." It is also worth noting that OSHRC has adopted the good faith exception to the exclusionary rule. *See Sanders Lead Co.*, 15 O.S.H. Cas. 1640 (May 1992) (explicitly adopting the good faith exception to the exclusionary rule).

SCP has not alleged any prejudice that resulted from Inspector Phillip's refusal to allow its owner, Mr. Stone, the opportunity to accompany him.³ Indeed in his letter to Judge Feldman, Mr. Stone rebuts the allegations contained in the citations, accuses the inspector of "lying on and about the tickets" and assures the judge he "look[s] forward to proving this in court." SCP Show Cause Reply at 3.

Chairman Duffy has not advocated for an exclusionary rule but would allow the judge to "take into account an improper denial of walkaround rights" when that denial "may have prevented the operator from presenting probative evidence in support of its contest." Slip op. at 19. For the same reason that I believe an exclusionary rule is inappropriate, I believe it would be improper for the judge to take the walkaround denial into account in deciding whether the Secretary established a violation. Moreover, with regard to determining the appropriate penalty, the statute is explicit as to what factors the Commission should consider.⁴ The inspector's failure to afford the operator the opportunity to accompany him or her on the inspection is not one of them.

³ Indeed, as Commissioners Cohen and Young acknowledge (slip op. at 17 n.18), none of the OSHA cases cited by him involve an employer who could establish prejudice.

⁴ In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in achieving rapid compliance after notification of a violation.

For the foregoing reasons, I would vacate the judge's dismissal order and remand the case to him for further proceedings.


Mary Lu Jordan, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 11, 2009

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

v.

ROCKHOUSE ENERGY MINING CO.

Docket No. KENT 2008-1363
A.C. No. 15-17651-150064

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On July 29, 2008, the Commission received from Rockhouse Energy Mining Co. ("Rockhouse") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

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

This case involves an assessment, issued by MSHA on May 8, 2008, which includes a large number of citations and orders. The operator represents that on May 16, 2008, its Safety Director reviewed the proposed penalty assessment and marked the assessments which the company intended to contest. The operator attached to its motion a copy of MSHA Form 1000-179, indicating that it intended to contest 15 assessments totaling \$229,499.00. The operator further contends that the Safety Director gave the Form 1000-179 to his administrative assistant for faxing to the company's attorneys in order that the marked assessments be contested. The affidavit of the Safety Director states that he did not learn that the assessments were delinquent until on or about July 20, 2008, when the company's attorneys so informed him. The affidavit of the administrative assistant states that she does not have any recollection of receiving the Form 1000-179 from the Safety Director at any time. However, after the Safety Director learned of the delinquencies and inquired about them, the administrative assistant discovered a copy of the Form 1000-179 in the appropriate file, but there was no accompanying fax transmission sheet indicating that the form had ever been sent to the operator's attorneys.

In addition to the \$229,499.00 which is delinquent in this case, the Form 1000-179 indicates that as of May 8, 2008, the operator was also delinquent in four other assessment cases, with total penalties of \$61,680.79.

We further note that in Docket No. KENT 2007-280, this same operator sought reopening of a final assessment in a situation where it faxed part, but not all, of the pages included in the proposed assessment to its attorneys for submission of a contest to MSHA. Consequently, the operator was obliged to request reopening of the assessments contained on the page it failed to fax to its attorneys. These are the same type of internal system failures which occurred in the present case.

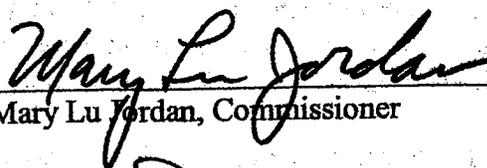
The operator has not indicated that it has any kind of back-up or tracking system by which it can determine whether faxes or other communications intended to be sent to its attorneys for transmittal of assessment contests to MSHA have actually been received and processed. If such a system had been in place in this case, the Safety Director would have learned, within 30 days of receipt of the proposed assessments, that the notice of contest had not been sent to MSHA. Thus, the Safety Director would have been able to file a timely contest even despite the mis-communication with the administrative assistant.

The Secretary states that she does not oppose the reopening of the proposed penalty assessment.¹

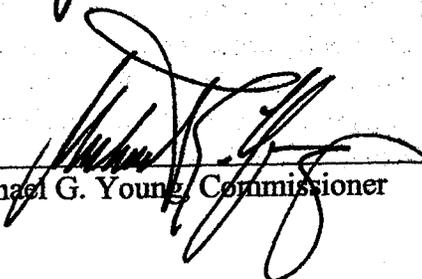
¹ We consider the Secretary's position in this case in light of the provisions of the "Informal Agreement between Dinsmore & Shohl Attorneys and Department of Labor – MSHA – Attorneys Regarding Matters Involving Massey Energy Company Subsidiaries" dated September 13, 2006. Therein, the Secretary agreed not to object to any motion to reopen a matter in which any Massey Energy subsidiary failed to timely return MSHA Form 1000-179 or inadvertently paid a penalty it intended to contest so long as the motion to reopen is filed within a

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

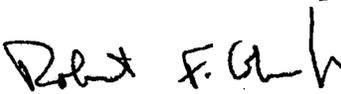
In determining whether to reopen this case, the Chief Administrative Law Judge should consider whether the operator exercised due diligence in its efforts to timely contest the penalty assessments, particularly in light of the size of the proposed penalty, the existence of other substantial delinquencies, the operator's history of similar prior untimely contests, and the lack of a back-up or tracking system.



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



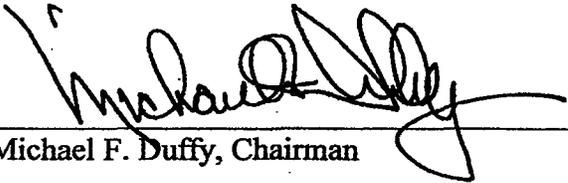
Robert F. Cohen, Jr., Commissioner

reasonable time. Thus, we assume that the Secretary is not considering the substantive merits of a motion to reopen from any Massey Energy subsidiary so long as the motion is filed within a reasonable time. Such agreements obviously are not binding on the Commission, and the Secretary's position in conformance with the agreement in this case has no bearing on our determination on the merits of the operator's proffered excuse.

Chairman Duffy, dissenting:

I cannot agree with the majority's remand instructions in this case. Section 113(b)(2) of the Mine Act states that the Commission's judges are to "carry out the functions of the Commission." 30 U.S.C. § 823(b)(2). The terms of the remand would have the Chief Administrative Law Judge or his designee conduct a proceeding that would inquire into, among other things, the operator's "due diligence in its efforts to timely contest the penalty assessments" at issue here, "the existence of other substantial delinquencies" by the operator in paying penalty assessments, and the operator's "lack of a back-up or tracking system." While I am not unsympathetic to what motivates the majority in this case – an operator whose internal handling of proposed penalty assessments appears less than satisfactory – I simply cannot see how the policing the Commission is undertaking in this case is a function of this Commission under the Mine Act. In addition, the question of whether the Commission, in ruling on motions to reopen, should consider the type of evidence the majority's remand order is designed to elicit is better addressed as part of the Commission's presently pending rulemaking on such motions, rather than within an individual order issued among the many the Commission is issuing these days.

The Secretary of Labor, who has an even greater interest than the Commission in having this case efficiently processed, is not opposing reopening. Because I do not believe the objectives of the Mine Act are furthered by the proceeding envisioned by the majority, I would instead grant reopening and have the Secretary file a petition for assessment of penalty within 45 days. *See* 29 C.F.R. § 2700.28.



Michael F. Duffy, Chairman

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 13, 2009

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

v.

PANZER COAL INC.

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Docket No. KENT 2009-1032
A.C. No. 15-18161-179573

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On May 7, 2009, the Commission received from Panzer Coal Inc. ("Panzer") a letter seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

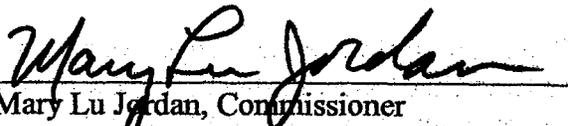
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

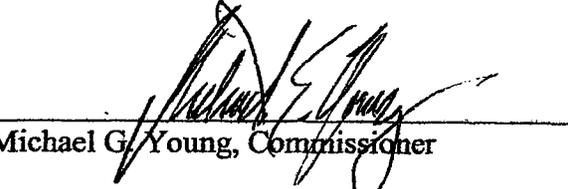
However, we have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

In his letter seeking reopening of Proposed Assessment No. 000179573, the vice president/treasurer of Panzer explained that he failed to contest the proposed assessment in a timely manner due to the birth of his child and the circumstances surrounding that occasion. The operator promptly sought re-opening of the assessment after realizing its mistake. The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

Having reviewed Panzer's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 13, 2009

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

v.

CONSOLIDATED CONTAINER CO., LP

Docket No. SE 2009-551-M

A.C. No. 22-00582-180213 V100

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On May 26, 2009, the Commission received from Consolidated Container Company, LP ("CCC") a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

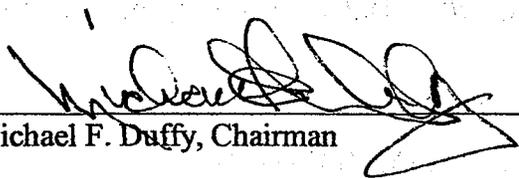
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

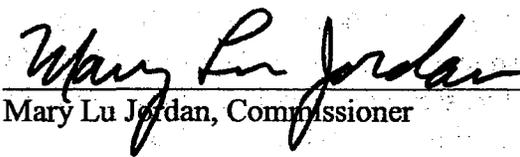
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

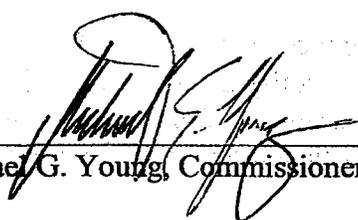
for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

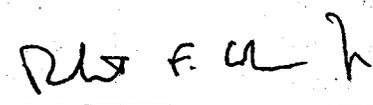
The record indicates that the operator was not familiar with Mine Act procedures and inadvertently sent the form contesting the proposed penalties two days late. The record further indicates that prior to receiving the proposed assessment, the operator had contacted MSHA to attempt to contest the citations. The Secretary states that she does not oppose reopening the proposed penalty assessment.

Having reviewed CCC's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Michael F. Duffy, Chairman


Mary Lu Jordan, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 13, 2009

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

v.

CHEMICAL LIME COMPANY
OF ALABAMA

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Docket No. SE 2009-552-M
A.C. No. 01-00003-170058

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On May 28, 2009, the Commission received from Chemical Lime Company of Alabama ("Chemical Lime") a motion by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On December 3, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000170058 to Chemical Lime, proposing civil penalties for Citation Nos. 6083927 and 6083928. Chemical Lime states that it indicated on the proposed assessment that it was contesting Citation No. 6083928 and forwarded the proposed assessment to its counsel by electronic mail in December 2008 for submission to MSHA. The operator states that its counsel did not receive the e-mail. In March 2009, Chemical Lime received a delinquency notice from MSHA regarding the penalty assessment. Chemical Lime and its counsel investigated the matter, but the investigation did not reveal the reason for the delivery failure.

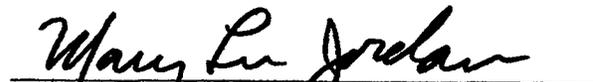
The Secretary states that she does not oppose the reopening of the proposed penalty assessment.

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

Having reviewed Chemical Lime's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.



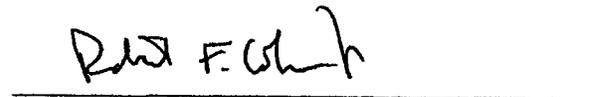
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 13, 2009

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

v.

NEWMONT USA LIMITED

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Docket No. WEST 2009-396-M
A.C. No. 26-02512-154038

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On January 13, 2009, the Commission received a letter from Newmont USA Limited ("Newmont") seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On June 18, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000154038 to Newmont, proposing civil penalties for 48 citations. Newmont states that on April 11, 2008, before it received the proposed assessment, it contested two of the citations, Citation Nos. 6437773 and 6437775. It asserts that it contested the proposed penalties of 15 of the citations listed on Proposed Assessment No. 000154038, and that MSHA received the contest on August 4, 2008 (which, according to the Secretary, was sent beyond the statutory deadline for mailing the contest). The operator further explains that it paid the proposed penalties for the remaining 33 citations, and that payment was received by MSHA on August 26, 2008. The operator submits that it received a delinquency notice from MSHA dated September 11, 2008, which included Citation Nos. 6437773 and

6437775.¹ Newmont contends that the delinquency notice created confusion as to the amount due and the true status of the cases filed with the Commission.

The Secretary opposes reopening the proposed assessment. She states that the operator fails to explain why, after it was informed of the delinquency, it took as long as it did to request reopening. The Secretary explains that the proposed assessment became a final order on July 23, 2008. The operator mailed its contest of the proposed penalties on July 29, 2008. She states that MSHA sent Newmont a notice on August 7, 2008, and again on September 11, 2008, stating that payment of the penalties was delinquent. The Secretary emphasizes that the Commission received Newmont's request to reopen approximately five months after the first notice and that the operator did not explain the delay.

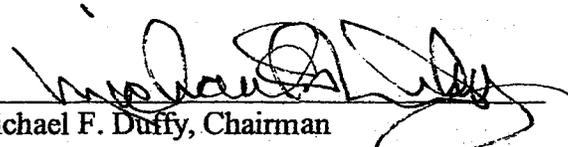
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the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

In considering whether an operator has unreasonably delayed in filing a motion to reopen a final Commission order, we find relevant the amount of time that has passed between an operator's receipt of a delinquency notice and the operator's filing of its motion to reopen. *See, e.g., Left Fork Mining Co.*, 31 FMSHRC 8, 11 (Jan. 2009). Although the Secretary raised the issue that Newmont failed to explain why, after it was informed of the delinquency, it took as long as it did to request reopening, the operator did not file a reply providing an explanation.²

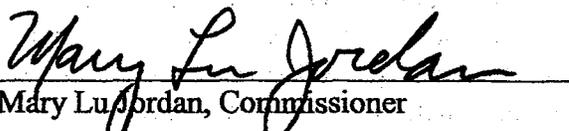
¹ Even though the operator filed contests of Citation Nos. 6437773 and 6437775, it must also separately contest the proposed penalties for those citations. *See* 29 C.F.R. § 2700.21. Because the operator failed to timely contest those penalties, they were deemed final Commission orders and appropriate for collection efforts. *See* 29 C.F.R. § 2700.27.

² An operator's failure to respond to a delinquency notice may constitute grounds for dismissal with prejudice. *See Left Fork*, 31 FMSHRC at 10-11. Accordingly, an operator who does not explain why, after it was informed of a delinquency, it took as long as it did to request reopening, does so at its peril. We encourage parties seeking reopening to provide further information in response to pertinent questions raised in the Secretary's response. *See, e.g., Climax Molybdenum Co.*, 30 FMSHRC 439, 440 n.1 (June 2008).

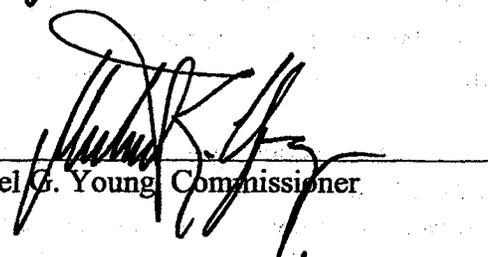
Having reviewed Newmont's request and the Secretary's response, we conclude that Newmont has failed to provide an explanation for its failure to timely contest Proposed Assessment No. 000154038. Newmont's failure to explain the delay in contesting the proposed penalties and in responding to the delinquency notices does not provide the Commission with an adequate basis to reopen. *See, e.g., Petra Materials*, 31 FMSHRC 47, 49 (Jan. 2009). Accordingly, we deny without prejudice Newmont's request to reopen. The words "without prejudice" mean Newmont may submit another request to reopen so that it can contest the citations and penalty assessments.³



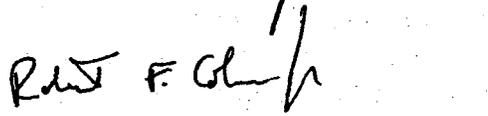
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

³ If Newmont submits another request to reopen, it must establish good cause for not contesting the citations and proposed penalties within 30 days from the date it received the proposed penalty assessments from MSHA. Under Rule 60(b) of the Federal Rules of Civil Procedure, the existence of "good cause" may be shown by a number of different factors including mistake, inadvertence, surprise or excusable fault on the part of the party seeking relief. Newmont should include a full description of the facts supporting its claim of "good cause," including how the mistake or other problem prevented Newmont from responding within the time limits provided in the Mine Act, as part of its request to reopen the case. Newmont should also explain its delay in responding to the delinquency notices. In addition, Newmont should submit copies of supporting documents with its request to reopen the case.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 13, 2009

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

v.

MYRICK CONSTRUCTION
COMPANY, INC.

Docket No. SE 2008-961-M
A.C. No. 31-00718-151259 MNK

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, 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. (2006) ("Mine Act"). On August 15, 2008, the Commission received from Myrick Construction Company, Inc. ("Myrick") a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

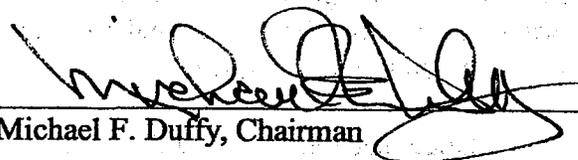
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

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

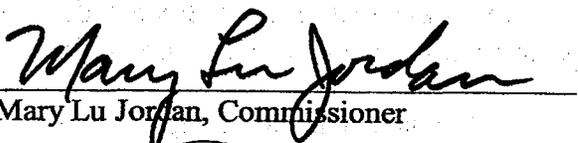
On May 20, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Penalty Assessment No. 000151259. Myrick paid the penalty in a timely fashion. In July 2008, Myrick learned that MSHA was initiating a special investigation against two of its employees under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), based on allegations contained in the penalty assessment. Myrick seeks to reopen the penalty assessment and consolidate it with the section 110(c) proceedings. It asserts that it was not aware that payment of the penalty could be construed as an admission of a violation and used as evidence against its personnel in subsequent proceedings.

The Secretary opposes reopening and submits that under the doctrine of collateral estoppel, an operator's failure to contest a proposed penalty does not estop agents of the operator from litigating any aspect of the underlying violation. The Secretary states that she "traditionally has not argued that an operator's payment of or failure to contest a proposed assessment estops agents of the operator from litigating any aspect of the underlying violation in a subsequent section 110(c) proceeding, and the Secretary will not so argue if a subsequent section 110(c) proceeding is initiated here." S. Opp'n. at 4. The Secretary also contends that the operator's professed ignorance of, and unfamiliarity with, the Mine Act is not a basis for reopening.

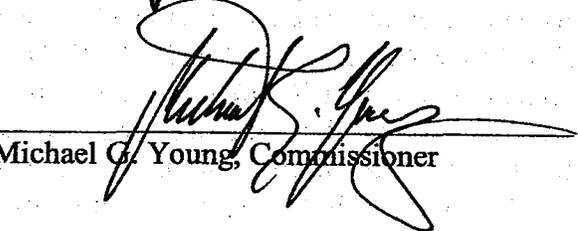
Based on the Secretary's representation that, if a section 110(c) proceeding is initiated, she will not argue that Myrick's payment of or failure to contest a proposed assessment estops the agents of the operator from litigating any aspect of the underlying violation, the grounds for the operator's contentions are unfounded. Accordingly, we hereby dismiss Myrick's request to reopen with prejudice.



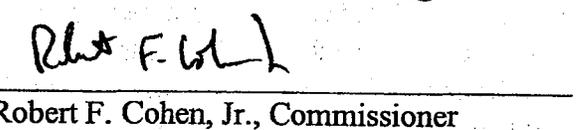
Michael F. Duffy, Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

August 19, 2009

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

v.

MICHAEL DIAMOND

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Docket No. KENT 2009-1224
A.C. No. 15-18775-18276A

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) (“Mine Act”). On June 22, 2009, the Commission received from Michael Diamond a motion by counsel seeking to reopen a penalty assessment against Diamond under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that may have become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

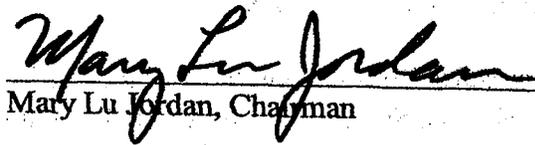
Under the Commission’s Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

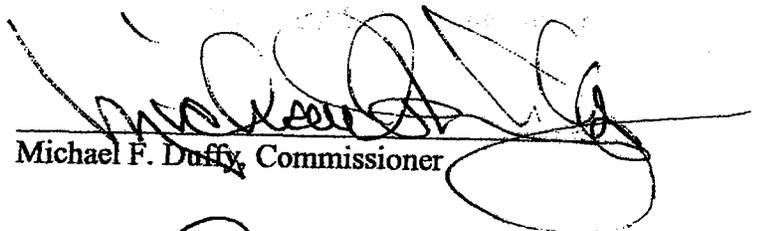
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders. *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect. *See* 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a

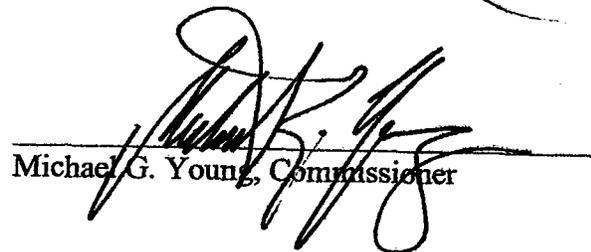
harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

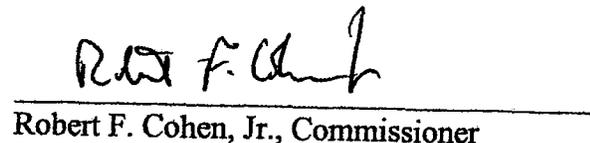
Mr. Diamond states that MSHA did not send the proposed assessment to his counsel, as he had previously requested to MSHA. Diamond further states that he was unaware that his counsel had not received a copy of the assessment, and that by the time he realized it and had counsel return the assessment form, it was sent to MSHA one day late. The Secretary states that she does not oppose reopening.

Having reviewed Diamond's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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August 19, 2009

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

v.

SOUTH RIDGE GRANITE QUARRY

Docket No. SE 2009-625-M
A.C. No. 09-00961-168437

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) ("Mine Act"). On June 15, 2009, the Commission received a motion by counsel to reopen a penalty assessment issued to South Ridge Granite Quarry ("South Ridge") that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

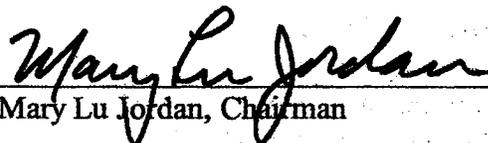
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

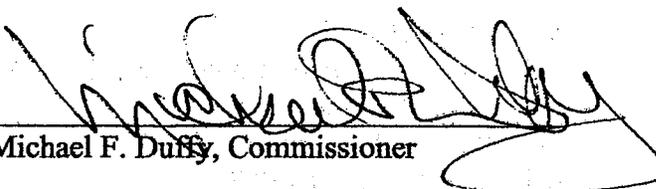
The Department of Labor's Mine Safety and Health Administration ("MSHA") issued South Ridge Assessment No. 000168437 on November 12, 2008, proposing a penalty for a single citation MSHA had issued to South Ridge two months earlier. According to South Ridge, November 12, 2008, was also the date it had held an informal conference with MSHA representatives regarding the citation. The operator states that it consequently concluded that it did not have to respond to the proposed assessment when it subsequently received it, nor to a later MSHA delinquency notice it received, and that the informal conference would eventually result in a formal hearing on the matter. South Ridge, which states that it had never before contested a penalty assessment, did not consult with its counsel on this matter until it received a Treasury Department notice regarding the assessment dated May 23, 2009. Counsel

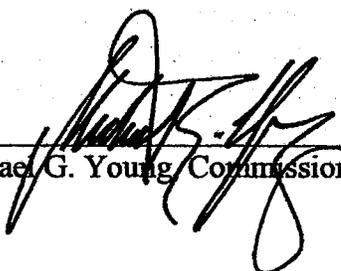
subsequently filed the motion to reopen. The Secretary of Labor does not oppose the request to reopen.

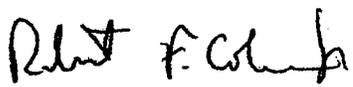
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) (“*JWR*”). In evaluating requests to reopen final section 105(a) orders, the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

Having reviewed South Ridge's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.¹


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

¹ We grant reopening even though South Ridge, because of its confusion about the effect of the conference, did not move to reopen the assessment until nearly six months had passed since the assessment had become a final order. However, operators should be aware that, in general, a delay of such length decreases the likelihood that the Commission will look favorably upon a request to reopen.

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601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

August 19, 2009

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

v.

PACIFIC ROCK PRODUCTS, LLC

:
:
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Docket No. WEST 2009-1003-M
A.C. No. 45-03039-176249

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

ORDER

BY THE COMMISSION:

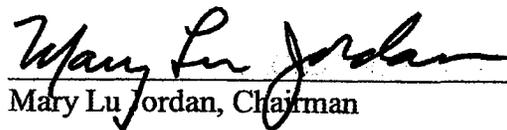
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On June 18, 2009, the Commission received from Pacific Rock Products, LLC ("Pacific Rock") a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

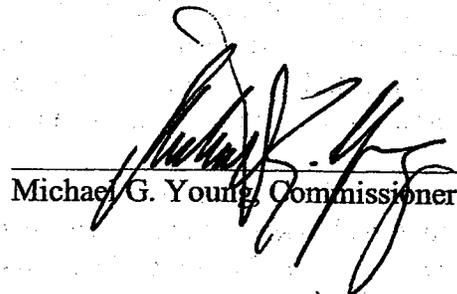
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

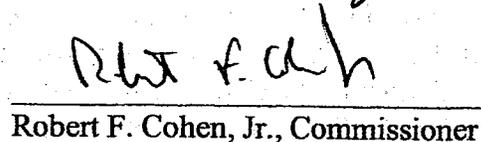
On February 10, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued proposed penalty assessment No. 000176249 to Pacific Rock, for seven citations MSHA had issued to the operator the previous month. Pacific Rock states that it intended to contest the proposed penalties, but failed to do so as a result of "management changes" necessitated by economic conditions. The Secretary of Labor states that she does not oppose reopening the proposed assessment.

Having reviewed Pacific Rock's request and the Secretary's response, we conclude that Pacific Rock has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Pacific Rock's statement that it failed to file a timely contest due to "management changes" made in its "Health and Safety Department for the Pacific Northwest" in late 2008 does not provide the Commission with an adequate basis to justify reopening an assessment that did not become a final order until March 19, 2009. Accordingly, we deny without prejudice Pacific Rock's request. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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August 19, 2009

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

v.

PENNY CREEK QUARRY, LLC

Docket No. WEST 2009-1016-M
A.C. No. 45-03356-179479

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) ("Mine Act"). On June 22, 2009, the Commission received from Penny Creek Quarry, LLC ("Penny Creek") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

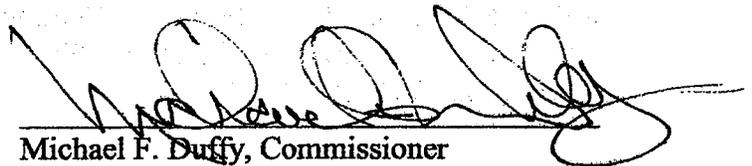
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

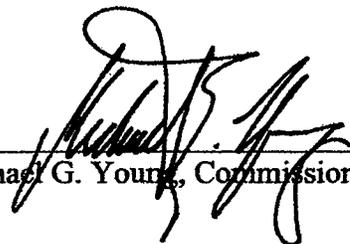
However, we have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

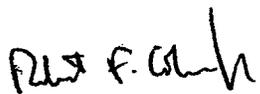
Penny Creek states that it received the assessment at issue, but its bookkeeper at that time filed it away and then stopped working at the mine without notice. Penny Creek explains that no one else at the mine was aware of the assessment until it received a delinquency notice from MSHA dated June 10, 2009. The operator states that it filed the motion immediately upon receipt of the delinquency notice, and indicates that it wishes to contest all three penalties proposed in the assessment. The Secretary states that she does not oppose reopening the assessment.

Having reviewed Penny Creek's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 25, 2009

SECRETARY OF LABOR,	:	Docket No. KENT 2009-924
MINE SAFETY AND HEALTH	:	A.C. No. 15-07082-170350
ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2009-1198
v.	:	A.C. No. 15-07082-178373
	:	
FREEDOM ENERGY MINING COMPANY	:	Docket No. KENT 2009-1341
	:	A.C. No. 15-07082-180991

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) (“Mine Act”). On April 16, June 16, and July 21, 2009, the Commission received motions by counsel to reopen three penalty assessments issued to Freedom Energy Mining Company (“Freedom”) which may have become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

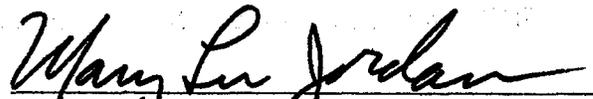
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

According to Freedom, none of the assessments – No. 000170350 issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) on December 4, 2008, No. 000178373 issued on March 5, 2009, and No. 000180991 issued on April 2, 2009 – were received by the operator at its designated address. Instead, MSHA’s records show that each time

¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers KENT 2009-924, KENT 2009-1198, and KENT 2009-1341, all captioned *Freedom Energy Mining Co.* and involving similar procedural issues. 29 C.F.R. § 2700.12.

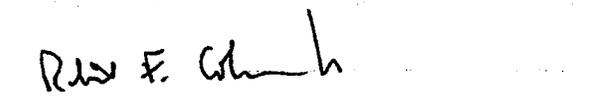
Federal Express returned the packages containing the assessments to MSHA. The Secretary concedes that the deliveries never took place, and states that she and Freedom have agreed that future assessments will be mailed to a Post Office Box. The Secretary further reports that the new arrangement is in place as of April 9, 2009.

Having reviewed Freedom's requests and the Secretary's responses, we conclude that none of the assessments became a final order of the Commission, and thus reopening is not necessary. Accordingly, we deny the operator's requests as moot and remand this matter to the Chief Administrative Law Judge for further proceedings as appropriate, pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Consistent with Rule 28, the Secretary, if she has not already done so, shall file petitions for assessment of penalty in each docket within 45 days of the date of this order, based on the penalties Freedom indicated it wished to contest on the forms it attached to its motions to reopen. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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August 25, 2009

SECRETARY OF LABOR,	:	Docket No. WEVA 2008-879
MINE SAFETY AND HEALTH	:	A.C. No. 46-09020-123653
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 2008-880
	:	A.C. No. 46-09020-130296
DOUBLE BONUS COAL COMPANY,	:	Docket No. WEVA 2008-1354
	:	A.C. No. 46-09020-148893
	:	
	:	Docket No. WEVA 2008-1355
	:	A.C. No. 46-09020-145248
DYNAMIC ENERGY, INC.,	:	Docket No. WEVA 2008-1356
	:	A.C. No. 46-09062-147434
	:	
	:	Docket No. WEVA 2008-1448
	:	A.C. No. 46-09062-144939
	:	
FRONTIER COAL COMPANY,	:	Docket No. WEVA 2008-1357
	:	A.C. No. 46-09227-145258
	:	
	:	Docket No. WEVA 2008-1358
BLUESTONE COAL CORPORATION,	:	A.C. No. 46-08684-146783
	:	
	:	Docket No. WEVA 2008-1661
	:	A.C. No. 46-08684-150175
	:	
	:	Docket No. WEVA 2008-1359
JUSTICE HIGHWALL MINING, INC.,	:	A.C. No. 46-09123-147164
	:	
	:	Docket No. WEVA 2009-727
	:	A.C. No. 46-09031-162833
and	:	
	:	Docket No. WEVA 2008-1563
PAY CAR MINING, INC.	:	A.C. No. 46-08884-148891
	:	
	:	Docket No. WEVA 2009-812
	:	A.C. No. 46-08884-170006

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

ORDER

These matters arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). In each of the 13 captioned cases, the Commission received a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a). Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty from the Department of Labor’s Mine Safety and Health Administration (“MSHA”) must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. *Id.*

In 11 of the 12 cases in which she filed responses, the Secretary originally did not oppose reopening of the assessments. While separate orders in those 12 cases were being finalized by the Commission, in the thirteenth case, *Pay Car Mining, Inc.*, Docket No. WEVA 2009-812 (“*Pay Car II*”), the Secretary, in a response dated March 2, 2009, opposed reopening the case. She requested that if the Commission voted to grant relief, it order the operators to prepay the penalties. She also indicated that she planned to file supplemental responses in the 11 other cases in which she had not opposed reopening. The Secretary did so shortly thereafter, filing a series of supplemental responses opposing those requests for relief on the same or similar grounds as stated in her response in Docket No. WEVA 2009-812.¹

Because the Secretary’s filings addressed the interrelationship between the operators in the cases and raised very serious issues regarding the operators’ requests to reopen when those requests are considered together,² the Commission consolidated all 13 cases and issued a

¹ In *Justice Highwall Mining, Inc.*, Docket No. WEVA 2009-727, the Secretary opposed reopening immediately in response to the motion to reopen, and did not file a supplemental response.

² In her March 2, 2009, submission, the Secretary stated that she

opposes reopening in this case and the other cases because it has become clear over time that the operators in all of the cases are controlled by the same individual, James Justice; that they all use the same ineffective and unreliable system by which to process penalty assessments; that they all offer the same unpersuasive and unmeritorious excuses for failing to contest penalty assessments in a timely manner; and that they all exhibit the same attitude toward penalty assessments – an attitude of carelessness, indifference, and outright evasion.

Sec’y of Labor’s Opposition to Request to Reopen Penalty Assessment and Request for Prepayment of Penalties at 2 (Docket No. WEVA 2009-812) (hereinafter “*S. Pay Car II Opp’n*”).

schedule by which the parties could submit further evidence and argument on the issues raised by the Secretary's filings. 31 FMSHRC 339 (Mar. 2009). Consequently, in response to the Commission's order, the Secretary filed a response affirming that she was opposing all 13 requests to reopen.

The operators' reply submissions took the form of a response and five answers to the Secretary's opposition filings. The six filings by the operators covered (1) Docket No. WEVA 2009-727 (Mar. 5, 2009); (2) Docket No. WEVA 2008-1355 (Mar. 23, 2009); (3) Docket No. WEVA 2009-812 (Mar. 27, 2009); (4) Docket Nos. WEVA 2008-1356, WEVA 2008-1357, WEVA 2008-1358, and WEVA 2008-1359 (Mar. 27, 2009); (5) Docket Nos. WEVA 2008-1354, WEVA 2008-1448, WEVA 2008-1563, and WEVA 2008-1661 (Mar. 31, 2009); and (6) Docket Nos. WEVA 2008-879 and WEVA 2008-880 (Apr. 2, 2009).

The Secretary then filed a consolidated surreply to the operators' submissions, as permitted by the Commission's scheduling order. Finally, in a Notice dated May 22, 2009, the Secretary informed the Commission that the operators had submitted a check to MSHA for \$649,740.14 to be deposited into an escrow account. That amount represented the full amount of the initial penalties at issue in the cases, plus interest, fees, and costs through May 14, 2009.

The Commission has considered the extensive submissions of the operators and the Secretary. For the reasons set forth below in their separate opinion, Chairman Duffy and Commissioner Young would reopen all 13 cases and remand the individual cases to the Chief Administrative Law Judge for further proceedings. Commissioners Jordan and Cohen, for the reasons set below in their separate opinion, would reopen five of the cases, and deny with prejudice the requests to reopen seven other cases. In one case, they would grant relief in part and deny in part.

Consequently, Docket Nos. WEVA 2008-1356, WEVA 2008-1357, WEVA 2008-1358, WEVA 2008-1359, WEVA 2009-812, and the penalty associated with Citation No. 7259169 in Docket No. WEVA 2008-1355 are hereby reopened and separately remanded to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order in each of the six cases. *See* 29 C.F.R. § 2700.28.

Furthermore, the effect of the split decision of the Commissioners as to the other requests to reopen is that the requests in Docket Nos. WEVA 2008-879, WEVA 2008-880, WEVA 2008-1354, WEVA 2008-1448, WEVA 2008-1661, WEVA 2008-1563, WEVA 2009-727, and Docket No. WEVA 2008-1355 (except for the penalty associated with Citation No. 7259169) are all denied.³

³ In deciding the motion to reopen in Docket No. WEVA 2008-1355, the Commission also considered pleadings that were filed in *Double Bonus Coal Co.*, Docket No. WEVA 2008-

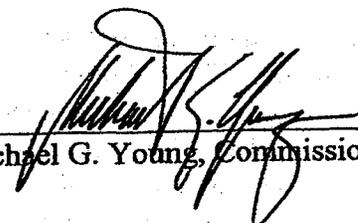
Opinion of Commissioner Duffy and Commissioner Young:

We joined with our colleagues in consolidating these cases and taking further submissions from the parties because of the significant issues the Secretary raised in her March 2, 2009 filing when she reversed course in many of these cases and began opposing reopening. We also believe, similar to our colleagues, that if the merits of each of the cases were to be considered, the operators' grounds for reopening may be better in some cases than in others.

However, in the interest of efficiently disposing of these cases, some of which were filed over a year ago, we would reopen all of the cases on the ground that the operators' prepayment of the penalties, plus interest, fees, and costs, reasonably satisfies the concerns the Secretary expressed in her March 2 filing. Therein, she explained that the enormity of the total amount of the delinquent penalty payments compromises the deterrent effect of civil penalties at all of the operators' mines. *S. Pay Car II Opp'n* at 11. She further argued that, with regard to the failure to contest the assessments on a timely basis, "the operators' excuses reveal a carelessness that warrants prepayment of the full penalty amount if the motions are granted." *Id.* at 16-17. Consequently, the Secretary took the position that "if the Commission grants the operators' requests, the Secretary requests that the Commission do so conditioned upon the operators' payment of the full penalty amount, subject to refund by MSHA to the extent that Respondent prevails on the merits of the citations and/or penalties." *Id.* at 1-2; *see also id.* at 20.

Given that the operators paid the amounts at issue to MSHA (which will hold the money in escrow in an account that, presumably, will accrue interest), even before the Commission ruled on their pending motions to reopen, we would grant the requests to reopen with respect to all 13 assessments at issue. We do so without ruling on whether the Commission would have the authority to require prepayment of penalties, in these or any other cases, and without reaching the merits of any of the requests to reopen.


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner

1596. That docket was administratively closed after it was learned that the request to reopen in it was duplicative of part of Docket No. WEVA 2008-1355. All documents in *Double Bonus Coal Co.*, Docket No. WEVA 2008-1596, will be transferred into Docket No. WEVA 2008-1355.

Separate opinion of Chairman Jordan and Commissioner Cohen:

I. Introduction

Between April 2008 and February 2009, six mine operators controlled by a single individual, James C. Justice, filed a total of fifteen motions seeking relief from final Commission orders.¹ The thirteen matters before us in this proceeding² involve delinquent penalties totaling over half a million dollars. Sec'y of Labor's Opposition to Request to Reopen Penalty Assessment and Request for Prepayment of Penalties at 11, *Pay Car Mining, Inc.*, Docket No. WEVA 2009-812 (hereinafter "*S. Pay Car II Opp'n*").³ For the reasons set forth below, in seven dockets, we would deny relief. We would grant relief in five of the other dockets and order the Secretary to proceed with the case and file her penalty petition. In the remaining docket, we would grant relief in part and deny in part.

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

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

¹ In its Order of March 13, 2009, the Commission consolidated 13 of these cases.

² The Commission previously issued an order in *Double Bonus Coal Co.*, Docket Nos. WEVA 2009-810 and WEVA 2009-811, regarding the two other motions. 31 FMSHRC 358 (Mar. 2009). In that case, the Commission concluded that the proposed assessments at issue never became final orders of the Commission because they were never delivered to the operator. *Id.* at 360. The Commission denied the motions as moot, remanded the matters to the Chief Administrative Law Judge for further proceedings, and ordered the Secretary to file petitions for assessment of penalty. *Id.*

³ In this March 2, 2009 submission, the Secretary opposed relief in all of the cases at issue here, explaining the relationships between the operators, their mail-handling systems, the excuses offered in their motions, and their history of late penalty contests.

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).

The Commission agreed to consolidate these proceedings because during our review of the operators' motions, we found that a disturbing pattern of carelessness had emerged in many of these proceedings, and we believed it would be beneficial to review all of these requests to reopen as a group. In so doing, we found a series of unpersuasive excuses for late-filed penalty assessments, and evidence of unreliable systems used by these operators when processing penalty assessments. We were also concerned that in many instances, the operators sought relief from these final orders only after receiving delinquency letters from the Mine Safety and Health Administration ("MSHA") or after being put on notice of enhanced enforcement efforts.

Moreover, a global approach to these motions (in addition to scrutiny of each individual case) is particularly helpful because, except for Double Bonus, each operator's point of contact for MSHA is the same in terms of the operator's address and contact person. The same individual, Patrick M. Graham,⁴ was involved in most of the operators' responses to the assessments, including the responses of Double Bonus. *S. Pay Car II* Opp'n at 8-11. Also in many of the cases, the operators cited similar reasons for failing to timely contest penalty assessments. These were grounded in a faulty mail processing system. *Id.* at 12-17. For example, after proposed assessments issued in 2007 were mishandled, the operators claimed to have initiated a new system for timely contesting assessments in February 2008. *Double Bonus*, Docket No. WEVA 2008-1355, Mot. to Reopen at 2. The operators acknowledged that this system contained "some faults," and so a new system was established in June 2008. *Id.* This system also failed to work properly and so, as of January 2009, it was decided to "stamp in" assessment sheets "to avoid any mistakes." *Pay Car II* Mot. to Reopen at 2.

Reviewing these cases as a group also reveals the repetitive nature of the excuses offered for the late filings. The first two cases, filed in April 2008,⁵ contained identical excuses for late-filed contests of assessments that were proposed three months apart. *Double Bonus Coal Co.*, Docket Nos. WEVA 2008-879 and WEVA 2008-880. Three other cases, filed by three different operators and involving assessments issued in March, April and May of 2008 contained identical excuses. *Dynamic Energy, Inc.*, Docket No. WEVA 2008-1448, *Pay Car Mining, Inc.*, Docket No. WEVA 2008-1563 ("*Pay Car I*"), and *Bluestone Coal Corp.*, Docket No. WEVA 2008-1661, Mots. to Reopen.

⁴ In an affidavit attached to some of the operators' responses, Mr. Graham identifies himself as the Director and General Manager of Safety/Human Resources for the "James C. Justice Companies."

⁵ Double Bonus first attempted to reopen these assessment cases in February 2008, but sent the letter to MSHA rather than the Commission. The reopening request was sent to the Commission in April 2008.

Furthermore, according to the Secretary, as of March 2009, the total delinquencies for mines controlled by Mr. Justice equaled \$870,843. *S. Pay Car II Opp'n* at 11. Of that amount, 70% was the subject of motions seeking relief before the Commission (\$608,182) and 30% remained unpaid (\$262,661). *Id.* We are deeply troubled by this significant amount of unpaid penalties, which contravenes Congress' intent that

the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.

....

... To be effective and to induce compliance, civil penalties, once proposed, must be assessed and collected with reasonable promptness and efficiency.

S. Rep. No. 95-181, at 41, 43 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 629, 631 (1978) ("*Legis. Hist.*"). Senator Williams, the sponsor of the Mine Act, emphasized that the civil penalty was "the mechanism for encouraging operator compliance with safety and health standards." *Legis. Hist.* at 85. In reviewing the relevant legislative history, the D.C. Circuit concluded that "Congress was intent on assuring that the civil penalties provide an effective deterrent against all offenders, and particularly against offenders with records of past violations." *Coal Employment Project v. Dole*, 889 F.2d 1127, 1133 (D.C. Cir. 1989).⁶

⁶ The importance of civil monetary penalties was recognized by the Supreme Court even prior to the passage of the Mine Act. In *National Independent Coal Operators' Assoc. v. Kleppe*, 423 U.S. 388, (1976), a suit brought to enjoin the use of regulations adopted for assessing civil penalties under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), the Court recognized that:

The importance of § 109 [the Coal Act's civil penalty provisions] cannot be overstated. Section 109 provides a strong incentive for compliance with the mandatory health and safety standards. That the violations of the Act have been abated or miners withdrawn from the dangerous area before § 109 comes into effect is not dispositive; if a mine operator does not also face a monetary penalty for violations, he has little incentive to eliminate dangers until directed to do so by a mine inspector. . . . A major objective of Congress was prevention of accidents and disasters; the

It is against this backdrop that we now turn to the merits of the individual motions to reopen.⁷

II. Cases in Which Denial of Relief is Warranted

A. Double Bonus Coal Co., Docket Nos. WEVA 2008-879 and WEVA 2008-880

On April 3, 2008,⁸ Double Bonus asked the Commission to reopen two penalty assessments that had become final upon the operator's failure to contest the penalties within 30 days. Docket Nos. WEVA 2008-879 and 2008-880. On July 31, 2007, and October 30, 2007, MSHA had issued proposed penalty assessments to Double Bonus. After receiving no response, MSHA sent Double Bonus delinquency notifications on November 1, 2007, and January 23, 2008, for those assessments. Double Bonus alleged that it failed to timely respond to the proposed penalty assessments because of several personnel changes, different internal document routing procedures due to different delivery services, and a staff that was confused and failed to appreciate the importance of the proposed assessments or the time limits contained in them. Double Bonus also asserts that it "has established a procedure to insure that all assessment documents are properly channeled to the appropriate office."

After initially not opposing reopening, the Secretary changed her position in her March 2, 2009 opposition. She cited the two cases as the start of either a pattern of carelessness by the operators with respect to responding to assessments or an indication that they lack credibility regarding their explanations for their failures to timely respond. *S. Pay Car II Opp'n* at 12-17. She pointed out that the excuses offered in these two cases were identical even though the assessments were issued three months apart. *Id.* at 15. She also argued that the requests to reopen were not filed by Double Bonus until six months and two and one half months,

deterrence provided by monetary sanctions is essential to that objective.

Id. at 401.

⁷ Invoking "the interest of efficiently disposing of these cases," slip op. at 4, our colleagues summarily grant relief in all of them. Although our colleagues acknowledge the "significant issues" raised by the Secretary in her opposition to the motions to reopen, they would grant relief without addressing any of them, because they consider the operator's prepayment of penalty to "reasonably satisf[y]" these concerns. *Id.* This would reward an operator whose track record in failing to contest penalties is egregious, and who accumulated so many delinquent penalties involving such a large sum of money that the Secretary took the unprecedented step of asking the Commission to condition any grant of relief on a penalty prepayment.

⁸ See note 5, *supra*.

respectively, had passed from the time MSHA had sent delinquency notices to the operator regarding the assessments. *Id.* at 17 & n.39.⁹

In a reply dated April 2, 2009, and also in the Justice Companies' reply dated March 27, 2009 in *Pay Car II*, Double Bonus attributed the failure to timely respond to the assessments to a breakdown somewhere in the chain of custody of the assessments. Double Bonus stated that the breakdown may have occurred because of MSHA's change in delivery agents for assessments from the U.S. Postal Service to Federal Express. *Double Bonus Reply* at 2-3; *Pay Car II Reply* at 8, 13-14, 15. It identified another breakdown point in moving the assessments from the mine at Pineville, WV to its business office in Beckley, WV. *Double Bonus Reply* at 2-3; *Pay Car II Reply* at 16. Double Bonus claimed it first learned of the delinquencies in late January 2008, and thereafter moved to improve its handling of assessments. *Double Bonus Reply* at 3-4. Its reply includes a three-page affidavit from Pat Graham, the first half of which addressed these two cases. Double Bonus also argued that later cases show that the assessments in these cases may not have ever been delivered to Double Bonus. *Id.* at 2-3; *Pay Car II Reply* at 15-16.

In her April 13, 2009 consolidated reply, with respect to these two cases, the Secretary argues that safety director Patrick Graham in his affidavits and other evidence establishes a pattern of carelessness by the operators. S. Surreply at 6. With regard to the question whether Double Bonus received the assessments, the Secretary notes that Double Bonus received other correspondence from MSHA at the addresses on the respective assessments. *Id.* at 8. She also notes there is no explanation for why Double Bonus took so long to file requests to reopen after receiving delinquency notices. *Id.* at 8-9.

After carefully reviewing the operators' submissions in this matter, we are still unable to discern a cogent explanation of why the failure to timely contest these penalties might constitute excusable neglect. The pleadings merely identify several *potential* problems: personnel were confused by the delivery of mail by Federal Express, *Double Bonus Reply* (Aff. of Pat Graham at 1); there was a change in personnel receiving penalty assessments, *Double Bonus Mot.* at 1; confused staff members did not know the importance of proposed assessments and their related time deadlines, *id.* at 2; there were transmission problems to the Beckley office, *Double Bonus Reply* at 3. Reciting this list of possible excuses, with no detailed explanation as to why the penalties were not timely contested, does not justify relief. We therefore would deny Double Bonus' request to reopen in these two dockets.

⁹ Although the delay in Docket No. WEVA 2008-897 was five months, not six, we are nevertheless troubled by the operator's lack of diligence in seeking relief.

- B. Double Bonus Coal Co., Docket No. WEVA 2008-1354; Dynamic Energy, Inc., Docket No. WEVA 2008-1448; Pay Car Mining, Inc., Docket No. WEVA 2008-1563 ("Pay Car I"); Bluestone Coal Corp., Docket No. WEVA 2008-1661

On June 20, 2008, Double Bonus filed a motion to reopen an assessment dated April 29, 2008 that had become a final Commission order upon the operator's failure to contest the penalties. Docket No. WEVA 2008-1354. Double Bonus asserted that it first learned of this penalty assessment when Mr. Graham was reviewing data on MSHA's data retrieval system on June 11, 2008. It subsequently discovered that the proposed assessment had been lost or misplaced due to internal handling problems.

On July 2, 2008, Dynamic filed a motion to reopen a penalty assessment that had become a final Commission order upon the operator's failure to contest the penalties. Docket No. WEVA 2008-1448. On March 31, 2008, MSHA assessed proposed penalties resulting from four orders that were issued in December 2006. According to Dynamic, the proposed assessment was "misplaced or lost." In a letter dated June 19, 2008, MSHA informed Dynamic that the civil penalties were delinquent.¹⁰ Dynamic contended that it conducted a search for the proposed assessment and could not locate it. Dynamic claimed that it had always intended to contest the violations because they had been designated by MSHA as unwarrantable. The motion states in part:

We have experienced a serious fault in distribution of mail throughout the corporation. We previously installed a system that we believed would put the penalty assessments in the proper hands for contest or payment. That system has obviously failed. We are working on a new system that we expect will be successful. The rotation of newly hired persons is a problem as more experienced personnel move up. The training of new employees is lacking with respect to assessments. More intense training of new employees has already begun.

Dynamic Mot. to Reopen at 2.

On July 29, 2008, Pay Car filed a motion to reopen an April 29, 2008 proposed assessment to the operator arising from citations that were issued in February 2008. Docket No. WEVA 2008-1563. According to Pay Car, the proposed assessment was "misplaced or lost." Pay Car contended that it conducted a search for the proposed assessment and could not locate it. Pay Car also stated that it had always intended to contest the violations because they had been

¹⁰ This assessment had been issued by MSHA on March 31, 2008 and had become final on May 2, 2008. Dynamic does not explain why Graham did not notice it when he reviewed MSHA's data retrieval system on June 11, 2008.

designated as significant and substantial. The motion also contained the same paragraph included in the July 2, 2008 Dynamic Motion to Reopen, quoted *supra*.

On August 13, 2008, Bluestone filed a motion to reopen a penalty assessment issued in May 2008. Docket No. WEVA 2008-1661. The assessment to Bluestone arose from nine citations issued during February and March 2008. According to Bluestone, the proposed assessment was “misplaced or lost.” Bluestone stated that MSHA informed it by letter that the civil penalties were delinquent.¹¹ Bluestone contended that it conducted a search for the proposed assessment and could not locate it. Bluestone stated that it had always intended to contest the violations because of their significant and substantial nature. The motion also contained the same paragraph included in the July 2, 2008 Dynamic Motion to Reopen, quoted *supra*.

The Secretary originally did not oppose reopening in any of the cases. She did note in *Bluestone*, however, that in the previous three months the operator had become delinquent with respect to 30 penalties that had become final orders. She stated that her decision not to oppose reopening was based on the operator’s representation that it had experienced a serious problem in processing assessments and that it was currently training new employees to correct that problem.

In her March 2, 2009 opposition in *Pay Car II*, the Secretary changed her position and opposed reopening of all four assessments. She noted the excuses in this Double Bonus case (WEVA 2008-1354) were identical to the excuses in another Double Bonus case (WEVA 2008-1355, discussed below). She argued that the excuses in the other three cases (*Dynamic Energy*, *Pay Car I*, and *Bluestone*), which had been filed over the course of six weeks between late June and mid-August, were also identical, although filed by three different operators. *S. Pay Car II* Opp’n at 15. She argued that the formulaic and repetitive excuses of poor mail handling offered by the operators demonstrated that either the excuses were not credible or that their shared mail processing system was inadequate a year ago and remained inadequate. *Id.* at 16. The Secretary also pointed out that in two of the cases, *Dynamic Energy* and *Bluestone*, the operators had not requested reopening until after such time as they would have received delinquency notices from MSHA regarding the unpaid assessments. *Id.* at 17.

The operators submitted a reply dated March 31, 2009. They noted that the problem in these cases was only with transfer of mail to the central office in Beckley. Mar. 31 Reply at 3-4. They stated that the time period in which this later problem occurred was limited to a two-week period between late April and mid-May 2008, and that “[t]here have been no similar problems with distribution since discovering the problem in June 2008.” *Id.* They further noted that upon learning of the new problems, Graham took steps to retrain personnel on the transfer of mail to

¹¹ Since the proposed assessment was issued on May 8, 2008, it should have been apparent to Graham when he reviewed MSHA’s data retrieval system on June 11, 2008. If Graham had noticed it then, he could have filed a timely notice of contest, since the assessment did not become final until June 13, 2008.

Beckley, and that there were no problems after mid-May. *Id.* at 3-4, 6. A three-page affidavit from Graham is included in the March 31 reply, in which he states that all of the mines' respective addresses of record with MSHA, except for that of Double Bonus, were changed to Beckley.

The Secretary in her surreply stated that the operators in the four cases had provided no new evidence to justify reopening, specifically failing to provide any evidence of a potentially meritorious defense in the event the cases were reopened. Surreply at 11.

Other than a brief statement in an affidavit,¹² the only information the operators have provided us as an explanation for their failure to timely contest these penalties in these four cases is that a problem existed in transferring proposed assessments to their Beckley business office. Mar. 31 Reply at 4. This generalized excuse does not warrant reopening. Moreover, as stated in notes 10 and 11, *supra*, and note 13, *infra*, Graham's review of the MSHA data retrieval system every three months clearly was ineffective. Additionally, with this history of problems, it would be expected that Graham would check the data retrieval system more frequently than every three months. Accordingly, we would deny relief in these dockets.

C. Justice Highwall Mining, Inc., Docket No. WEVA 2009-727

On January 27, 2009, Justice Highwall filed a request to reopen with regard to Proposed Penalty Assessment No. 000162833, dated September 16, 2008, which MSHA had issued for two citations in the sum of \$120,000. Docket No. WEVA 2009-727. According to the operator, the proposed assessment became a final order either by Justice [Highwall]'s "inadvertence or mistake." It explained that the proposed assessment was received and signed for by Justice Highwall's receptionist on September 23, 2008. The proposed assessment was believed to have been electronically transferred to the operator's representative (to contest the penalty) but, according to computer records, was not transmitted. The operator discovered that the proposed assessment had become a final order of the Commission after it received a letter from MSHA dated December 10, 2008, stating that Justice Highwall was delinquent in the payment of penalties. *Justice Highwall Mot.* at 1-2.¹³

¹² In the operator's response in *Double Bonus*, Docket Nos. WEVA 2008-879 and WEVA 2008-880, the affidavit of Graham discusses the circumstances arising in *Double Bonus*, Docket No. WEVA 2008-1354. Graham stated only that the operator had determined that a certain clerk had signed for certified mail on May 5, 2008 and placed the mail in the outbox to the Beckley office. *Graham Aff.* at 2.

¹³ In its June 13, 2008 Motion to Reopen in Docket No. WEVA 2008-1354, *Double Bonus* represents that Graham "reviews the [MSHA] data retrieval system every three months looking for potential problems," and had done so on March 11, 2008 and June 11, 2008. *Double Bonus Mot.* at 2. Under this schedule, Graham would have checked the data retrieval system

In her response filed on February 4, 2009, the Secretary opposed the request on the basis that the operator had made no showing of exceptional circumstances that warrant reopening. She argued that the operator's statements that the failure to timely contest the proposed penalties arose from inadvertence or mistake, and that the proposed assessment was thought to have been electronically transferred to its representative, were conclusory, lacked evidentiary support, and were insufficient to establish a basis for reopening. The Secretary also faulted the motion for failing to plead a meritorious defense. S. Opp'n at 2-3.

The operator filed a reply to the Secretary's response in opposition. The submission, dated March 5, 2009, is primarily directed at the Secretary's meritorious defense argument. It includes four affidavits from Justice personnel regarding the two citations at issue.

The fifth affidavit included with the reply is from Graham, the safety director for Bluestone Industries. Therein, he states that the assessment at issue was one of three in which he informed his document processor that he intended to contest. He states that a procedure that had been successfully used in the past was again employed, whereby the processor, who he describes as a dependable employee, would scan the documents and attach them in an e-mail to the representative. Two of the assessments were forwarded to the representative on September 23, 2008, but the third was not. A hard copy of the assessment was found in the processor's files, but it had not been electronically transmitted. Graham states that it could not be determined whether the mistake was caused by computer, scanning, or human error, and that "[o]versight reviews have been put in place to prevent the same mistake in the future." Aff. at 2-4.

The Secretary in her April 13, 2009 consolidated surreply faulted the Justice response for (1) failing to provide authority for the proposition that the facts it presented justify a "presumptive meritorious defense;" (2) failing in the Graham affidavit to offer additional substantive information, such as identifying the date on which the processor was hired; and (3) including conclusory statements and unreliable hearsay in the Graham affidavit. Surreply at 11.

We would deny relief in this case. The rationale supplied by the operator is one of a litany of excuses involving faulty office procedures that have been offered in these proceedings. Graham's statement in his March 2009 affidavit that "[o]versight reviews have been put in place to prevent the same mistake in the future" rings hollow in light of the similar pledge in the operator's submission in *Double Bonus Coal*, Docket No. WEVA 2008-879 (which also involved Graham) that as of February 8, 2008, Double Bonus had "established a procedure to ensure that all assessment documents are properly channeled to the appropriate office," and similar commitments made in separate filings in the summer of 2008. By September 2008 (when this assessment in Justice Highwall was issued), these operators had been on notice that their office procedures to timely contest penalty assessments were sorely deficient, and they had

again on or about December 11, 2008. Justice Highwall does not explain why Graham did not notice that the assessment dated September 16, 2008 had become final on October 23, 2008.

already filed eleven requests to reopen final orders. We would therefore deny the operator's request.

III. Cases in Which Granting of Relief is Warranted

- A. Dynamic Energy, Inc., Docket No. WEVA 2008-1356; Frontier Coal Co., Docket No. WEVA 2008-1357; Bluestone Coal Corp., Docket No. WEVA 2008-1358; and Justice Highwall Mining, Inc., Docket No. WEVA 2008-1359

These four cases involve penalty assessments issued to four Justice companies in April 2008. According to each of the June 25, 2008 motions filed by the operators, their representative, James F. Bowman, claims that he placed in a single envelope four letters to MSHA stating that the respective operators wished to contest the penalties. Docket Nos. WEVA 2008-1356, 2008-1357, 2008-1358 and 2008-1359. Although Bowman asserts that the envelope with the four letters was sent by certified mail on April 28, 2008, he cannot locate the receipt for the mail. Bowman stated, "A good faith effort was made to send the Notices of contest which [have] unfortunately been lost." Mot. at 2. Bowman further avers that the postal service "could not track mail without a number" and refers to his computer log and business checking account as support for his allegations. *Id.* at 1-2. However, initially, no affidavits or documents were filed to support these statements. Bowman further stated that, when reviewing MSHA's data base, he discovered that the proposed assessments had become final orders in May 2008. The penalties in the Dynamic Energy case were for over \$285,000, while the penalties in the other three cases were significantly less than those for Dynamic, for a total of more than \$290,000 in all four dockets.

In her initial responses, the Secretary stated that she had no record that the penalty contest forms were received but, at least at that time, had no basis for questioning that the letters Bowman described were sent. Later, however, the Secretary filed her supplemental response opposing the reopening on the ground the four cases involved Justice-controlled companies, and that the filing of 11 motions to reopen over the course of a five-month period by Justice-controlled companies had revealed a pattern of carelessness that merited denial of reopening. *See* Sec'y's Supplemental Resps. in Opp'n to Respt's Mot. to Reopen Civil Penalties at 1 (received Mar. 9, 2008, in each case). In the alternative, the Secretary requested that if the Commission grants reopening, it do so only on the condition that the operators pay the penalties in their full amounts pending a decision on the merits of the citations, orders, and penalties. *Id.* at 4; Sec'y's Consolidated Opp'n to Reopening Requests at 3 (filed Mar. 26, 2008).

In the operators' reply, a submission dated March 27, 2009, Bowman, as the "Representative [for] James C. Justice," reiterated his original explanation for the failure to file timely contests of the four assessments. In support, he submitted an affidavit, as the owner of Bowman Industries, regarding how he came to mail the contests together by certified mail, what he did when he learned that the envelope was not received by MSHA, and his unsuccessful search for the certified mail receipt. He also submitted a copy of a statement showing that on

April 28, 2008, he used his debit card to make a \$3.96 purchase at the Midway, WV post office, which he stated was for the certified mail in question. He also submitted evidence and argument as to his good character and credibility, and argued that because this case is different from the other cases at issue here (in that there was a genuine attempt at a timely filing), these cases should be judged apart from the cases in which the Secretary argues that there was a pattern of carelessness in responding to penalty assessments.

The Secretary in her April 13, 2009 surreply affirmed her opposition to reopening the four cases. She stated that Bowman has not submitted a copy of the Postal Service forms that would support his allegations, such as the Certified Mail Receipt or the Domestic Return Receipt. Surreply at 7, 10-11. The Secretary argued that this failure provides further evidence of carelessness and inattentiveness to record keeping. *Id.* at 7-8. The Secretary submits that as the operators voluntarily hired Bowman, they must live with the consequences of retaining someone who appears to have lacked the necessary resources and systems to ensure compliance with MSHA and Commission rules. *Id.* at 6-7.

We would grant the operators' motions in these four cases. Their submissions, supported by adequate documentation (including copies of the contest letters, an affidavit and a copy of Bowman's debit card statement indicating a purchase at the post office on the day in question) indicate that the operators mailed their requests for a hearing to MSHA within the 30-day time limit. The affidavit submitted is sufficiently reliable and supports this allegation. In the circumstances presented here, we find that the operators' failure to timely file their hearing requests with MSHA was due to inadvertence or mistake within the meaning of Rule 60(b)(1). *See Mingo Logan Coal Co.*, 31 FMSHRC ____, slip op. at 1-2, No. WEVA 2009-835 (June 1, 2009) (granting operator's motion to reopen where MSHA had no record of receiving a penalty contest form, but operator submitted affidavit stating that its safety manager had sent a timely contest form). We also note that all four motions seeking relief were filed in a timely manner, either only two days after the delinquency notice was issued (Frontier Coal), or, in the case of the other three operators, prior to receipt of the delinquency notice.

Consequently, we would reopen these matters and remand them to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

B. *Pay Car Mining, Docket No. WEVA 2009-812 ("Pay Car II")*

In a motion dated February 3, 2009, Bowman sought reopening of a December 2, 2008 assessment he discovered had been sent in one day late. Docket No. WEVA 2009-812. The assessment contained proposed penalties totaling \$26,777. Bowman stated that inclement weather prevented the contest of the assessment from being mailed the previous day.

The Secretary did not file an individual response to the motion, but instead filed her March 2, 2009 opposition, in which she began to oppose reopening of almost all of the James

Justice cases. The portion of the response directed at the circumstances in this case is relatively brief. The Secretary argues that the operator failed to make a showing of exceptional circumstances, and that the explanation provided fails to name the individuals involved and is not supported by affidavits from them. *S. Pay Car II Opp'n* at 5-6. The Secretary also states the motion did not even attempt to establish a meritorious defense, and failed to address the issue of good faith. *Id.* at 6.

In his March 27, 2009 reply, Bowman, on behalf of Pay Car, addressed the Secretary's response, both with respect to circumstances of the late filing in this case and the overall pattern alleged by the Secretary. Bowman set forth in detail how the assessment was handled. *Pay Car II Reply* at 3-5. He stated that action on the assessment did not occur until after the holidays, at which point Bowman was training a new secretary, his wife, on the handling of assessments. According to Bowman, they prepared the contest for mailing on January 5, 2009, but unlike the other seven contests prepared that day, it was not taken to the post office. That it was left behind was not discovered until January 9, 2009, a day on which weather conditions were too unsafe to make a trip to the post office, so it was taken the following day, and thus was mailed one day late. Affidavits from Bowman, his wife, and Patrick Graham regarding this case are included. Pay Car also devoted one page of its reply to addressing the meritorious defense requirement. *Id.* at 7.

The Secretary in her April 13, 2009 surreply faults Bowman for not addressing why the assessment was not processed by his company until after it had sat for three weeks. Surreply at 7. The Secretary also takes issue with Pay Car limiting its discussion of its meritorious defense to one page of argument, unsupported by affidavits from persons with knowledge of the relevant facts. *Id.* at 12.

The Commission has previously granted a motion to reopen a final order when a penalty contest has been filed shortly after it was due and the delay was caused by mistake or inadvertence. *See, e.g., Ruscat Enters., Inc.*, 31 FMSHRC 112 (Feb. 2009) (reopening final order when operator was three days late in mailing the contest form); *Oak Grove Res., LLC*, 31 FMSHRC 115 (Feb. 2009) (reopening final order when operator was one day late in mailing the contest form); *Dickinson-Russell Coal Co.*, 31 FMSHRC ____, slip op. at 2, No. VA 2009-175 (June 10, 2009) (same). Accordingly, we would grant the motion and reopen the final order in this docket.

IV. Case Warranting Grant of Relief in Part and Denial of Relief in Part –
Double Bonus Coal Co., Docket No. WEVA 2008-1355

On April 1, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued proposed penalty assessment No. 000145248 to Double Bonus for penalties totaling \$79,300. After this assessment became final because of the lack of a contest by the operator, Bowman filed a motion to reopen on June 20, 2008. Docket No. WEVA 2008-1355. Double Bonus asserts that it first learned of the penalty assessments when its safety director was

reviewing data on MSHA's data retrieval system on June 11, 2008. It subsequently discovered that the proposed assessments were not contested due to internal handling problems. Specifically, it claims that when the proposed assessment was transferred from the office where it was delivered to an accounting office, it was lost or misplaced. It states that a clerk received the proposed assessment on April 9, 2008, gave the documents to a mine official, and he sent them to the accounting office. *Double Bonus* Mot. at 2.

A second motion to reopen was filed by counsel on August 1, 2008. In that motion, however, counsel requested reopening only for the civil penalty proceeding for Citation No. 7259169. Counsel also filed a supplemental pleading on March 23, 2009, responding to the Secretary, in which he stated that the motion to reopen was filed because the assessment pertained to Citation No. 7259169, arising from an investigation into a fatality at the mine. He noted that the operator had filed a timely pre-penalty notice of contest of that citation, pursuant to Commission Procedural Rule 20, 29 C.F.R. § 2700.20, demonstrating its intent from the outset to contest the penalty, and filed its motion to reopen when it realized a mistake had been made. March 26 Reply at 2. In addition, he objected to the Secretary's attempt to group this motion to reopen with others pending before the Commission. In his March 2009 submission, unlike in his August 2008 motion, counsel requested that all of the penalties in the docket be reopened, not just the one associated with Citation No. 7259169. However, he failed to provide any explanation as to why the other final orders warranted reopening.

In her April 13, 2009 surreply in these cases, the Secretary urges the Commission to reject the operator's argument on many grounds, including the fact that the operator failed to explain how its contest of one citation justifies reopening the other 45 citations in the assessment case. Surreply at 9.

The Commission has previously granted motions to reopen when the operator has filed a notice of contest of the underlying citations. For example, in *Phelps Dodge Sierrita, Inc.*, 24 FMSHRC 661 (July 2002), the operator inadvertently paid the assessment at issue, along with fourteen other assessments it intended to pay. In granting relief, the Commission indicated that "[t]he most compelling indication of Phelps Dodge's intention to contest this penalty is the notice of contest it filed concerning [the underlying citation]." *Id.* at 662; see also *Holnam Texas Ltd.*, 24 FMSHRC 436 (May 2002) and *Kaiser Cement Corp.*, 23 FMSHRC 374 (Apr. 2001) (both granting relief from final orders when notices of contest for the underlying citations had been filed).¹⁴

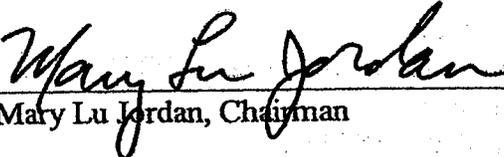
However, we believe the Secretary is correct in arguing that granting relief on this basis does not merit reopening of the remaining penalties in the same assessment. Other than the general excuse about internal document transmittal problems (similar to those offered in many of the other cases discussed herein), the operator provides no information on which to justify a

¹⁴ All three of these cases also involved inadvertent payment of the penalties by the operator.

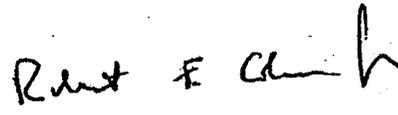
claim that the failure to timely contest the penalty was based on excusable neglect. Consequently, we would grant the reopening of the \$723 penalty assessed for Citation No. 7259169, and deny relief for the other penalties in the April 1, 2008 Assessment Case No. 000145248.

V. Conclusion

For the foregoing reasons, we would grant the requests to reopen in *Dynamic Energy, Inc.*, Docket No. WEVA 2008-1356; *Frontier Coal Co.*, Docket No. WEVA 2008-1357; *Bluestone Coal Corp.*, Docket No. WEVA 2008-1358; *Justice Highwall Mining, Inc.*, Docket No. WEVA 2008-1359; and *Pay Car Mining*, Docket No. WEVA 2009-812; and the penalty associated with Citation No. 7259169 in *Double Bonus Coal Co.*, WEVA 2008-1355. We would order the Secretary to proceed with these cases and file her penalty petitions within 45 days of this order. We would deny the requests to reopen in *Double Bonus Coal Co.*, Docket Nos. WEVA 2008-879 and WEVA 2008-880; *Double Bonus Coal Co.*, Docket No. WEVA 2008-1354; *Dynamic Energy, Inc.*, Docket No. WEVA 2008-1448; *Pay Car Mining, Inc.*, Docket No. WEVA 2008-1563 ("*Pay Car I*"); *Bluestone Coal Corp.*, Docket No. WEVA 2008-1661; and *Justice Highwall Mining, Inc.*, Docket No. WEVA 2009-727; and with regard to the remaining penalties in *Double Bonus Coal Co.*, Docket No. WEVA 2008-1355.



Mary Lu Jordan, Chairman



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

August 26, 2009

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

v.

PINE RIDGE COAL COMPANY, LLC

Docket No. WEVA 2009-1592

A.C. No. 46-07908-179891

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

ORDER

BY THE COMMISSION:

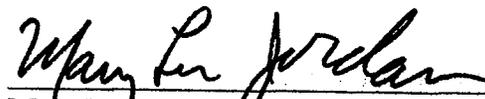
This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On June 22, 2009, the Commission received from Pine Ridge Coal Company, LLC ("Pine Ridge") a motion by counsel to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

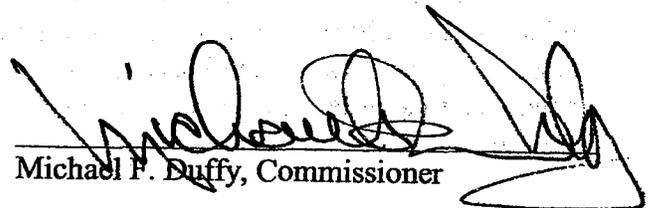
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

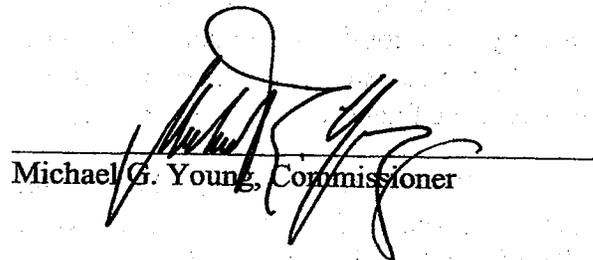
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a)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

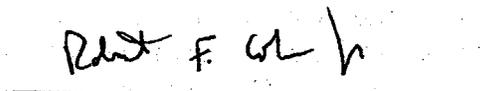
On March 19, 2009, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000179891 to Pine Ridge for 22 citations MSHA had issued to the operator over the previous two months. Pine Ridge states that it intended to contest 12 of the proposed penalties, but because of a "clerical error" it failed to return the contest form to MSHA. The operator later paid the other ten penalties. The Secretary of Labor states that she opposes reopening the proposed assessment on the ground that the proffered ground for reopening does not rise to the level of exceptional circumstances.

Having reviewed Pine Ridge's request and the Secretary's response, we conclude that Pine Ridge has failed to provide a sufficiently detailed explanation for its failure to timely contest the proposed penalty assessment. Pine Ridge's explanation that it failed to file a timely contest due to a "clerical error," without any further elaboration, does not provide the Commission with an adequate basis to justify reopening of the assessment. Accordingly, we deny without prejudice Pine Ridge's request. *See, e.g., Eastern Associated Coal LLC*, 30 FMSHRC 392, 394 (May 2008); *James Hamilton Constr.*, 29 FMSHRC 569, 570 (July 2007).


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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601 NEW JERSEY AVENUE, NW

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WASHINGTON, DC 20001

August 27, 2009

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

v.

OGLEBAY NORTON INDUSTRIAL
SANDS, INC.

Docket No. LAKE 2009-143-M
A.C. No. 33-01354-160482

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) ("Mine Act"). On December 3, 2008, the Commission received from Oglebay Norton Industrial Sands, Inc. ("Oglebay") a motion made by counsel seeking to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

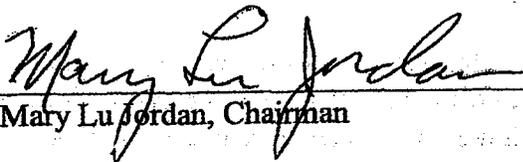
Under section 105(a) of the Mine Act, an operator who wishes to contest a proposed penalty must notify the Secretary of Labor no later than 30 days after receiving the proposed penalty assessment. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of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

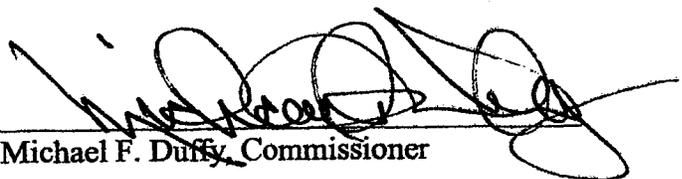
We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence or excusable neglect. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *JWR*, 15 FMSHRC at 787. We have also observed

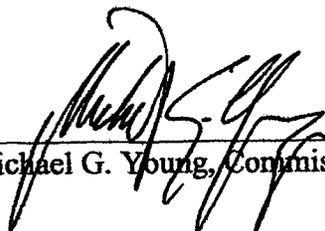
that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

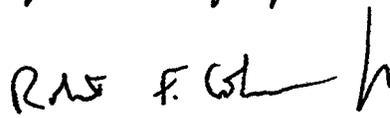
The record indicates that the operator intended to contest two proposed penalties and to pay one of the three penalties contained in the proposed assessment. The operator had already contested the two orders underlying the two penalties it intended to contest. It submitted the penalty payment on a timely basis, but an employee inadvertently failed to send MSHA the contest form for the other two penalties at the same time. The operator realized its mistake and submitted its request for relief before a delinquency notice was issued. The Secretary states that she does not oppose reopening the proposed penalty assessment.

Having reviewed Oglebay's request and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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August 27, 2009

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

v.

METTIKI COAL WV, LLC

Docket No. WEVA 2009-423
A.C. No. 46-09028-159728

Docket No. WEVA 2009-424
A.C. No. 46-09028-162606

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) ("Mine Act"). On December 4, 2008, the Commission received from Mettiki Coal WV, LLC ("Mettiki") motions made by counsel seeking to reopen penalty assessments that had become final orders of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).¹

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

We have held, however, that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure under which, for example, a party could be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence or excusable neglect.

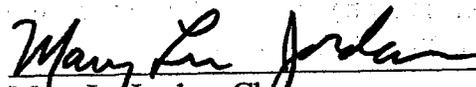
¹ Pursuant to Commission Procedural Rule 12, on our own motion, we hereby consolidate docket numbers WEVA 2009-423 and WEVA 2009-424, both captioned *Mettiki Coal WV, LLC*, and both involving similar procedural issues. 29 C.F.R. § 2700.12.

See 29 C.F.R. § 2700.1(b) (“the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure”); *JWR*, 15 FMSHRC at 787. We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of good cause for a failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

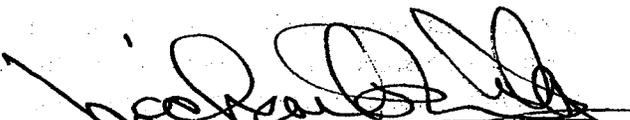
The record indicates that the operator intended to contest five proposed penalties on two proposed assessments and to pay the remaining penalties contained on those assessments. Mettiki submitted the penalty payments on a timely basis, but it failed to send MSHA the contest forms for the proposed penalties at the same time. The operator states that its safety director, who had never contested penalties before, mistakenly assumed that its main mine office, which is responsible for penalty payments, would also send the contest forms to MSHA.

The Secretary states that she does not oppose reopening the proposed penalty assessments.

Having reviewed Mettiki’s requests and the Secretary’s response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission’s Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. *See* 29 C.F.R. § 2700.28.



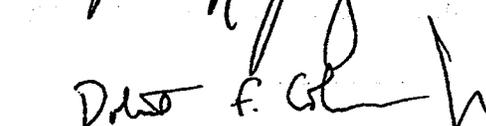
Mary Lu Jordan, Chairman



Michael F. Duffy, Commissioner



Michael G. Young, Commissioner



Robert F. Cohen, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
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WASHINGTON, DC 20001

August 28, 2009

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

v.

OIL-DRI PRODUCTION COMPANY

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Docket No. SE 2009-293-M
A.C. No. 22-00035-167206

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, 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. (2006) ("Mine Act"). On February 13 and July 29, 2009, the Commission received from Oil-Dri Production Company ("Oil-Dri") requests to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

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

On October 29, 2008, the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Proposed Assessment No. 000167206 to Oil-Dri, proposing penalties for 12 citations that had been issued to Oil-Dri in July and August 2008. After receiving no response, MSHA sent Oil-Dri a delinquency notification on or around January 26, 2009, for the assessment. In its first request to reopen, Oil-Dri stated that it intended to contest some of the penalties and pay the others, but had no record of having received the assessment, even though MSHA records indicate that it was signed for by a particular Oil-Dri employee. The Commission denied Oil-Dri's request to reopen without prejudice, stating that if the operator chose to file a new or amended motion to reopen, it needed to specify which penalties it wished to contest upon reopening. See 31 FMSHRC ___, slip op. at 2 (July 14, 2009). The Commission further

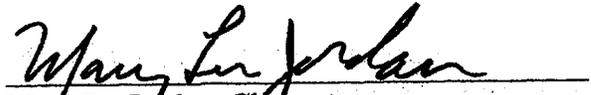
instructed Oil-Dri to include an affidavit from the particular employee who MSHA alleges signed for the assessment regarding the employee's knowledge of the assessment. *Id.*

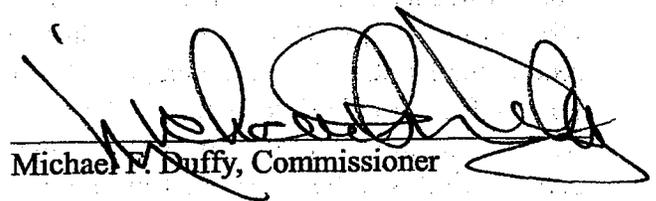
Oil-Dri filed a second request to reopen on July 29, 2009, specifying nine of the proposed penalties it wishes to contest upon reopening, and stating that it has paid the other three penalties. It also included with its second request the affidavit requested by the Commission, wherein the employee in question states that she signed for the package containing the assessment. She further explains that she would have placed any such package in the company's internal mail system, but she has no recollection of that particular package.

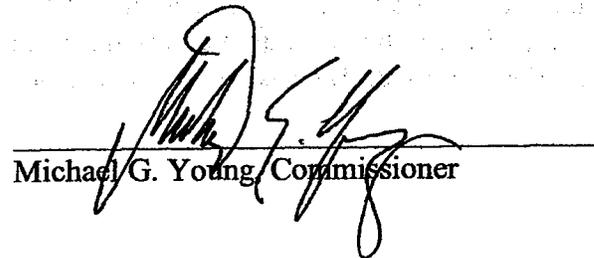
The Secretary did not oppose Oil-Dri's original request for reopening and did not respond to its second request.

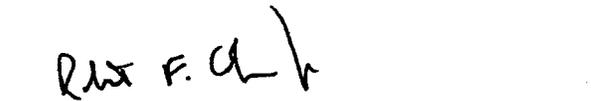
We have held that in appropriate circumstances, we possess jurisdiction to reopen uncontested assessments that have become final Commission orders under section 105(a). *Jim Walter Res., Inc.*, 15 FMSHRC 782, 786-89 (May 1993) ("*JWR*"). In evaluating requests to reopen final section 105(a) orders, the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

Having reviewed Oil-Dri's requests and the Secretary's response, in the interests of justice, we hereby reopen this matter and remand it to the Chief Administrative Law Judge for further proceedings pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700. Accordingly, consistent with Rule 28, the Secretary shall file a petition for assessment of penalty within 45 days of the date of this order. See 29 C.F.R. § 2700.28.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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Chief Administrative Law Judge Robert J. Lesnick
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and in an order dated May 15, 2009, ruling on cross motions for summary decision filed by the Secretary of Labor and Mach, Administrative Law Judge Richard Manning held that Mach had violated section 75.370(d). 31 FMSHRC 709, 713-15 (May 2009) (ALJ).²

Mach subsequently submitted a modified ventilation plan for approval to MSHA in order to abate the violation. MSHA did not agree that the violation had been abated and refused to terminate the order of withdrawal. Mach then requested a hearing on whether the violation has been abated and the order should terminate, and the judge set the case for hearing. The Secretary filed a motion to cancel the hearing on the ground that the Commission lacks jurisdiction to determine whether abatement has occurred and order termination of the order.

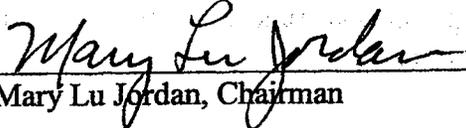
On August 18, 2009, the judge denied the Secretary's request to cancel the hearing based on his conclusion that he had jurisdiction to review the order. The Secretary subsequently requested that the judge reconsider his decision or, in the alternative, certify the question of jurisdiction for interlocutory review by the Commission. Mach filed a response in opposition to both requests. On August 25, 2009, the judge denied reconsideration but granted the request for certification.

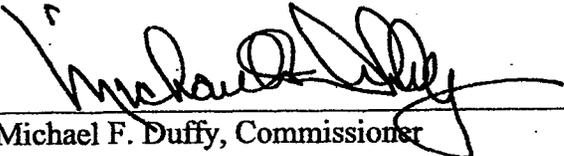
proposed set up rooms in headgate No. 3. The drawing titled "Ventilation Plan Map for future Longwall Operations" dated March 19, 2006, which is part of the currently approved ventilation plan for this mine approved on March 18, 2008, shows a six panel design with all six panels approximately 18,000 feet deep without any stair steps.

Order No. 8414238.

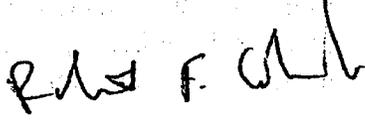
² The judge denied the Secretary's motion for summary decision on the issue of whether the violation was due to Mach's unwarrantable failure, and ordered the parties to confer as to that issue and the issue of negligence. 31 FMSHRC at 715, 716.

Interlocutory review is a matter of sound discretion of the Commission. 29 C.F.R. § 2700.76(a). The Commission will grant interlocutory review upon a majority vote that a judge's interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(2). Upon consideration of the judge's certification, all four Commissioners agree that the ruling involves a controlling question of law. Chairman Jordan and Commissioner Cohen further conclude that immediate review would materially advance the final disposition of the proceeding and thus would grant interlocutory review. Commissioner Duffy and Commissioner Young do not agree and would deny review. Accordingly, because there is not a majority of Commissioners who would grant interlocutory review, it is denied.


Mary Lu Jordan, Chairman


Michael F. Duffy, Commissioner


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner

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Administrative Law Judge Richard W. Manning
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Office of Administrative Law Judges
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1. The first part of the document discusses the importance of maintaining accurate records of all activities related to the project. This includes keeping track of time spent on various tasks, as well as documenting any changes or updates to the project plan.

2. The second part of the document outlines the specific steps that should be followed when conducting a project. This includes identifying the project goals, developing a detailed project plan, and implementing the plan while monitoring progress and adjusting as needed.

3. The third part of the document discusses the importance of communication and collaboration throughout the project. This includes regular meetings with team members, as well as keeping stakeholders informed of project progress and any potential issues.

4. The final part of the document provides a summary of the key points discussed and offers some final thoughts on the importance of effective project management. It emphasizes the need for clear communication, thorough planning, and consistent monitoring throughout the project lifecycle.

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 14, 2009

MARFORK COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. WEVA 2007-564-R
	:	Citation No. 7259269; 06/20/2007
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 2007-565-R
	:	Order No. 7259270; 06/20/2007
	:	White Queen
	:	Mine ID 46-08297
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. WEVA 2007-716
	:	A.C. No. 46-08297-122438
	:	Docket No. WEVA 2008-385
	:	A.C. No. 46-08297-133173
MARKFORK COAL COMPANY, Respondent	:	White Queen

CONSOLIDATION ORDER

AND

DECISION APPROVING SETTLEMENT

Appearances: Benjamin D. Chaykin, Esq., Office of the Regional Solicitor,
U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Matthew Nelson, Esq., Dinsmore & Shohl, LLP,
Morgantown, West Virginia, for the Respondent

Before: Judge Feldman

The captioned civil penalty in Docket Nos. WEVA 2007-716 and WEVA 2008-385 were the subject of a hearing that commenced on April 21, 2009, in St. Albans, West Virginia. The contest proceedings in Docket Nos. WEVA 2007-564-R and WEVA 2007-565-R, that concern 104(d)(1) Citation No. 7259269 and 104(d)(1) Order No. 7259270 contained in the

civil penalty proceeding in WEVA 2008-385, had been stayed. Subsequent to the hearing, on June 23, 2009, the stay of the contests was lifted by the Chief Administrative Law Judge, and, these contests were assigned to me. Consequently, **IT IS ORDERED** that the captioned contests **ARE CONSOLIDATED** for disposition with the captioned civil penalty matters.

The captioned matters concern Petitions for Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), as amended, 30 U.S.C. § 820(a), by the Secretary of Labor (“the Secretary”), against the respondent, Marfork Coal Company (“Marfork”). The petitions seek to impose a total civil penalty of \$76,555.00 for four alleged violations in Docket No. WEVA 2007-716, and seven alleged violations in Docket No. WEVA 2008-385, of mandatory safety standards contained in Parts 75 and 77 of the Secretary’s regulations governing surface and underground portions of underground coal mines. 30 C.F.R. Parts 75 and 77.

Shortly after the scheduled hearing began, the parties reached a comprehensive settlement disposing of all matters in issue. The parties settlement terms were approved on the record. The settlement terms were formalized in a Motion to Approve Settlement filed by the Secretary on June 8, 2009. Specifically, the parties have agreed to reduce the initial \$76,555.00 total civil penalty proposed by the Secretary to \$57,813.00.

The parties agreed to a partial settlement prior to the hearing. Pursuant to their agreement, Marfork has agreed to pay the original assessed civil penalty of \$12,778.00 for the four 104(a) citations in issue in WEVA 2007-716. With respect to WEVA 2008-385, Marfork has agreed to pay a reduced civil penalty of \$45,035.00 in satisfaction of the subject five 104(a) citations, one 104(d)(1) citation, and one 104(d)(1) order. The settlement terms included deleting the significant and substantial designation in Citation Nos. 7260718 and 7260723.

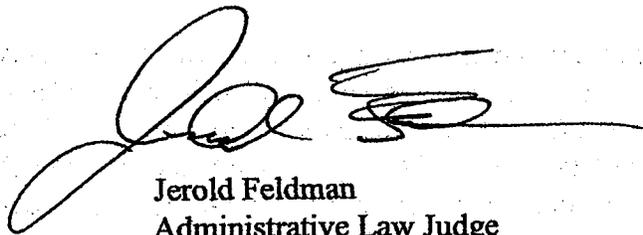
The parties agreed to settle 104(d)(1) Citation No. 7259269 and 104(d)(1) Order No. 7259270 in WEVA 2008-385 shortly after the hearing began. 104(d)(1) Citation No. 7259269 concerns an alleged violation of section 75.202(a), 30 C.F.R. § 75.202(a), that provides: “[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” The citation was issued after the mine inspector observed numerous hazardous roof conditions including loose and broken rock brows and areas of wide roof bolt spacing. The cited violation was attributed to an unwarrantable failure. Although the unwarrantable failure characterization has remained, the parties agreed to reduce the proposed penalty assessment from \$40,180.00 to \$28,126.00 based on the vagaries of litigation and potential conflicts of proof.

104(d)(1) Order No. 7259270 involves an alleged inadequate pre-shift examination, attributed to Marfork's unwarrantable failure, in violation of the mandatory standard in section 75.360(b), 30 C.F.R. § 75.360(b). The order was issued because the hazardous roof conditions cited in 104(d)(1) Citation No. 7259269 were not noted during the course of several pre-shift examinations. Again, based on the uncertainties of litigation, the parties agreed to reduce the proposed civil penalty for Order No. 7259270 from \$15,971.00 to \$11,180.00.

Section 110(i) of the Mine Act 30 U.S.C. § 820(i), sets forth the statutory civil penalty criteria used to determine the appropriate civil penalty to be assessed. In this regard, section 110(i) provides, in pertinent part:

The Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

As noted, the parties settlement terms were approved on the record as their agreement is consistent with the above statutory penalty criteria. Accordingly, consistent with the parties' agreement, **IT IS ORDERED** that Marfork Coal Company shall pay, within 45 days of the date of this decision, a total civil penalty of \$57,813.00 in satisfaction of the eleven citations and orders in issue in these proceedings. Upon receipt of timely payment, the captioned contest and civil penalty matters **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
303-844-3577/FAX 303-844-5268

July 28, 2009

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

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2008-660-M
A.C. No. 48-00167-141338

v.

BLACK HILLS BENTONITE, LLC,
Respondent

Mills Plant

DECISION

Appearances: Ronald Goldade, Conference and Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, and Kristi L. Henes, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Karen L. Johnston, Esq., and Dana M. Bartels, Esq. Jackson Kelly, PLLC, Denver, Colorado, for the Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA") against Black Hills Bentonite, LLC, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). A hearing was held in Casper, Wyoming and the parties introduced testimony and documentary evidence.

**I. DISCUSSION AND FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

On August 7, 2007 Inspector Gene Scheibe issued Citation No. 6305591 under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 56.12016, or in the alternative 30 C.F.R. § 56.14105, as follows:

Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it. An employee was attempting to remove mud from the Briquetter Screw Conveyor when his hand was caught up in

the screw causing cuts and a crushing injury. The conveyor was not locked out or tagged out. The disconnect was located in the restroom approx 50 to 75 feet around the corner from the screw. Employees are trained in lockout tag out procedures.

Scheibe determined that an injury had occurred that would likely be permanently disabling. He determined that the violation was of a significant and substantial nature (S&S) and that the company's negligence was moderate. The Secretary proposes a penalty of \$45,000.00 for this citation.

The parties stipulated to the fact that a violation of 30 C.F.R. § 56.14105 occurred which was significant and substantial.¹ The Respondent has challenged the level of negligence imputed to Black Hills Bentonite, as well as the gravity of the violation, for the purposes of assessing the penalty. Section 56.14105 provides:

Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

Inspector Scheibe was at the Mills Plant operated by Black Hills Bentonite on official business unrelated to this case when Ken Lisco, a Safety Trainer employed by Black Hills Bentonite, told him that an accident had occurred at the mine that day. (Tr. 19, 59). The inspector immediately began an accident investigation and determined that Aaron O'Hearn, an employee of the mine, had sustained an injury to his hand while attempting to dislodge mud from the briquette screw conveyor machine while it was in motion. (Tr. 23-26). No witnesses were in the immediate vicinity at the time of the injury.

Lisco interviewed O'Hearn following the accident as part of his internal investigation. Lisco testified that O'Hearn stated he had failed to "lockout/tagout" the briquetter screw conveyor before opening the safety lid and attempting to remove mud from the machine while it was still operating. (Tr. 69). O'Hearn's hand was caught, cut, and crushed by moving components in the machine before he was able to dislodge it. (Tr. 69). O'Hearn underwent reconstructive surgery for his injury, and returned to work approximately four months after the accident. (Tr. 72). He no longer works for the company and lives in another state. This conveyor is shut down at least once a day to clean mud from the screws. (Tr. 118).

¹ Inspector Scheibe initially cited 30 C.F.R. § 56.12016 as the section that was violated, while making a note that 30 C.F.R. § 56.14105 may also have been violated. The parties eventually jointly stipulated to a violation of 30 C.F.R. § 56.14105. (Stip. ¶ 11). The Secretary has indicated that the citation has been modified to reflect this. (Tr. 137).

Inspector Scheibe testified that the safety standard requires the individual performing maintenance to deenergize the equipment by turning off the main disconnect, put his lock on it, and fill out a tag that includes his name, the time, and a description of the work being performed. (Tr. 24-25). Additionally, the individual must block the machinery against hazardous motion.

Scheibe initially determined that the level of negligence was “high”, but later adjusted it to “moderate” due to mitigating factors, including the existence of a lockout and tagout policy, the availability of locks and tags, and the employee training that was provided. (Tr. 28).

Lisco testified that new employees are required to read the Black Hills Bentonite Safety and Discipline Manual (“Manual”), and sign the last page, indicating their obligation to abide by the policies therein. (Tr. 64-65). O’Hearn signed his Manual on March 1, 2007. (Ex. R-1). The Manual includes the company’s “Safety Lockout and Tagout Procedure,” which is designed for compliance with 30 C.F.R. § 56.14105.² (Tr. 65). Lisco testified that Black Hills Bentonite utilizes various means to implement its safety policy and communicate the lockout and tagout procedure, including the Manual, on-site training during an employee’s introduction into the work environment³, equipment-specific training, annual refresher training courses, and posted signs and safety procedures. (Tr. 60-64). Additionally, Plant Manager Nathan Plume testified that he would have occasional one-on-one or group meetings where he discussed safety topics such as the lockout and tagout procedure. (Tr. 99-100).

Commission administrative law judges assess penalties de novo taking into consideration the six penalty criteria in section 110(i) of the Mine Act. Two of those factors are at issue: (1) negligence of the operator, and (2) the gravity of the violation.

A. Negligence

Black Hills Bentonite contends that the level of negligence was improperly assigned. The negligence of a rank-and-file miner cannot be directly attributed to the mine operator for purposes of penalty assessment. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982). Rather, when “a rank-and-file employee has violated the Act, *the operator’s* supervision, training and disciplining of its employees must be examined to determine if *the operator* has taken reasonable steps to prevent the rank-and-file miner’s violative conduct.” *Id.*

² The Manual’s “Safety Lockout and Tagout Procedure” cautions that any equipment is potentially dangerous even if it is “presumed to be shut down.” (Ex. R-1). It also states that accidents occurring due to improper lockout and tagout most often “cause amputations, serious fractures, or death.” *Id.* It also sets forth the procedures to be followed in detail.

³ Lisco testified that the on-site introductory training included two videos which demonstrate the consequences of not following the lockout and tagout procedures. (Tr. 74-75).

I find that Black Hills Bentonite's negligence was quite low. O'Hearn was a classic rank-and-file miner, an hourly employee and relatively new hire, having been employed by Black Hills Bentonite for approximately 22 weeks. (Tr. 26, 103).

Plant Manager Plume testified that he was O'Hearn's direct supervisor, and spent approximately 90% of his work day walking the floor observing and talking with the miners regarding production, safety, and training issues. (Tr. 98, 123)

Safety Trainer Lisco provided some additional supervision and conducted mandatory training sessions that covered the lockout and tagout procedure. O'Hearn's signature on the Manual is evidence of his knowledge of, and obligation to abide by, the lockout and tagout procedure of Black Hills Bentonite. The New Miner Training Records indicate that O'Hearn received training on March 14, 2007 regarding how to correctly operate the briquetter screw conveyor. (Ex. R-4). This training included the lockout and tagout procedure specific to the briquetter screw conveyor. (Tr. 76-77). O'Hearn's training was current and he had read the safety procedure included in the Manual less than six months prior. Inspector Scheibe's Field Notes indicate that the correct lockout and tagout procedures were posted throughout the facility. (Ex. G-4). In spite of his training, O'Hearn failed to utilize the locks and tags that were readily available. There is no evidence that O'Hearn had violated any safety procedures, or failed to initiate the lockout and tagout procedure, at any time prior to the accident in question. Therefore, there was no reason for Black Hills Bentonite to believe that he would do so in this instance.

While Inspector Scheibe testified that he was not aware of any discipline policy for failure to follow safety regulations, both Lisco and Plume testified that Black Hills Bentonite does have a progressive discipline policy. (Tr. 37, 38, 90, 100-101). Plume testified that there is a disciplinary protocol which requires either a verbal or written reprimand for the first offense, and more severe penalties for subsequent violations of the safety policy. (Tr. 100-101). Two of the more severe disciplinary actions are suspension without pay and employment termination. (Tr. 101).

Given the level of supervision and training provided by the operator, the record does not support a moderate level of negligence on Black Hills Bentonite's part. Black Hills Bentonite's management clearly understood the importance of lockout and tagout procedures and communicated this information to its employees. I credit the company's evidence on this issue. In addition, the lockout and tagout stations at the plant were clearly marked and well maintained. (Ex. R-7 pp. 2, 6-10). As a consequence, I find that the negligence was very low.

B. Gravity

Black Hills Bentonite asserts that the Secretary improperly assigned the gravity of the violation, specifically the severity of the injury. Gravity is "often viewed in terms of the seriousness of the violation." *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996). The seriousness of a violation can be examined by looking at the importance of the standard

which was violated and the operator's conduct with respect to that standard, in the context of the Mine Act's purpose of limiting violations and protecting the safety and health of miners. See *Harlan Cumberland Coal Co.*, 12 FMSHRC 134, 140 (Jan. 1990) (ALJ).

I find the gravity of this violation to be high. The parties agree that the violation was S&S. (Stip. ¶ 13). While the citation listed the severity of the injury as reasonably expected to be permanently disabling, O'Hearn, nevertheless, returned to work four months later. The safety standard seeks to protect miners from being injured while repairing or performing maintenance on machinery or equipment. The regulation is of high importance given the dangerous nature of servicing large powerful equipment while it is in motion. There is no dispute that O'Hearn suffered a severe injury to his hand as a result of failing to follow the operator's lockout and tagout procedure with respect to the briquetter screw conveyor. While Black Hills Bentonite provided ample training to prevent such a circumstance, the severity of injury in this case, which potentially could have been much worse if O'Hearn had not been able to dislodge his hand, lends itself to a finding of high gravity.

II. APPROPRIATE CIVIL PENALTIES

The penalty proposed by the Secretary was specially assessed and is too high for this violation, especially since I have reduced the level of negligence attributable to the operator. Although the gravity was high, the operator took all reasonable steps to prevent this type of injury. Section 110(a) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. Black Hills Bentonite was issued 15 citations at the Mills Plant in the 24 months prior to August 8, 2007. (Ex. G-9). In 2007 there were 75,772 hours worked at the Mills Plant, and somewhere between 200,000 and 300,000 hours worked at all Black Hills Bentonite facilities.⁴ (Stip. ¶ 9, Ex. G-8). My findings with respect to negligence and gravity are set forth above. The penalty assessed in this decision will not affect Black Hills Bentonite's ability to continue in business. Respondent demonstrated good faith abating the cited condition. (Stip. ¶ 7, 8). Based on the penalty criteria, I find that the penalty set forth below is appropriate.

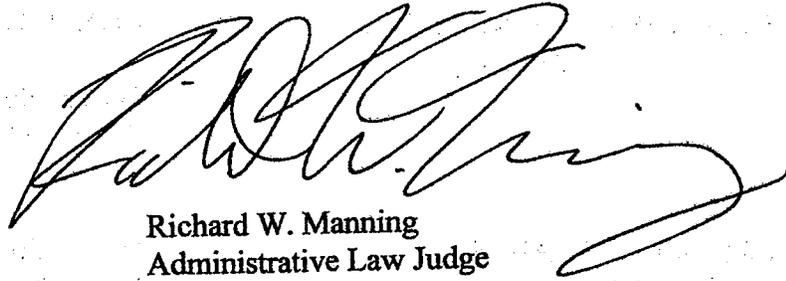
III. ORDER

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

<u>Citation No.</u>	<u>30.C.F.R. §</u>	<u>Penalty</u>
6305591	56.14105	\$900.00

⁴ The number of hours worked in 2007 for all Black Hills Bentonite operations was determined by taking the penalty points from "Controller Size" designation on the Proposed Assessment Form and then cross referencing that with the corresponding annual hours worked on Table IV-Size of Controlling Entity-Metal/Nonmetal Mine at 30 CFR § 100.3(b).

For the reasons set forth above Black Hills Bentonite, LLC, is **ORDERED TO PAY** the Secretary of Labor the sum of \$900.00 within 30 days of the date of this decision.⁵



Richard W. Manning
Administrative Law Judge

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Karen Johnston, Esq, and Dana Bartels, Esq, Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202-1958 (Certified Mail)

⁵ Payment should be sent to Mine Safety and Health Administration, U.S. Department of Labor, P.O. Box 790390, St. Louis, MO 63179-0390

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, NW, Suite 9500

Washington, DC 20001-2021

July 30, 2009

JIM WALTER RESOURCES, INC.	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. SE 2009-500-R
	:	Citation No. 7696888; 05/01/2009
v.	:	
	:	
SECRETARY OF LABOR,	:	No. 7 Mine
MINE SAFETY AND HEALTH	:	Mine ID 01-01401
ADMINISTRATION (MSHA)	:	
Respondent	:	

DECISION

Appearances: David M. Smith, Esq., Warren B. Lightfoot, Jr., Esq., and A. Christine Green, Esq., Maynard, Cooper & Gale, P.C., Birmingham, Alabama, and Guy Hensley, Esq., Brookwood, Alabama on behalf of the Contestant; Uche Egemonye, Esq., and Thomas Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia and Nashville Tennessee, respectively, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon Contestant's request for expedited hearings to challenge Citation Number 7696888 issued pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act". The citation alleges that Jim Walter Resources Inc., (JWR) was operating its No. 7 Mine with an unapproved ventilation plan in violation of 30 C.F.R. § 75.370(a)(1).¹ More specifically the citation charges as follows:

Conceptual approval was given on April 3, 2008 for the sealing plan of D, E, F, G, H, and I panels in the northeast gob contingent in part upon compatibility with requirements in the rule-making process for sealing. The rule making process has been completed and it has been determined that the previously approved conceptual plan does not comply with all requirements contained in the Sealing of Abandoned Areas, Final Rule and 30 CFR 75.364. Therefore, the conceptual approval was rescinded. The plan does not adequately address the

¹ The cited standard requires, in essence, that the mine operator develop and follow a ventilation plan approved by the Secretary.

ability to access and examine the seals after construction, not only for sampling procedures, but also for inspection during and after the curing process. Discussions concerning the issues have been conducted and the process is at an impasse. By letter dated April 23, 2009 and received via fax on April 27, 2009 the operator has adopted a ventilation plan containing seal provisions required by 75.371 (ff) that cannot be approved.

On March 28, 2008, JWR submitted a ventilation plan supplement (Plan Supplement) to the Department of Labor's Mine Safety and Health Administration (MSHA) (Govt. Exhs. No. 3 and 5). As noted in the citation, on April 3, 2008, MSHA approved the Plan Supplement conditioned upon compliance with final rules regarding the sealing of abandoned areas (Final Rules), not yet published but then under consideration by the Secretary.² The Final Rules were published on April 18, 2008, and introduced a requirement that mine operators must "maintain and repair seals to protect miners from hazards of sealed areas" (Govt. Exh. No. 9). MSHA thereafter, on December 16, 2008, rescinded its conditional approval of the Plan Supplement (Govt. Exh. No. 3). On April 23, 2009, JWR adopted the rescinded Plan Supplement under procedures set forth in MSHA's Program Policy Manual to accommodate mine operators who wish to contest disputed ventilation plans (Govt. Exh. No. 15). Accordingly, by agreement between MSHA and JWR, MSHA Inspector Harry Wilcox thereupon issued the citation at bar on May 1, 2009. On the same day, JWR abated the citation by adopting its approved ventilation plan. On May 9, 2009, JWR filed the instant notice of contest challenging the citation and the decision to rescind the Plan Supplement.

The Secretary maintains that the basis for her disapproval of the Plan Supplement is that, if implemented, it would violate the mandatory standards at 30 C.F.R. §§ 75.364(b)(4), 75.364 (c)(3) and 75.337(a). As noted, Section 75.337(a) represents the codification of one of the final rules published following the conditional approval of the Plan Supplement.

When the Secretary disputes a ventilation plan proposed by a mine operator, the Secretary has the burden of proving the unsuitability of the plan. See *Secretary v. Peabody Coal Company* 18 FMSHRC 686 (May 1996), aff'd 111F.3d 963 (D.C. Cir. 1997). The Commission has defined "suitable" as "matching or correspondent", "adopted to a use for purpose", "fit", "appropriate from the view point of... convenience, or fitness: proper, right," "having the necessary qualifications: meeting requirements." *Peabody* 18 FMSHRC at 690 quoting Webster's Third New International Dictionary 2286 (1986). Clearly, if a plan proposed by the mine operator would, if implemented, violate mandatory standards then it would also be unsuitable.

John Urosek has a Bachelor of Science degree in mining engineering from Pennsylvania State University and is a registered professional engineer. He is presently MSHA's chief of mine emergency operations. In that capacity he is responsible for administering MSHA's seal approval

² The Final Rules were being developed following explosions and seal failures at the Sago and Darby mines resulting in multiple fatalities (Govt. Exh. No. 28 p.7).

program. He was also chairman of the committee which developed the Final Rules for the sealing of abandoned areas. Mr. Urosek is eminently qualified as an expert in mining engineering and, in particular, in regard to mine ventilation and mine explosions (Govt. Exhs. No. 20 and 28). Mr. Urosek has also been designated as the sole decision maker authorized to speak for the Secretary of Labor on this matter and therefore he is the designee to be given deference in interpreting the agency's regulations should that be necessary. See *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994); *Akzo Nobel Salt, Inc. et al. v. Federal Mine Safety and Health Review Commission and Secretary of Labor*, 212 F.3d 1301 (2000); *Michigan Citizens for Indep. Press v. Thornburgh*, 868 F.2d 1285, 1293 (D.C. Cir. 1989); *Homemakers N. Shore, Inc., v. Bowen* 832 F.2d 408, 413 (7th Cir. 1987); *RAG Cumberland Resources v. FMSHRC*, 272 F.3d 590, 598 (D.C. Cir. 2001).

Urosek explained in his direct examination that JWR had requested a change to the mine ventilation plan for its No. 7 Mine to allow the use of seals to separate the active longwall panel from the adjacent mined-out longwall panels (Govt. Exh. No. 28).³ As the active longwall begins to mine, these seals, he explained, would not be accessible and could not be examined for hazardous conditions, could not be accessed to test for methane, and could not be maintained or repaired. Urosek explained that MSHA could not approve these changes because, if made, they would violate the mandatory standards at 30 C.F.R. § 75.364(b)(4), 30 C.F.R. § 75.364(c)(3), 30 C.F.R. § 75.337(a) and 30 C.F.R. § 75.336(a)(1)(II).⁴

30 C.F.R. § 75.364(b)(4) provides as follows:

Hazardous conditions. At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator: ... (4) at each seal along return and bleeder air courses and at each seal along intake air courses not examined under § 75.360(b)(5).

§ 75.364(c)(3) provides as follows:

Measurements and tests. At least every 7 days a certified person shall-... (3) test for methane in the return entry nearest each set of seals immediately after the air passes the seals.

30 C.F.R. § 75.337(a) provides that "[t]he mine operator shall maintain and repair seals to protect miners from hazards of sealed areas."

The Secretary maintains that the language of the referenced standards is plain and unambiguous and should be enforced as written. I have no difficulty in agreeing with the Secretary

³ In order to better expedite these proceedings Mr. Urosek's direct testimony, as well as that of other experts in this case, was presented in written form before trial (Govt. Exh. No. 28).

⁴ The Secretary, upon subsequent receipt of additional information from JWR, acknowledged at hearings that the latter standard would not be violated by implementation of the Plan Supplement.

and find that indeed the plain language of Sections 75.337(a), 75.364(b)(4), and 75.364(c)(3) must be enforced as written and requires that JWR regularly examine, maintain and repair the proposed seals as well as perform the required methane tests. JWR acknowledges that, as the active longwall in its No. 7 Mine begins to mine, the proposed seals will not be accessible. It will therefore not be able to examine the seals for hazardous conditions, gain access to test for methane, maintain the seals, and, if structural defects are discovered, replace the seals. In sum, under its Plan Supplement, JWR would not be able to comply with the seal standards. The Plan Supplement, therefore, is not "suitable" under Section 75.370(a)(1). Consequently, the conditional approval of the Plan Supplement was properly rescinded by the MSHA district manager.

It is a cardinal rule of construction that if a regulation's meaning is plain, the regulation cannot be construed to mean something different from that plain meaning. *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990); *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (citing *Udall v. Tallman*, 380 U.S. 1, 16 (1965)). When the language of a provision is plain, the plain language is the meaning of the provision and the sole function of the courts is to enforce the language as written. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.Na.*, 530 U.S. 1, 6 (2002). The Commission has also held that, where, as here, "the meaning of a standard is clear based on its plain language, it follows that the standard provides the operator with adequate notice of its requirements." *Jim Walter Resources*, 28 FMSHRC 579, 595 (August 2006); *LaFarge Constr. Materials, et.al.* 20 FMSHRC 1140, 1144 (October 1998).

Moreover, no language in the standards at issue sets forth or even suggests any exception to the requirements that seals be examined for hazardous conditions, that seals be maintained and repaired, and that the return entry nearest each set of seals be tested for methane. As a result, the standards cannot be read as containing such an exception. See *Thunder Basin Coal Co v. FMSHRC*, 56 F.3d 1275, 1280 (10th Cir. 1995). If the Secretary intended to exempt the seals that JWR proposed in its Plan Supplement from the requirements of Sections 75.337(a), 75.364(b)(4) and 75.364(c)(3), these sections could have so provided. See *Russello v. United States*, 464 U.S. 16, 23 (1983).

Contestant, while professing to also argue that the plain language of the standards should prevail, in actuality has devoted the great bulk of its case in attempting, through extrinsic evidence, to create ambiguities where none exist.⁵ By then citing this extrinsic evidence, Contestant claims that it is not receiving fair notice of what is required by the standards at issue. This argument is, of course, the equivalent of a classic "strawman" argument and can not withstand close scrutiny. In any event, while I am certainly sympathetic with Contestant's understandable prior confusion engendered by the Secretary's prior inconsistent enforcement of Section 75.364, I cannot find that Contestant has now failed to have received fair notice of what is required by the standards at issue. Since this proceeding involves only a challenge to the disapproval of a ventilation plan pursuant to procedures set forth in MSHA's Program Policy Manual, it is not in the same posture as a typical enforcement proceeding under the Act. Unlike enforcement proceedings where punitive penalty

⁵ The Contestant had also earlier claimed that the Secretary failed to negotiate in good faith but specifically withdrew that claim at hearings.

sanctions are imposed and where the question of whether fair notice has been provided regarding the application of a mandatory standard may be a relevant issue, in these proceedings the Secretary is actually providing clear advance notice of how the mandatory standards are now, and will be, applied in the future. Such notice has not only been provided by the plain meaning of the language of Sections 75.364 and 75.337(a) but also by the issuance of the letter of disapproval on December 16, 2008, by the issuance of the citation at bar on May 1, 2009, by these proceedings and reconfirmed by the testimony of the Secretary's designee, Mr. Urosek. Under the circumstances JWR cannot claim in this case that it has not received fair notice before any punitive enforcement action has been taken. See *Akzo Noble Salt, Inc. at 1304-1305*.⁶

While apparently acknowledging that the language of Section 75.364 does indeed prohibit it from using internal seals, JWR nevertheless argues, in effect, that by issuing a memorandum in 1993 (Gov't Exh. No. 25) effectively waiving enforcement of 75.364 at its No. 7 Mine, the Secretary is barred or estopped from changing that policy. As explained by Mr. Urosek, the mining disasters of 2006 prompted the Secretary to more strictly enforce the provisions of section 75.364. A lack of prior enforcement does not, in any event, constitute a defense to a violation and does not estop the government from prosecuting the violation. *Emery Mining Corp. v. Secretary* 744 F.2d 1411, 1416 (10th Cir. 1984); *U.S. Steel Mining Co.*, 15 FMSHRC 1541, 1546-47 (August 1993); *Nolichuckey Sand Co.*, 22 FMSHRC 1057; 1063-64 (September 2000). As previously noted, moreover, this is not an actual enforcement proceeding and JWR has now been given, prior to any actual enforcement action, clear notice of the Secretary's change in policy to a strict enforcement of Section 75.364. For all the above reasons the Contestant's argument must in any event be rejected.

I also have not disregarded JWR's assertion that Section 337(a) is ambiguous based on language in the preamble to the Secretary's Final Rules published in 2008. However it is well established law that language in a preamble cannot create an ambiguity where none exists in the plain language. See *Pfizer Inc. v. Heckler*, 735 F.2d at 1509 ("Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble") *Association of American Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *Albermarle Corp. v. Herman*, 221 F.3d 782, 786 (5th Cir. 2000) "The preamble need be consulted only when, unlike here, the regulation's plain language is ambiguous"; *Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) ("It is a mistake to allow general language of a preamble to create an ambiguity in specific statutory or treaty text where none exists. Courts should look to materials like preambles and titles only if the text of the instrument is ambiguous").

It is also noted that, in any event, the Secretary's authorized decision maker, Mr. Urosek, testified that what JWR calls an "exception" to the Final Rules appearing in the preamble applies only to "spontaneous combustion" mines and explained at trial why that language only applies to

⁶ As the Secretary noted at hearings, the proper forum for JWR's dispute herein is under a Petition for Modification proceeding pursuant to Section 101(c) of the Act. Under such a proceeding, JWR would have the opportunity to prove that its alternative to compliance with the standards at issue herein would be just as safe as compliance with these standards.

such mines. It is undisputed that the No. 7 Mine is not a "spontaneous combustion" mine. Urosek explained that mines that are susceptible to spontaneous combustion are provided an exception because such mines must comply with other rules that afford miners the same protection from hazards (Gov't Exh. No. 28).

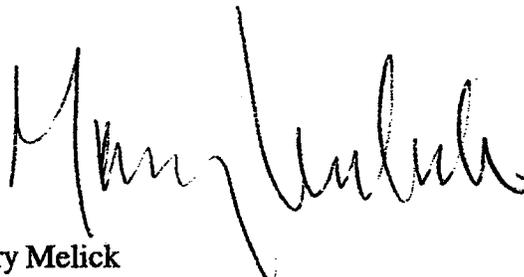
JWR also argues that MSHA intended to depart from its practice of only exempting seals in "spontaneous combustion" mines from the maintenance, examination, and testing requirements. JWR points out that MSHA's 2007 Procedure Instruction Letter (PIL) contained language that exempted seals in spontaneous combustion mines from the maintenance, examination, and testing requirements, whereas the 2008 PIL omits this language. As Mr. Urosek explained, however, the omission of this phrase did not indicate a change in the interpretation of 75.337(a) to recognize the blanket exception to the maintenance and repair of seals which JWR seeks to impose on MSHA. (Gov't Exhs. No. 28 and 15). Further, where a new version of a standard eliminates a provision in a previous version, such elimination does not establish a new intent, especially where, as here, the result is simply silence on the matter. See *US v. Wilson* 290 F.3d 347, 360 (D.C. Cir 2002), cert. denied, 537 U.S. 1028 (2002).

In any event, directives contained in agency materials such as instruction manuals, memoranda, opinion letters, and enforcement guidelines are not entitled to deference where, as here, the interpretation or policy statement cannot be squared with the plain language of mandatory standards. *Christensen et al. v. Harris County, et al.* 529 U.S. 576 (2000); *Brock v. Cathedral Bluffs Shale Oil Co.* 796 F.2d 533, 538-39 (D.C. Cir. 1986); *Secretary v. Utah Power and Light Company*, 11 FMSHRC 1926 (October 1989).

Under all the circumstances, it is clear that JWR's proposed Plan Supplement, if implemented, would be in violation of the standards at 30 C.F.R. §§ 75.364(b), 75.364(c)(3) and 75.337(a) and that the Secretary has therefore met her burden of proving that the Plan Supplement is "unsuitable".

ORDER

Citation No. 7696888 is affirmed and Contest Proceeding Docket No. SE 2009-500-R is hereby dismissed.



Gary Melick
Administrative Law Judge
202-434-9977

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/lh

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August 7, 2009

MILESTONE MATERIALS, : CONTEST PROCEEDING
Div. of MATHY CONSTRUCTION :
Contestant : Docket No. LAKE 2009-432-RM
 : Citation No. 6494042; 04/14/2008
v. :
 :
SECRETARY OF LABOR, : Mine: Plant #66
MINE SAFETY AND HEALTH : Mine ID 47-03274
ADMINISTRATION (MSHA), :
Respondent :

DECISION

Appearances: Rafael Alvarez, U.S. Department of Labor, Chicago, Illinois, on behalf of the Respondent
Adele L. Abrams, Esq., Office of Adele L. Abrams, P.C., Beltsville, Maryland, on behalf of the Contestant

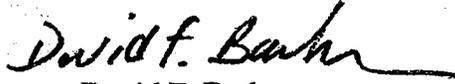
Before: Judge Barbour

In this proceeding, Milestone Materials, Division of Mathy Construction (“Milestone”), challenges the validity of Citation No. 6494042, a citation that, as amended, alleges Milestone violated 30 C.F.R. § 46.6(a), a mandatory training standard for newly-employed, experienced miners. Milestone asserts the citation is invalid because the person alleged in the citation to lack the required training is not a “miner” as that word is defined in Part 46. The Secretary responds that the citation is valid in all respects. The case was tried on June 24, 2009.

After the trial adjourned and the transcript was received, the parties advised me they had resolved their differences. Counsel for the Secretary then filed a motion to dismiss, stating that “[a]fter reviewing the facts . . . and in light of . . . new information,” Citation No. 6494042 has been vacated. Motion to Dismiss 1. Milestone does not oppose the motion. Id.

ORDER

WHEREFORE, the citation at issue having been vacated, this proceeding is moot and **IS DISMISSED**.


David F. Barbour
Administrative Law Judge

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/ej

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

August 21, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2008-130-M
Petitioner	:	A.C. No. 40-00170-132631
v.	:	
	:	
EAST TENNESSEE ZINC COMPANY, LLC:	:	Immel Mine
Respondent	:	
	:	
EAST TENNESSEE ZINC COMPANY, LLC:	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. SE 2007-438-RM
	:	Citation No. 7775339; 08/06/2007
v.	:	
	:	
	:	Docket No. SE 2007-439-RM
	:	Citation No. 7775341; 08/06/2007
	:	
SECRETARY OF LABOR,	:	Immel Mine
MINE SAFETY AND HEALTH	:	Mine ID 40-00170
ADMINISTRATION, (MSHA),	:	
Respondent	:	

DECISION

Appearances: Christian P. Barber, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, on behalf of the Petitioner;
John Flood, Esq., Ogletree, Deakins, Nash Smoak & Stewart, P.C., Washington, DC, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty (consolidated with related contest proceedings) filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging East Tennessee Zinc Company, LLC, (East Tennessee) with two violations of mandatory standards and proposing civil penalties of \$3,806.00 for the violations. The general issue before me is whether East Tennessee violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act. Additional specific issues are addressed as noted.

Citation Number 7775339 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.20001 and charges as follows:

During an inspection of the topside of the “big cage”, located in the 1600 foot main shaft, marijuana was discovered. The drug was located in the center of the cage in a cigarette package. This site is a regular work area for contractor miners on both 12 hour shifts on various days per week. A hazard of the miners working at this site under the influence of marijuana could contribute to a serious injury or fatality. The confirmation of the marijuana blunts was made by the local sheriffs department drug laboratory. The mine operator did not ensure the contractor conducted any type of drug testing while on this site since April of 2007. The mine operator did not review the contractors policies or procedures concerning drug testing nor did they observe the employees to ensure they were in compliance with this standard.

The cited standard provides in relevant part that “. . . narcotics shall not be permitted . . . in or around mines.”

It is undisputed that, during the course of his accident investigation at the Immel Mine on August 6, 2007, Inspector Thomas Galbreath of the Department of Labor’s Mine Safety and Health Administration (MSHA) found marijuana “blunts” secreted in a cigarette package and hidden in an obscure area of the “big cage” (an elevator located in the 1600-foot main shaft of the mine) where employees of an independent contractor had been working.

While there is a legitimate dispute and a conflict among authorities as to whether marijuana is a “narcotic”, I find in this case that, in any event, Respondent had not “permitted” the substance to be on its mine premises.¹ Accordingly there was no violation as charged.

It is well established, that 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. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987). See also *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (October 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (August 1993).

The regulation at bar does not define the word “permitted”. In the absence of an express definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word to be construed. *Peabody Coal Co.* 18 FMSHRC 686, 690 (May 1996), aff’d, 111 F.3d 963 (D.C. Cir. 1997) (table); *Thompson Brothers Coal Co.* 6 FMSHRC 2091, 2096 (September 1984). In this regard the Commission has utilized *Webster’s Third New International Dictionary (Unabridged)* as the source of the ordinary meaning of words. Accordingly, I look to that source for the ordinary definition of the word “permit”. “Permit” is defined therein as “to consent to expressly or formally”, “grant leave for or the privilege of”, “allow”, “tolerate”, “to give (a person) leave”, “authorize”, “to make possible”, “to give an opportunity”. *Webster’s Third New International Dictionary (Unabridged)* 1683 (2002).

¹ Respondent’s stipulation at hearings that marijuana was a “narcotic” was subsequently withdrawn with the consent of the Secretary.

Accordingly, based on the ordinary definition of the term “permit”, I find that the language of the cited standard is clear and unambiguous and that it must be enforced as written. Since there is no evidence in this case that Respondent acted in any of the enumerated ways and, indeed, since the Secretary has acknowledged that Respondent did not actively permit marijuana to be in its mine nor consent to, nor authorize, its presence, I find that there was no violation as charged².

In reaching this conclusion I have not disregarded the Secretary’s proffer of an alleged “passive” definition of the word “permitted” and reference to two judicial decisions in purported support of that proffer i.e. *SEC v. Bolla*, 401 F. Supp.2d 43, 62-63 D. D.C. 2005) and *National Realty and Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257, 1264 and n.27 (D.C. Cir. 1973). However, these judicial interpretations were necessarily derived from the unique legal and factual circumstances of those cases and cannot be considered to be the “ordinary” definition of the word “permitted”. Indeed, the Circuit Court in the latter case recognized that the word permission “usually connotes knowing consent” and the usage of the word in a passive sense “may be loose.”

Citation Number 7775341 alleges a violation of the standard at 30 C.F.R. § 48.3(f) and charges as follows:

The operator did not have a copy of the MSHA approved training plan available at the mine site for MSHA and for review by the miners and the representatives. A hazard of the operator attempting to train onsite and not having the plan to follow to assure the miners receive the proper training exists. This hazard could cause a disabling injury to the employees. The operator has a copy of the plan on file in the corporate office located approximately five miles from this mine. Hazard, site specific and refresher training are done on this site at various times.

The cited standard, 30 C.F.R. § 48.3(f), provides as relevant hereto, that “[t]he operator shall make a copy of the MSHA approved training plan available at the mine site for MSHA inspection. . . .”

There is no dispute that on August 1, 2007, during the course of a multi-day investigation into an accident at the Immel Mine, MSHA Inspector Rick Boggs asked Respondent’s safety manager, Dennis Hillman, for a copy of East Tennessee’s MSHA approved training plan. It is also undisputed that Mr. Hillman told Inspector Boggs that a copy of the subject plan was available at the Respondent’s Beaver Creek office. The office is located less than five miles from where the request was made and is a part of the Immel Mine under the Act. The citation was then issued without waiting for the plan to be produced.

² In apparent recognition of the difficulties of enforcing the current standard, the Secretary has proposed new rules that would set forth precisely which substances are prohibited. It would also place the onus of possession of banned substances on the miscreant miner and “provide clear and actionable guidance for mine operators”. 73 F.R.52136 (September 8, 2008).

Respondent maintains that since the Beaver Creek office is, under Section 3(h)(1)(c) of the Act, a part of the Immel Mine and that since it is undisputed that a copy of the subject training plan was available at the Beaver creek office, there was no violation as charged.³ The Secretary does not disagree that the Beaver Creek office is, under the Act, a part of the Immel Mine but argues that since it has given the Beaver Creek office a Federal mine identification number different from that given to the Immel Mine, the Beaver Creek office is not part of the Immel Mine “site” for purposes of the cited standard.

East Tennessee responds by asserting that it was not provided fair notice of this definition of “mine site” now advanced by the Secretary. Whether or not the Secretary’s interpretation is entitled to deference as a reasonable or permissible reading of her regulation, I agree that fair notice of the Secretary’s interpretation of the term “mine site” was not provided.⁴

Where an agency imposes a fine based on its interpretation, a separate inquiry may arise concerning whether the respondent has received “fair notice” of the interpretation it was fined for violating. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995). “[D]ue process. . . prevents. . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.” *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir 1986). An agency’s interpretation may be “permissible” but nevertheless fail to provide the notice required under this principle of administrative law to support imposition of a civil sanction. *General Elec.*, 53 F.3d at 1333-34. The Commission has not required that the operator receive actual notice of the Secretary’s interpretation. Instead, the Commission uses the test of “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.” *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990).

³ Section 3 of the Act provides in part as follows:

(h)(1) “coal or other mine” means (A) an area of land from which minerals are extracted in nonliquid form. . . and (c) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, **structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits** in nonliquid form (Emphasis added).

⁴ Because the Secretary has also advocated different definitions of the term “mine site”, see e.g. *Secretary v. National Cement Company of California Inc. et al.* No. 08-1312, slip op at 16 (D.C. Cir. July 21, 2009), there are also serious questions as to whether this interpretation represents the Secretary’s “fair and considered” judgement and would, in any event, therefore merit deference. See *Akzo Noble Salt, Inc. et al. v. FMSHRC et al.* 212 F.3d 1301, 1304 (D.C. Cir. 2000).

There is no evidence that the Respondent herein or anyone in the mining community ever received actual notice that the Secretary's arbitrary interpretation of the term "mine site" is limited geographically to areas only within a single Federal mine identification number. I further find that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized the specific requirement that a copy of the training plan must be made available other than at the "mine" as defined in the Act and, in particular, would be based on a mine identification number - a number which, in any event, does not provide any definitive geographic boundaries. It is unreasonable to anticipate, without prior notice, that the Secretary's definition of "mine site" would differ from the definition of "mine" under the Act and be limited to only areas with the same Federal identification number. Fair notice was not afforded in this case and, accordingly, Citation No. 7775341 must be vacated.

Even assuming, *arguendo*, that fair notice had been provided and that the Beaver Creek office is found not to be a part of the Immel Mine "site", I find that the copy of the training plan kept at the mine office less than five miles away was "available" within the meaning of the cited standard. It is first noted that the cited standard does not require that a copy of the plan be actually kept at the "mine site" but only that it be made available for inspection. Furthermore, there is no time set forth in the standard within which the mine operator must make the plan available for inspection. The time must therefore be "reasonable" under the circumstances. See *Steele Branch Mining*, 15 FMSHRC 597, 602 (April 1993).

The MSHA inspection group remained at the Immel Mine for several days after its request for a copy of the plan and, since according to the undisputed testimony of MSHA Inspector Galbreath, the need for a copy of the plan was only for purposes of comparison with the actual training that was being performed at the mine, there was clearly no urgent need for a copy of the plan. It may also reasonably be inferred that Respondent could have obtained a copy of the plan within minutes of its request since it was located at the mine office less than five miles away.⁵ I find that it is therefore reasonable to infer that a copy of the plan was accordingly "available" within the meaning of the cited standard.

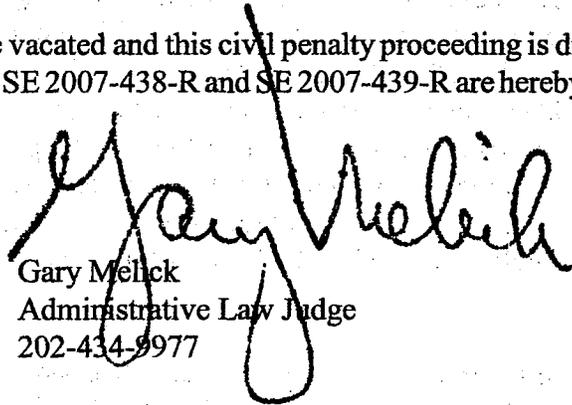
The evidence is also uncontradicted that, when MSHA representatives first requested a copy of the training plan, there was in fact a copy located at the "mine site" as interpreted by the Secretary. This copy of the plan was kept in the file cabinet of mine manager Steele's locked office. As a condition precedent to enforcing this standard I find that it is incumbent upon MSHA representatives to request the plan copy from the mine's authorized custodian of records or from the management official then in charge of the mine. This is essential since only certain mine employees could be expected to know the location of such documents. MSHA's failure to make a proper request for a

⁵ In this regard, it is noted that under the Secretary's proffered definition, the training plan for the Young Mine would be "available" at the Young "mine site" even though kept at the Beaver Creek office located 1.6 miles away, because they have the same Federal mine identification number.

copy of the training plan should, for this additional reason, also result in vacating the citation.⁶

ORDER

Citations Number 7775339 and 7775341 are vacated and this civil penalty proceeding is dismissed. The related contest proceedings, Dockets No SE 2007-438-R and SE 2007-439-R are hereby granted.



Gary Melick
Administrative Law Judge
202-434-9977

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/lh

⁶ It is also noted that in terminating the citation the Secretary stated that “the mine operator now has a copy of the approved training plan on site for review by MSHA, miners and representatives”. Since it is undisputed that in fact there always had been a copy of the approved training plan on site, nothing in fact had to be performed in order to abate the citation.

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 15, 2009

MACH MINING, LLC., Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. LAKE 2009-323-R
	:	Citation No. 8414211; 02/12/2009
	:	
	:	Docket No. LAKE 2009-324-R
SECRETARY OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION, (MSHA) Respondent	:	Citation No. 8414214; 02/12/2009
	:	
	:	Mach #1 Mine
	:	Mine ID 11-03141

PARTIAL DECISION

Appearances: Christopher D. Pence, Esq., and David J. Hardy, Esq., Allen, Guthrie, McHugh & Thomas, PLLC, Charleston, West Virginia, for the Contestant,
Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Respondent.

Before: Judge Weisberger

I. Introduction

These cases are before me based on Notices of Contest filed by Mach Mining, LLC (“Mach”) challenging the issuance of two citations alleging violations of the provisions of two mandatory standards¹ relating to the requirement of providing escapeways. Pursuant to notice, a hearing was held in St. Louis, Missouri on May 14, 2009. After each party rested, the record was kept open to allow for the possibility of any additional evidentiary hearing. The parties were directed to file briefs addressing the limited issue of whether the cited area was a “working section”, and thus triggering the requirements of escapeways.² Each party subsequently filed a

¹Citation No. 8414211 alleges a violation of 30 C.F.R. § 75.380(d)(1) which requires that escapeways be maintained in a safe condition. Citation No. 8414214 alleges a violation of 30 C.F.R. § 75.364(b)(5), which requires an examination of an escapeway for hazardous conditions. At the conclusion of the hearing held on May 14, 2009, the Secretary made a motion to amend the citation by changing the alleged violative standard to 30 C.F.R. § 75.364(h), which requires that a record be made of hazardous conditions found during weekly examinations. After the parties argued the merits of the motion, it was granted.

²Pursuant to 30 C.F.R. § 75.380(b)(1), an operator is required to provide an escapeway “for each working section.” Thus, the existence of a working section is a predicate for the

brief, and a reply.

The decision that follows addresses only the issue of whether the cited area was a working section.

II. Stipulations

At the hearing, the parties filed Joint Stipulations, which, as pertinent to the issue at bar, are set forth as follows:

9. On February 12, 2009, MSHA Inspector Bobby F. Jones conducted a regular quarterly inspection of Mach #1 Mine, operated by Mach Mining, LLC. ["Mach"]
10. While conducting his inspection, Mr. Jones inspected the primary escapeway to the Headgate (hereinafter "HG") #4.
11. The objects described in the body of Citation No. 8414211 extended 100 to 120 feet of the primary escapeway in HG #4. There was an amount of water at the intersection of crosscut #2. The objects described in the citation ended at the stairs leading to the overcast at crosscut #1. The width of the portion of the escapeway described in the aforementioned citation is 19 feet from rib to rib.
12. In the escapeway, there was a lifeline.
13. The lifeline in the HG#4 primary escapeway was continuous from the fan at the surface of the mine to the loading point. The lifeline was present in the area cited just outby crosscut #2 to crosscut #1 and ran through the regulator and up to the overcast.
14. A lifeline is a line that the miners may grasp to guide them through the primary escapeway to the surface of the mine in the event of an emergency evacuation.
15. The lifeline is available for miners to use to guide them out of the mine, if necessary.
16. A lifeline is not fixed, but rather is flexible to allow movement of the miner.
17. At the mouth of the escapeway, was a regulator.

imposition of all regulatory mandates relating to escapeways, including those set forth in Sections 75.380(d)(1), and 75.364(h), the standards at issue in the case at bar.

18. A regulator is a stopping (ie. a solid, concrete block wall) with a hole knocked out of it for purposes of controlling air into the mine.
19. The regulator (or stopping) was approximately 11" tall and stretched from rib to rib, a distance of 19 feet.
20. The hole knocked out of the stopping in order to create the regulator measured 4' 4" wide X 6' tall.
21. The concrete blocks that made up the regulator measured 8" tall X 16" wide X 6" deep.
22. The regulator was created on or about January 6, 2009. Prior to its creation, it was a stopping because there was no need for air inby this location.
23. In order to make it through the escapeway, a miner must walk through the 4'4" wide X 6' tall hole in the regulator.
24. The regulator controls the amount and velocity of air going to the section in order to comply with the approved ventilation control plan.

27. Air blows through the regulator at 106,832 cubic feet of air per minute ("cfm").
28. The fan that blows the air is at the surface of the mine.
29. Further into the escapeway, there were concrete blocks on the ground outby the regulator.
30. The concrete blocks that lay on the ground outby the regulator were knocked out of the stopping when a change in air ventilation was created.
31. Outby the regulator was a pile of gob.
32. In the primary escapeway, there lay a take-up track.
33. A take-up track is a steel piece of equipment used in belt storage units.
34. There were no items between the pullet of crib ties and the stairs to the overcast.
35. Contestant began weekly examination of the primary escapeway at HG #4 five weeks prior to the issuance of the subject citations.

36. Contestant assigned Mine Examiner Dave Adams the task of conducting the weekly examinations at HG#4 from January 8, 2009 through February 12, 2009.
37. The concrete blocks existed in the escapeway outby the regulator since on or about January 6, 2009 when the regulator was created through February 12, 2009 when the subject citations were issued.
38. The pile of gob existed in the escapeway since on or about January 6, 2009 when the regulator was created through February 12, 2009 when the subject citations were issued.
39. The take-up track existed in the escapeway since on or about January 6, 2009 when the regulator was created through February 12, 2009 when the subject citations were issued.
40. The pallet of crib ties existed in the escapeway since on or about January 6, 2009 when the regulator was created through February 12, 2009 when the subject citations were issued.
41. Mine Examiner Adams last conducted a weekly exam of the primary escapeway prior to the issuance of Cit. No. 8414211 on or about February 9, 2009.
42. The concrete blocks outby, pile of gob, take-up track, and pallet of crib ties were present in the primary escapeway at HG#4 since January 6, 2009 when the regulator was created through February 12, 2009 when the subject citations were issued.
43. Mine Examiner Dave Adams did, in fact, conduct weekly examinations for hazardous conditions at the primary escapeway at HG #4 from January 8, 2009 through February 12, 2009.
44. Mine Examiner Dave Adams did not note any hazardous conditions in the weekly examination records for the primary escapeway at HG #4 during the period from January 8, 2009 through February 12, 2009.

III. Mach's Case

Essentially it is Mach's position that HG #4 was not a working section when cited by Jones. According to Anthony Webb, Mach's mine manager, HG # 4 was producing coal from January 9 through February 9, 2009. On February 9, 2009, HG # 4 was idled, and power was removed from the HG # 4 power center and the belt drive. The miners working on the section were assigned to provide assistance to a crew that was setting up a longwall section approximately one mile from HG # 4. Webb indicated that Mach intended that HG # 4 would remain idled for a minimum of approximately four weeks. Production was resumed at HG #4

about the first week of March 2009.

Webb explained that before production could be resumed in the cited area, Mach had to return power to the belt drive, and make sure the area was safe. He indicated that on February 12, 2009, the crew working on moving the longwall would have used the Tailgate #1 escapeway, which was “a distinct separation” from the primary escapeway at HG #4. (Tr. 156) He opined that had there been an emergency on February 12, 2009, the men would not have traversed the cited area to get to the escapeway. Rather, “the lifeline directs them to the shortest distance to the capsule and the lifeline would prevent them from traveling towards Headgate 4 which would actually take them further away from the escape capsule.” (Tr. 159) Webb further stated that on the date cited, HG #4 did not have a designated working face, or a designated loading point.

IV. Discussion

Introduction

Section 317(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 877(f), imposes a requirement of escapeways from each “working section.” Title 30, Code of Federal Regulations, reiterates this requirement (*See* 30 C.F.R. § 75.380(b)(1)), and requires further that the escapeways shall be maintained in a safe condition to always assure passage. (*See* 30 C.F.R. § 380(d)(1)).

30 C.F.R. § 75.2 defines working section as follows: “all areas of the coal mine from the loading point of the section to and including the working faces.” Working face is defined as “any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle.” *Id.*

In *BethEnergy Mines, Inc.*, 11 FMSHRC 1445 (1989), an issue before the Commission was whether the cited areas were “working sections,” and thus subject to the requirement of providing mandatory escapeways. The Commission set forth the following “chief” broad factors as being among those suggested by the record before it as bearing on whether an area of a mine is a “working section:” “the hazards associated with the work being done in the area (hazards); the geographical components of the area (location); the physical components of the area and their functional readiness (capability); and the development of the area with respect to the actual production (timeliness).” 11 FMSHRC at 1453.

The Commission went on to elaborate as follows:

For example, the hazards associated with the work being done in the area include the increased dangers associated with the ongoing activities in a section. As acknowledged by counsel for the Secretary at oral argument, the activities associated with reasonably imminent coal production introduce increased hazards to the particular area of the mine where production takes place. Oral Arg. Tr. at 12. It is the presence of the increased hazards to miners attendant to actual or reasonably close coal production that

form a pragmatic basis for the two escapeways requirement of section 75.1704. It is then that methane is more likely to be released in larger quantities during extraction of coal at the face. Also at this time, there may be an increase in the generation of suspended coal dust, an increase in the possibility of sparking, and an increased possibility of exposure to unsupported roof. The geographical components of a working section, as delineated in section 75.2(g)(3), are the existence of an identifiable face from which coal is or will be extracted, as well as a section loading point. The physical components of an area and their functional readiness relate to the presence of those mechanical mining components integral to the method of extraction contemplated in the identified location. In this regard, the presence of a functioning power center, a functional loading point connected to the mine's main haulage system, and necessary roof support equipment (such as shields where longwall mining is involved) are appropriate indicators of a section's capability. On the other hand, the location of equipment that merely has to be trammed into position--such as a continuous mining machine, roof bolter or shuttle car--is not necessarily dispositive of the "capability" of a section to extract coal. Timeliness is linked to capability and refers to the imminence of production. We agree with the judge that while actual production is not necessary, the term "working section" is inextricably linked to the term "working face" and that term, we conclude, implies coal production that is reasonably close in time. Once production is reasonably close, mechanical and electrical problems that temporarily interrupt the otherwise established capability of a section to produce coal do not relieve the operator from compliance with the mandates of section 75.1704. Other relevant factors also include the status of the mine's operations at the time of the alleged violation and any evidence as to the operator's plan for establishing unobstructed escapeways prior to the start of production activities. See Oral Arg. Tr. at 23-24.

BethEnergy, 11 FMSHRC at 1453-54.³

Further Findings and Discussion

I take cognizance of Webb's testimony that when HG #4 was cited on February 12, 2009, it had been idled since February 9, 2009, and Mach "had planned" for it to remain idle for

³The Commission, in affirming that the Judge's finding that the cited area was not a working section, noted the following facts in the record: the cited areas were "in a state of shut-down," the lack of evidence that the company would have begun coal production with escapeways in their "obstructed state," a loading point that was not functional because certain equipment required to allow it to be functional had not yet been constructed, the power center was "inoperable," mining did not resume until two months after the MSHA inspection, the cited area was "not capable of coal extraction," a belt necessary in the mining operation had been disassembled, only half of the required roof support had been installed, shears were in company shops, and the conveyor had not been connected to any of the mining equipment. 11 FMSHRC at 1454.

approximately four weeks.⁴ However, there is not any evidence in the record that any equipment had to be moved to HG #4, in order for production to be resumed, nor is there any evidence that any construction or repairs were necessary for the resumption of production. Indeed, the following testimony by Webb is the only evidence adduced by Mach as to what was necessary in order to resume production:

Q. What steps had to be taken before production could resume in Headgate #4?

A. We had to put the power back into the section. We had to –
JUDGE WEISBERGER: Just go slowly here.

A. Okay. We had to put power on the belt drive. We had to make sure that the area was safe. We did an exam where we are required to carry that exam outside by the State of Illinois, and then we were able to resume production.⁵

(Tr. 154) (Emphasis added).

⁴I take cognizance of Webb's testimony that, when the area in question was cited, the section did not have a designated working face for the section, nor was there a designed loading point for HG #4. However, it is significant to note that HG #4 had been producing coal for a month up until three days prior to the issuance of the citations at bar, which, of necessity, would have included operations at a working face and a loading point. Moreover, there is not any evidence in the record that the loading point had been removed or rendered incapable of functioning after production was suspended on February 9, 2009.

⁵In this connection, Mach argues in its brief that there is not any evidence that it would have resumed production with the escapeway in the state it was found by Jones on February 12. However, it is significant to note that Webb did not specifically indicate which of the accumulated materials in the escapeway would have had to be removed in order to make the area safe for production to resume. Moreover, there is not any evidence that the presence of the conditions observed by Jones had contributed to the shut-down of the section or delay in the resumption of production. Indeed, I note that from January 6, 2009 through February 9, 2009, Mach was actively producing coal in HG #4, in spite of the fact that concrete blocks outby the regulator, gob, a take-up track, and a pallet of crib ties, existed in the escapeway during this period.

Additionally, I note that Mach represented in its brief that it "contests the Secretary's assertion that the presence of 2 to 8 inches of water, the 'gob' pile and the cinder blocks constituted obstructions of the escapeways violative of 30 C.F.R. § 75.380(d)(1)," (Mach Mining's Post-Hearing Brief ["Mach's brief"], at 8). Thus, an inference may be made that Mach's position is that these materials and conditions do not constitute obstructions of such a degree as to have rendered HG #4 incapable of resuming productions as a working section.

Thus I find that resumption of coal production in HG #4 depended not upon removal of physical obstructions, the return to the area of any equipment, or any repair or construction. Indeed, the cause for the idle state of HG #4 was a decision by Mach to remove the crew from HG #4 in order to assign it to assist in the development of another longwall section. Hence, the resumption of production depended solely on a management decision to return miners back to the area, and to return power to it by turning on a switch. Under these circumstances, clearly the return to production, with all its attendant hazards, for all intents and purposes, is to be considered imminent. Accordingly, I conclude that the situation at bar involved only a temporary interruption by Mach of the established capability of the section to produce coal. As such, I find that it was not incapable of functioning as a working section. Thus, I find that Mach should not be relieved from its obligation to maintain a safe escapeway.⁶

For all of the above reasons, I find that the facts in the case at bar are to be distinguished from those presented in *BethEnergy*, 11 FMSHRC 1445 (1989). I further find, applying the broad factors set forth in *BethEnergy*, that the cited area was a working section.⁷

ORDER

⁶See *BethEnergy*, 11 FMSHRC at 1453-54 (“Once production is reasonably close, mechanical and electrical problems that temporarily interrupt the otherwise established capability of a section to produce coal do not relieve the operator from compliance with the mandates of Section 75.1704 [which provide for two passageways to ensure passage of any person including disabled persons from each working section].”) (Emphasis added).

⁷I take cognizance of Mach’s assertion, in support of its position that the cited area was not a “working section,” that Jones admitted in “deposition testimony” that the area was not a working section at the time he issued the citation at bar. (Mach’s brief, at 3) However, I note that at the hearing, Jones explained his deposition as follows:

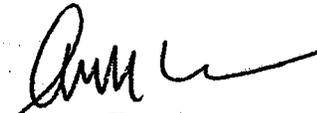
Q. Earlier on you were talking about a working section. When you testified at deposition about this not being a working section, why did you consider it to have not been a working section on the day that you cited the escapeway?

A. At the time I cited it, it was idle, but there was nothing to keep it, if another section broke down, say Headgate 3 broke down, there was nothing to prevent a crew from another part of the mine going to that unit and in 15 minutes firing that unit up and loading again.

(Tr. 126-27)

I observed Jones’ demeanor and found his testimony credible on this point. Also, as set forth above, the evidence in this *de novo* proceeding clearly establishes that the area was a working section.

It is Ordered that, no later than ten days after the issuance of this partial decision, contestant shall convene a conference call. The agenda for the call is the status of the disposition of all remaining issues posed by the two notices of contest at issue in these proceedings.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 23, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-939
Petitioner	:	A.C. No. 42-01715-145920-01
	:	
v.	:	Docket No. WEST 2008-940
	:	A.C. No. 42-01715-145920-02
GENWAL RESOURCES, INC.,	:	
Respondent	:	Crandall Canyon Mine

ORDER DENYING MOTION TO DISMISS
AMENDED PREHEARING ORDER

On July 16, 2008, the Secretary of Labor filed petitions for assessment of civil penalty in these cases under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* ("Mine Act"). She also filed a motion to file these petitions out of time. Genwal Resources, Inc, filed its answer to the petition within 30 days. In its answer, Genwal opposed the Secretary's motion to file the petitions for penalty out of time and asked that the cases be dismissed on several grounds. The cases were assigned to me on March 19, 2009, without a resolution of these issues. Genwal filed another motion to dismiss on June 29, 2009, and the Secretary filed an opposition.

These cases involve three citations issued under section 104(a) of the Mine Act, a citation issued under section 104(d)(1) and an order issued under section 104(d)(2). The citations were issued in July 2006 and the order was issued in July 2007. The total proposed penalty is \$11,080.00. In her motion to file the petitions for penalty late, the Secretary states that Genwal's notice of contest of the proposed penalties was filed on April 30, 2008. Commission Procedural Rule 28(a) required the Secretary to file the petitions for penalty within 45 days after Genwal contested the penalties, which would be no later than June 16, 2008. 29 C.F.R. § 2700.28(a). She attributes the late filing of her penalty petition to "an increased workload and administrative oversight by the [MSHA] field office." She argues that the time limit in the Commission's rule does not impose a jurisdictional limitation and that, because the Mine Act states that petitions for penalty must be filed "within a reasonable time," the court should examine whether reasonable cause existed for the Secretary's delay. A declaration of Price, Utah, Field Office Supervisor William M. Taylor was submitted in support of her motion.

Genwal's motion to dismiss raises a number of additional issues. It states that the cases should be dismissed "because the citations were written while the mine was under its previous ownership and because of the extreme prejudice that has been created by the passage of time and the events that have occurred since these citations were written on July 27, 2006." (Motion, p.

1). The mine was purchased by its current owner on August 9, 2006. Genwal states that as part of the purchase agreement, outstanding penalties and fines were addressed and the parties agreed that the former owner would be responsible for all MSHA penalties that had not yet been assessed during its period of ownership. In negotiating these terms, Genwal represents that neither the current owner nor the former owner of the company could have foreseen that "MSHA penalties would take in excess of two (2) years to be assessed, and therefore, extreme prejudice has been created by the passing of time." *Id.* 1-2. Genwal also maintains that the information contained in the declaration of MSHA's field office supervisor is not relevant because the Secretary had "one full year to assess the penalties for the citations at issue prior to the occurrence of the events referenced in the declaration. . . ." *Id.* 2.

In addition, Genwal states that the citations were served on the company's safety director, Jim Pruitt. Because Mr. Pruitt is now an MSHA inspector, Genwal argues that it "will undoubtedly face obstacles in attempting to interview Mr. Pruitt for discovery purposes . . ." *Id.* 2.

Section 105(a) of the Mine Act provides:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, [she] shall, *within a reasonable time after termination of such inspection or investigation*, notify the operator . . . of the civil penalty proposed

(30 U.S.C. §815(a); emphasis added). This statutory provision requires the Secretary to propose penalties within a reasonable period of time after a citation or order of withdrawal has been terminated.

The Secretary states that Genwal contested the penalties on or about April 30, 2008. Commission Procedural Rule 26, 29 C.F.R. § 2700.26, provides that a mine operator must notify the Secretary that it wishes to contest a proposed penalty assessment within 30 days of its receipt. Consequently, it can be estimated that Genwal received the Secretary's proposed penalty assessment on or about March 31, 2008. The citations at issue were terminated on or about August 7, 2006. Thus, it took the Secretary more than a year and a half to propose penalties for these citations. The Commission's procedural rules do not set forth a time limit for the Secretary to propose penalties. Rule 25 simply states that the Secretary "shall notify the operator . . . of the violation alleged [and] the amount of the proposed penalty assessment. . . ." 29 U.S.C. § 2700.25.

The record reveals that the Secretary filed her petition for assessment of penalty about 77 days after Genwal filed its notice of contest of the penalties. As stated above, Commission Procedural Rule 29 provides that the Secretary shall file her petition for assessment of penalty within 45 days of receipt of a mine operator's contest of a proposed assessment.

The declaration of Field Office Supervisor Taylor states that the field office was not able to process and submit to the Office of the Solicitor the “packets” necessary for the petition for assessment of penalty until early July 2008. He states that the Price, Utah, field office was “diligently involved” in providing information to investigative panels and the public following the entrapment of miners at the Crandall Canyon Mine starting in August 2007. All available office personnel were involved in this effort. The declaration also states that, at about the same time, the number of penalty contests drastically increased both nationwide and in Utah. He states that the delay in processing Genwal’s penalty contest was not “due to any dilatory intent on the part of the agency.”

It is well settled that the Secretary’s failure to meet time deadlines when filing penalty proposals and petitions for assessment of penalty is not jurisdictional. The statutory processing deadlines generally are intended to “spur the Secretary to action” rather than to confer rights on litigants that limit the scope of the Secretary’s authority. *Sec’y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005).

The key events can be summarized as follows:

July 27, 2006	Citations issued
August 7, 2006	Citations terminated
March 31, 2008	Penalty proposed under Procedural Rule 25
April 30, 2008	Penalty contested by Genwal under Procedural Rule 26
July 16, 2008	Petition for Assessment Penalty filed under Procedural Rule 28
August 15, 2008	Answer filed by Genwal

There can be no dispute that the citations were issued about three years ago. Almost one year of the delay in these cases can be attributed to this Commission. The Commission’s caseload increased significantly during this period. The Secretary’s petition for assessment of penalty was filed only about 30 days after the due date. The biggest delay was at the Price field office and MSHA’s Office of Assessments. Although the citations were terminated on August 7, 2006, the Secretary did not propose penalties until March 31, 2008.

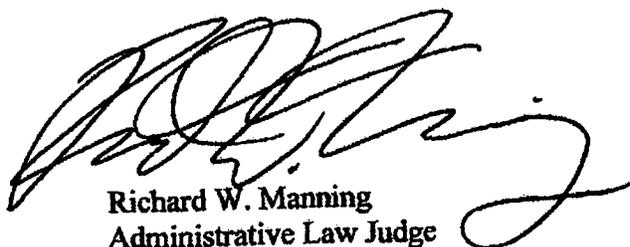
Dismissal is a harsh remedy. Genwal alleges that it has been prejudiced by this delay, but it does not set forth any specifics. It argues that the length of time establishes prejudice. Genwal also relies on the transfer of ownership of the company because neither party to the sale “could have foreseen that MSHA penalties would take in excess of two (2) years to be assessed.” (Motion, 1- 2). It is well established that the mere passage of time is not sufficient to establish prejudice. Indeed, it often takes the Office of Assessments nine to twelve months to propose a penalty. Section 105(a) of the Mine Act was written to encourage compliance with the Secretary’s safety and health standards rather than to create an avenue for respondents to limit the scope of the Secretary’s authority. Genwal admitted that arrangements were made in the purchase agreement for the payment of outstanding penalties assessed for citations issued prior to

the purchase date. Genwal knew that it had been issued the subject citations and that penalties had not yet been proposed.

The Senate committee that was instrumental in drafting the Mine Act specifically stated in its report that the committee "does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 95-181, at 34 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978). I accept the Secretary's explanation for her delay and find that it was reasonable under the circumstances. Other administrative law judges have reached similar conclusions in other cases. *See, Wabash Mine Holding Co.*, 27 FMSHRC 672, 685-88 (October 2005) (15 month delay); *Mountain Coal Co.*, 31 FMSHRC _____, No WEST 2009-189 (June 30, 2009) (2 year delay).¹

If these cases do not settle and Genwal is able to establish at a hearing that the delay prejudiced its ability to offer evidence in its defense with respect to specific citations, then I will consider whether an equitable remedy is appropriate. For the reasons set forth above, Genwal's motion to dismiss these cases is **DENIED** and the Secretary's motion to file late petitions for the assessment of civil penalty is **GRANTED**.

In order to encourage the parties to settle these cases, counsel for the Secretary shall contact Respondent to discuss settlement. If a settlement is reached, a motion for its approval shall be filed by the Secretary no later than **August 19, 2009**. If the parties are not able to settle the cases, counsel for the Secretary shall, on or before **August 20, 2009**, initiate a conference call with me to discuss the status of the cases and potential hearing dates.



Richard W. Manning
Administrative Law Judge

Distribution:

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¹ The issue raised concerning Mr. Pruitt is irrelevant. Mr. Pruitt could have taken a position with MSHA even if there had not been a delay in proposing a penalty. There has been no showing that Mr. Pruitt's departure will create any prejudice to Genwal.

Jason D. Witt, Esq., Assistant General Counsel, Coal Services Group, 56854 Pleasant Ridge Road, Alledonia, OH 43902 (Fax and First Class Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500

WASHINGTON, D.C. 20001

(202) 434-9980

July 24, 2009

BILLY BRANNON, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 2009-302-D
: BARB CD 2008-07

PANTHER MINING, LLC, : No. 1 Mine
Respondent : Mine ID 15-18198

BILLY BRANNON, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 2009-1225-D
: BARB CD 2009-07

PANTHER MINING, LLC and :
MARK D. SHELTON, : No. 1 Mine
Respondent : Mine ID 16-18198

SECRETARY OF LABOR, : DISCRIMINATION PROCEEDING
on behalf of BILLY BRANNON, :
Complainant, : Docket No. KENT 2009-1259-D
: BARB CD 2009-09

PANTHER MINING, LLC, : No.1 Mine
Respondent : Mine ID 15-18198

**ORDER GRANTING IN PART COMPLAINANT'S MOTION TO COMPEL
RULING ON MOTION FOR EXTENSION OF TIME TO COMPLETE DISCOVERY
RULING ON MOTION FOR CONTINUANCE OF TRIAL
AND
RULING ON MOTION TO CONSOLIDATE**

I. THE MOTION TO COMPEL (DOCKET NO. KENT 200-302-D)

The Complainant, Billy Brannon, has moved to compel the Respondent, Panther Mining, LLC ("Panther Mining" or "the company"), to respond to several interrogatories in the Complainant's First Set of Interrogatories and to produce certain documents requested in

Complainant's First Request for Production of Documents. According to Brannon, the company either has objected to the interrogatories and requests or provided incomplete information.

INTERROGATORIES, ANSWERS AND RULINGS¹

A.

Interrogatory 5. Please identify the person(s) who made the decision to transfer Brannon from Cloverlick Coal to Panther Mining [on] February 8, 2008, and state the precise date that said transfer was effectuated.

Answer: Rick Raleigh and Ross Kegan. March 3, 2008.

Complainant notes in his first set of interrogatories Brannon stated: "When an interrogatory asks you to 'identify' a person, please state the person's name and job title, and their last known mailing address, telephone number, and e-mail address." The Complainant states that Panther provided Raleigh's job title and contact information in response to another interrogatory, but that it did not provide Kegan's job title and contact information. Complainant asserts he is entitled to the information.

The company responds that it is providing Kegan's job title and contact information to the Complainant.

B.

Interrogatory 6. Please identify all of the employees, both management and hourly, who were assigned to the 2nd shift at Panther Mining's No. 1 mine *at any time* during the period that Brannon worked on said shift prior to his transfer to the day shift on or about June 26, 2008 (emphasis in original).

Answer: The Respondent objects to the interrogatory as overly broad and not relevant or reasonably calculated to lead to the discovery of admissible evidence.

The Complainant argues that the interrogatory is not overly broad, in that any employee who worked on the second shift at the mine might have information relevant to Brannon's claims. It further argues it is not unduly burdensome, since the information sought is within the knowledge and control of the company.

The company responds that the only protected activity Brannon alleges while he worked on the second shift is that he filed a civil suit based on an assault that occurred at the mine where

¹The allegedly incomplete or unanswered interrogatories and requests are numbered as in the First Set of Interrogatories and First Request for Production of Documents.

he worked (the Cloverlick mine) before he was transferred to Panther's mine. According to the company, the other alleged protected activities occurred while the Complainant worked at the Cloverlick mine or on the day shift.

The information sought by the Complainant must be disclosed. The interrogatory, while broad, is not overly so. A mine is a confined environment in more ways than one, and second shift miners may well have heard or seen things bearing on the Complainant's claims.

The company **IS ORDERED** to provide the Complainant with the information requested in the interrogatory, and to do so within 15 days of the date of this order.

C.

Interrogatory 8. Please identify all of the employees, both management and hourly, who were assigned to the day shift at Panther Mining's No. 1 mine *at any time* during the period that Brannon worked on said shift through and including September 12, 2008 (emphasis in original).

Answer: Respondent objects to this interrogatory as overly broad and not relevant or reasonably calculated to lead to the discovery of admissible evidence.

For the same reasons as stated above, the Complainant maintains the interrogatory is not overly broad and is relevant.

The company contends Brannon already knows the names of day shift employees with information relevant to his claims and that he should not be allowed to use the Commission's litigation process to "shop for new claims, gain information for . . . pending claims, or cause unnecessary interference with [the company's] business or employees." Opposition to Motion to Compel 5.

For essentially the same reasons as stated with regard to Interrogatory 6, I agree with the Complainant that the information requested in the interrogatory should be disclosed. The company **IS ORDERED** to provide the Complainant with the information requested in the interrogatory, and to do so within 15 days of the date of this order.

D.

Interrogatory 11. Please state whether anyone from Panther Mining or Black Mountain Resources investigated the allegations made in Brannon's complaint of discrimination after Brannon filed Case No. BARB-CD-2008-07 with MSHA. If the answer is "yes," please identify who conducted said investigation and identify every person to whom he spoke during the investigation.

Answer: Yes, Rick Raleigh and Panther's counsel. Except as stated, Panther objects to

this interrogatory as calling for information that is protected from disclosure by the attorney-client privilege and/or work product doctrine.

The Complainant states he is not asking for copies of notes taken by Panther's counsel, but that he is entitled to know to whom Rick Raleigh, the company's personnel director, spoke during the investigation. The Complainant asserts notes taken by Raleigh during his investigation are much closer in time to the events forming the basis for the discrimination proceeding, and that the Complainant cannot obtain their equivalent by any other means. The Complainant further notes that in response to a motion to compel filed by the company, I ruled that copies of notes and logs made by Brannon at the behest of his counsel should be made available to the Respondent, provided appropriate redactions were made to protect the identity of miner witnesses and to exclude material relating to the company's attorney's thought processes and litigation strategies. Order 5 (May 29, 2009).

The company answers that Raleigh's notes were not contemporaneous with the events at issue, but were made after the Complainant filed his complaint with MSHA and as part of the company's "after the fact" investigation of the Complainant's charges. As such, they are protected by the work product doctrine. Opposition to Motion to Compel 6-7.

While there is no gainsaying the fact that the information the Complainant seeks can be viewed as coming within the work product doctrine, the doctrine is not sacrosanct and there are times when it must yield to more weighty concerns. In my view, one such concern is the paramount need for full or nearly full disclosure prior to trial. The need originally engendered the federal rules governing discovery and in administrative proceedings such as this adherence to the original purpose can help parties resolve their differences short of trial or, failing that, can greatly enhance the likelihood of a just resolution. As I have noted elsewhere, it is for these reasons that many administrative law judges, myself included, have little sympathy for claims of privilege. See Order 5 (May 29, 2008). Here, because the information could reasonably be expected to lead to the discovery of relevant evidence, I hold that the names of the persons to whom Raleigh spoke and Raleigh's notes of the conversations are discoverable.

The company **IS ORDERED** to provide the Complainant with the information requested in the interrogatory within 15 days of this order. Any material in the information relating to the company's attorney's thought processes and/or its attorney's litigation strategies must be redacted.

E.

Interrogatory 17. In ¶ 8 of Panther Mining's Answer, the company alleges that "there was only one regular head drive operator whose drives were much further in the mine than those assigned to complainant." Please identify said head drive operator.

Answer: Joe Yeary.

The Complainant states the company did not provide Mr. Yeary's contact information.

The company agrees, and states it is sending the information to the Complainant.

F.

Interrogatory 23. Please identify each and every person whom Panther Mining intends on calling as a witness at the trial of this action, and provide a summary of the expected testimony of each said person.

Answer: Panther Mining has not determined who it intends to call as a witness, but they will probably include Mark Shelton [and nine others who are named] and may include some or all of the following: Justin Adams [and seven others who are named].

The Complaint states that although Panther did not object to the interrogatory, it failed to provide a summary of the expected testimony of each person. It notes that such summaries routinely are required by Commission judges in their pre-hearing orders and that the summaries may indicate to the Complainant that deposition of a witness or witnesses is unnecessary, thereby saving the Complainant considerable expense.

The company asserts it presently intends to call 17 witnesses. It states it "should not be required to summarize the testimony of so many witnesses covering so much detailed information" and that any required responses should "be limited to general topics of expected testimony[,] not full details." Opposition to Motion to Compel 8.

Interrogatory 23 and the company's objection to it have been overtaken by events. Under the April 20, 2009, Notice of Hearing as amended below, the parties are required to provide one another with the names of their intended witnesses and with synopses of the witnesses' testimony on or before January 26, 2010. Therefore, the company is under no obligation to do so now. However, all of the parties are required to exchange the names and the synopses. While the synopses must describe the subjects about which the witnesses will testify, they need not describe the details of the expected testimony.

REQUESTS FOR PRODUCTION OF DOCUMENTS, RESPONSES, AND RULINGS

A.

Request 1. A copy of the official mine map for the Panther No. 1 mine . . . that was in effect during September 2-12, 2008.

Response: See the attached map dated November 19, 2008, document no. 000101 [i.e., Panther Mining "Bates-stamped" numbers on the documents it provided to the Complainant].

The Complainant states that the company did not object to this request, but nonetheless did not provide the map. Instead, it sent only the bottom, right-hand corner of the map.

The company responds that its failure to provide the Complainant with a complete copy of the map was the result of a clerical error and that the requested copy has been sent.

B.

Request 4. Copies of all statements given to [MSHA] by management personnel from Panther Mining during MSHA's investigation of Brannon's discrimination complaint (Case No. BARB-CD-2008-07), which preceded the filing of the instant Complaint of Discrimination with [the Commission].

Response: See attached statements from Mark Shelton and Herschel [sic] Napier, documents no. 000301-000309.

The Complainant asserts, based on information available to him, the company's section foreman, Justin Adams, gave a statement to MSHA, and that a copy of the statement, which was not included in the materials the company made available, should have been provided.

The company states that it does not have a copy of Mr. Adams's statement. Opposition to Motion to Compel 8-11.

For the reasons set forth with regard to Request 5, the Motion to Compel **IS DENIED** with regard to Request 4.

C.

Request 5. Copies of all statements given to MSHA by hourly employees from Panther Mining during the agency's investigation of Brannon's discrimination complaint (Case No. BARB-CD-2008-07), in which management personnel from Panther or Black Mountain Resources were allowed to sit in on said witness interviews.

Response: Panther has none.

The Complainant asserts that, in response to one of his interrogatories, the company stated that Darrell Cohelia, the company's safety director, sat in on the MSHA interviews of Jonathan Whitehead, Shawn Daniels and Joe Yeary, each an hourly employee. It further states that Cohelia and Rick Raleigh, the company's personnel director, sat in on the MSHA interview of hourly employee Jim Lamb. The Complainant argues that by allowing the company officials to sit in, the hourly employees waived any claim of confidentiality they might otherwise have asserted. Because the company knows what the employees told MSHA, Panther Mining should be required to obtain the statements and produce them. The Complainant also describes his efforts to obtain

the statements from MSHA via a FOIA request. Thus far, the effort has resulted in MSHA's sending the Complainant copies of the requested statements, but with the names, job classifications, signatures, addresses and social security numbers of the interviewed hourly employees redacted. The Complainant describes the redacted statements as "worthless." Motion 11.

The company again responds it does not have any of the statements the Complainant seeks. Opposition to Motion to Compel 9-11.

The Complainant's motion to compel the company to produce the statements of Whitehead, Daniels, Yeary and Lamb **IS DENIED**. The company states it has no such copies, and I cannot order a party to produce something it does not have. The Complainant knows the names of the persons whose statements it wants. He can ask the persons. The Complainant also can and has followed an appropriate route for obtaining the statements by filing a FOIA request with MSHA. This has resulted, as the Complainant admits, in his obtaining redacted copies of the statements. If the Complainant is denied complete copies of the statements by those who were interviewed, he can depose the miners and/or call them as witnesses.

D.

Request 7. Any employee handbooks, personnel policies or other compilations of Panther Mining's personnel rules or policies that were in effect during Brannon's employment with the company prior to September 12, 2008.

Response: The [company] objects to this request as vague and overbroad and not calculated to lead to the discovery of admissible evidence. Without waiving this objection, see the attached attendance policy and drug policy, documents no. 000501-000509.

The Complainant states there is nothing "vague" or "overbroad" about its request and that the company either has employee handbooks, etc., or it does not. The Complainant wants the company to identify and produce all such documents that exist, and if the company objects to producing any of the specific documents, the Complainant wants the company to lodge specific objections.

The company states, if the Complainant needs the requested materials, he should "[identify] the subjects of the policies he seeks so that [the company] and . . . the [Administrative Law Judge will] have some basis to assess their discoverability." Opposition to Motion to Compel 10.

Employee handbooks and written personnel policies are discoverable, unless a sustainable objection is raised. Therefore, within 15 days of the date of this order, the company **IS ORDERED** to identify for the Complainant the handbooks and written personnel policies in effect during the Complainant's employment and to provide the complainant with copies of the

handbooks and policies in effect during the Complainant's employment. If such materials exist, but the company has privileges to assert or other objections to raise, the company must seek a protective order. In its motion, the company should describe the material(s) with specificity and state its position(s) against disclosure. If the Complainant wishes to respond, he must do so within five days of the date of his receipt of the company's motion.

E.

Request 11. If anyone from Panther Mining or Black Mountain Resources investigated Brannon's allegations after he filed his discrimination complaint (Case No. BARB-CD-2008-07) with MSHA, copies of any and all interview notes and other documents compiled by said person during his investigation.

Response: The [company] objects to this request, as it calls for information that is protected from disclosure by attorney-client privilege and/or the work product doctrine.

The Complaint reiterates the arguments he made with regard to Interrogatory 11, the company reiterates its objections, and I reiterate my ruling. The company **IS ORDERED** to provide the Complainant with the information requested within 15 days of this order. Any material on the information relating to the company's attorney's thought processes and/or litigation strategies must be redacted.

II. MOTION FOR EXTENSION OF TIME TO COMPLETE DISCOVERY
(DOCKET NO. KENT 2009-302-D)

III. MOTION FOR CONTINUANCE OF THE TRIAL
(DOCKET NO. KENT 2009-302-D)

IV. MOTION FOR CONSOLIDATION OF PROCEEDINGS
(DOCKETS NO. KENT 2009-302-D, KENT 2009-1225-D AND KENT 2009-1259-D)

Docket No. KENT 2009-302-D was assigned to me on March 6, 2009. On April 20, 2009, I scheduled the case to be heard on August 11, 2009, in Barbourville, Kentucky. At the same time, I ordered the Complainant to respond to the company's First Set of Interrogatories no later than May 8, and I stated I expected counsels "to cooperate to ensure all discovery is . . . completed by July 10, 2009." Order and Notice 1 (April 20, 2009). Thereafter, I ruled on the company's motion to overturn the Complainant's objections to written discovery requests and to compel discovery (May 29, 2009). Now, I have before me the Complainant's motion to compel.

Obviously, July 10 has come and gone, and discovery has not been completed, at least to the satisfaction of the Complainant. The Complainant, therefore, moves for a 120-day extension of time to complete discovery and for a commensurate continuation of the trial date. Complicating the matter is the fact that the Complainant has filed an additional discrimination

complaint against the company (*Billy Brannon v. Panther Mining, LLC and Mark D. Shelton*, Docket No. KENT 2009-1225-D), and the Secretary of Labor has filed a discrimination complaint on the Complainant's behalf (*Secretary of Labor, on behalf of Billy Brannon v. Panther Mining, LLC*, Docket No. KENT 2009-1259-D). The company has moved to consolidate the two "new" cases with the instant case.

As I noted when ruling on the Complainant's first motion to compel, judges, especially administrative law judges, liberally construe discovery rules in order to provide parties with the information needed at trial. Order 5 (May 29, 2009). However, there is no denying the fact that unfettered discovery can consume a great deal of time. As a result, there exists an inherent tension between a judge's duty to hear and decide a case promptly and his or her duty to further discovery's ideal result, ensuring a party "see[s] many, if not all, of his or her opponent's cards before proceeding through the courthouse door." *Id.* The tension has become particularly acute for the Commission's judges, who face an ever mounting backlog of cases and a potential breakdown of the agency's ability to provide timely decision making.

The facts speak for themselves. This month cases pending before the Commission will surpass 13,000, an increase of 600% since the passage of the Miner Act. From fiscal year 2000 through fiscal year 2005, the average number of cases filed per year was approximately 2,300. However, in fiscal year 2008, the number was approximately 8,900, and, at the current rate, the projected total backlog will be over 18,000 cases by the end of fiscal year 2010. Barring a large increase in staffing – an increase that is not on the horizon – the keeping of trial dates becomes vital if the Commission is to maintain even a semblance of timeliness in the decisional process.

The present motion for a continuance illustrates the problem. Docket No. KENT 2009-302-D was given priority on my calendar because, in general, the nature of discrimination complaints calls for their prompt resolution. In setting an August 11 trial date, I gave the case precedence over other cases that had been pending far longer. Now, the next open date on my trial calendar is March 2, 2010, and it is when the subject case will be heard. This seems an inordinately long time to wait for a trial, especially when the company is paying the Complainant not to work.² Yet, discovery is ongoing in the instant case, and it may not have begun yet in KENT 2009-1225-D and KENT 2009-1259-D. In my opinion, the need for full or nearly full disclosure prior to trial outweighs the economic and managerial inconvenience of a long delay. Therefore, the Complainant's motion for a continuance **IS GRANTED** and the trial **IS RESCHEDULED** to begin on **MARCH 2, 2010**. There is simply no more immediate date available without "bumping" others. Having given the parties precedence once, I am not inclined to do so again.

²On May 14, 2009, Commission Administrative Law Judge Jacqueline Bulluck ordered Brannon's temporary reinstatement (KENT 2009-988-D). The order was based on the parties' agreement that Brannon would be economically reinstated pending a final ruling on a complaint of discrimination the Secretary of Labor would file on Brannon's behalf. As discussed below, that complaint, Docket No. KENT 2009-1259-D, is now before me.

The parties' inability to meet the original discovery schedule and the resultant continuance means in all likelihood August 11 is lost as a trial day to the Commission. Lost trial days have adverse consequences for the agency, because they mean an increase in the Commission's burgeoning case backlog. For this reason, the parties are advised, as will be all appearing before me hereafter, that the days of liberal continuances are over. I no longer will grant them, except under the most dire of circumstances. The parties will meet the trial discovery schedule as originally set and go to trial on the date(s) scheduled, or they will risk default.

Docket No. KENT 2009-302-D will be called for trial on **March 2, 2010**, in **Barbourville, Kentucky**. The trial will commence at **8:30 a.m.** In addition, counsel for the company's motion to consolidate **IS GRANTED**, and Docket No. KENT 2009-1225 and KENT 2009-1255-D **ARE CONSOLIDATED WITH** Docket No. KENT 2009-302-D for hearing and decision. The latter two cases will be called for hearing on **March 2, 2010**, with Docket No. KENT 2009-302-D. I understand the Complainant's objections to consolidation, but, by scheduling the testimony, the evidence relating to KENT 2009-1255-D can be identified and kept fairly contiguous in the record. Further, if the need arises, attorney's fees issues can be sorted out after the trial. I have a duty to minimize disruption to the parties and their witnesses. Consolidation of the cases does that. I also have a duty to prevent even more delay in the cases than has already occurred, and consolidation assists in that regard. While the mechanics of presiding over the consolidated cases may be complicated, with the assistance and cooperation of the parties they can be mastered.

The parties are advised the requirements of the April 20, 2009, Notice of Hearing **ARE EXTENDED** to Docket Nos. KENT 2009-1225-D and KENT 2009-1259-D, except that all discovery must be completed by **January 15, 2010**. On or before **January 26, 2010**, the Complainant and the Respondent will file their prehearing reports, including their witness lists and testimony summaries.

Counsels are reminded Commission Rule 10(c) requires the moving party to confer or make reasonable efforts to confer with the other parties prior to filing a non-dispositive motion and to state in the motion if any other party opposes or does not oppose the motion. 29 C.F.R. § 2700.10(c). Compliance with the rule is expected. Unless a statement indicating compliance is included in future non-dispositive motions, the motions will not be accepted for filing and will be returned.


David F. Barbour
Administrative Law Judge

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August 31, 2009

BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 2009-302-D
v.	:	BARB CD 2008-07
	:	
PANTHER MINING, LLC,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198
	:	
BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 2009-1225-D
v.	:	BARB CD 2009-07
	:	
PANTHER MINING , LLC and	:	
MARK D. SHELTON,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
on behalf of BILLY BRANNON,	:	
Complainant,	:	Docket No. KENT 2009-1259-D
	:	BARB CD 2009-09
v.	:	
	:	
PANTHER MINING, LLC,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198

ORDER DENYING MOTION TO RECONSIDER DISCOVERY RULING

On July 24, 2009, I granted in part and denied in part Complainant's motion to compel the Respondent to answer certain interrogatories and to produce certain documents. Order Granting in Part and Denying in Part Complainant's Motion to Compel ("Order"). Among the documents sought were "Copies of all statements given to [MSHA] by management personnel . . . during MSHA's investigation of Brannon's discrimination complaint (Case No. BARB-CD-2008-07), which preceded the filing to the instant Complaint of Discrimination with [the Commission]" (i.e., Docket No. KENT 2009-302-D). Order 6. Also sought were "Copies of all

statements given to MSHA by hourly employees [of the company] during the agency's investigation of [the same] . . . complaint . . . in which management personnel from Panther or Black Mountain Resources [(Panther's parent company)] were allowed to sit in on . . . [the] interviews." *Id.* In his motion to compel, the Complainant described his efforts to obtain copies of the statements from MSHA via a FOIA request. The request resulted in the agency sending the Complainant copies of the statements, but with the names, job classifications, signatures, addresses and social security numbers of the interviewed employees redacted. The Complainant described the redacted statements as "worthless." *See Id.* at 6-7. The company responded to the request it provide the Complainant with complete copies by stating it has no such copies. *Id.* at 6.

In denying the Complainant's motion to compel production of the copies, I stated in part:

The company states it has no such copies, and I cannot order a party to produce something it does not have. The Complainant knows the names of the persons whose statements it wants. He can ask the persons. The Complainant also can and has followed an appropriate route for obtaining the statements by filing a FOIA request with MSHA. This has resulted, as the Complainant admits, in [his] obtaining redacted copies of the statements. If the Complainant is denied complete copies . . . by those who were interviewed, he can depose the miners and/or call them as witnesses.

Order at 7.

The Complainant now asks me to reconsider this ruling. He states the company's section foreman, Justin Adams, gave a statement to MSHA and that although the company claims it does not have a copy of the statement, "clearly it can obtain that statement, whereas [the Complainant] cannot." Mot.1. The Complainant wants me to require the company to instruct Adams to get the company a copy of his statement and then to require the company to provide that copy to the Complainant. *Id.*

The Complainant further states that although the company "may be telling the truth" about not having copies of the statements of four of its hourly employees (Jonathan Whitehead, Shawn Daniels, Joe Yeary and Jim Lamb), the company actually is saying that "it doesn't want [the Complainant] to have copies of the statements, so it will not do anything – absent a court order – to obtain [them]." Mot. 2. The Complainant adds that, because the employees allowed company officials to attend their interviews, the employees obviously will be "adverse witnesses" if they are called to testify, and that as a matter of "fundamental fairness" he needs the statements to effectively examine and/or cross-examine the employees. *Id.* at 3.

The company responds that the Complainant is merely repeating arguments that already have been made and rejected. The company notes that the Federal Rules of Civil Procedure sanction requests for documents "which are in the possession, custody or control of the party upon whom the request is served" (Fed. R. Civ. P. 34), and that Rule 34 does not permit a court to order a party to an action to force a person to acquire something the party does not have.
Response 2.

The company's contention is not entirely accurate. Nor was I entirely accurate to state that "I cannot order a party to produce something it does not have." Order 7. There have been situations in which the courts, acting under Rule 34, ordered parties to produce documents and other items that were not in the parties' physical possession. However, in those situations the parties objecting to producing the materials were held to have constructive control of the materials, a situation that is decidedly not the case here. In no sense is the company in constructive control of the statements of Messrs. Adams, Whitehead, Daniels, Yeary and Lamb. When the individuals gave the statements to MSHA, the individuals were acting on their own behalf and at the behest of the agency. They were not acting for the company. The company does not have an ownership interest in the statements no matter how liberally "control" is construed, and were I to order the company to instruct the employees to give it copies of the statements, and were the employees to refuse, there would be no way for the Commission to compel production. The order would essentially be unenforceable, and, as matter of sound policy, the Commission should eschew unenforceable orders. In addition, other valid policy concerns relating to the effectiveness of the Secretary's investigations of alleged discrimination militate against ordering production.

For all of these reasons, the Complainant's motion to reconsider the order **IS DENIED**.



David Barbour
Administrative Law Judge

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