JULY 1999

COMMISSION DECISIONS AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JULY 1999

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

Secretary of Labor, MSHA v. Consolidation Coal Company, Docket No. WEVA 98-111. (Judge Bulluck, June 9, 1999)

Secretary of Labor, MSHA v. L & T Fabrication & Construction, Inc., Docket No. EAJ 99-1. (Judge Hodgdon, June 7, 1999)

Nolichuckey Sand Company, Inc. v. Secretary of Labor, MSHA, Docket Nos. SE 99-101-RM, etc. (Judge Weisberger, June 30, 1999)

No cases were filed in which review was denied during the month of July:

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 16, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	CIVIL PENALTY PROCEEDING
v.	:	Docket No. YORK 98-87-M
	:	A.C. No. 18-00525-05501 9BM
CUSIC TRUCKING, INC.	:	

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

ORDER

BY: Jordan, Chairman; Riley and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994). On January 27, 1999, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Cusic Trucking, Inc. ("Cusic") for failing to answer the October 21, 1998 petition for assessment of penalty filed by the Secretary of Labor or the judge's December 9, 1998 Order to Respondent to Show Cause. The judge assessed the $90 civil penalty proposed by the Secretary.

On March 17, 1999, the Commission received a copy of a letter from Cusic dated September 9, 1998 disputing the Secretary's proposed civil penalty. Mot. at 1. While this letter appears to be a response to the Secretary's proposed penalty assessment, it was forwarded to the Commission without explanation or assertion that it had been previously sent to either the Commission or the Secretary of Labor. Moreover, the letter does not mention the default order issued in this matter.

On May 7, 1999, the Commission received the Secretary's opposition of Cusic's request. The Secretary asserts that the September 9 letter Cusic submitted to the Commission fails to state grounds upon which Fed. R. Civ. P. 60(b) relief could be granted. S. Opp'n at 5-6.

The judge's jurisdiction over this case terminated when his default order was issued on January 27, 1999. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of an order's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Cusic's request

was received by the Commission on March 17, after Judge Merlin's order had become a final decision of the Commission.

Relief from a final Commission judgment or order is available to a party under Fed. R. Civ. P. 60(b); *see also* 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules); *Lloyd Logging, Inc.*, 13 FMSHRC 781, 782 (May 1991). Rule 60(b) motions are committed to the sound discretion of the judicial tribunal in which relief is sought. *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988); *see Green Coal Co.*, 18 FMSHRC 1594, 1595 (Sept. 1996).

The operator offers no explanation for its failure to timely file an answer to the Secretary's petition for assessment of penalty or to the judge's show cause order. Thus, Cusic has failed to set forth any grounds establishing that Fed. R. Civ. P. 60(b) relief is appropriate. *See Tanglewood Energy, Inc.*, 17 FMSHRC 1105, 1107 (July 1995) (denying request to reopen final Commission order where operator failed to set forth grounds justifying relief); *Green Coal Co.*, 18 FMSHRC at 1595 (denying unrepresented operator's late-filed petition for discretionary review of judge's decision because no satisfactory explanation offered for late filing).[1]

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[1] Our holding here in no way departs from the Commission's longstanding practice of holding the pleadings of unrepresented litigants to less stringent standards than those drafted by attorneys. *See, e.g.*, *CG&G Trucking, Inc.*, 15 FMSHRC 193, 193-94 (Feb. 1993) (remanding where small operator acting without benefit of counsel offered potentially valid reason for failing to timely respond to show cause order); *Hickory Coal Co.*, 12 FMSHRC 1201, 1202 (June 1990) (same). Rather, we maintain that, even applying this less stringent standard, Cusic has failed to present in its request a colorable claim on which we could grant relief from the final order. In this regard, the instant matter is distinguishable from *Farmer v. Island Creek Coal Co.*, 13 FMSHRC 1226, 1231-32 (Aug. 1991), cited by the dissent (slip op. at 4), in which we determined that, "[g]iven the possible exculpatory nature of [complainants'] explanations [for their failure to meet a filing deadline], a remand to the judge to allow him to assess the merits of these allegations is appropriate." 13 FMSHRC at 1232. Here, by contrast, Cusic has offered no explanation whatsoever for its failure to respond to the judge's show cause order, which unambiguously and in plain language ordered Cusic to "send an Answer . . . within 30 days or show good reason for [failing] to do so." Show Cause Order dated December 9, 1998.

Accordingly, Cusic's request for relief from the final Commission decision is denied.[2]

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

[2] The dissent views Cusic's September 9 letter, submitted with the notice of contest, as the "functional equivalent" of an answer to the petition for assessment of penalty filed October 21, 1998. Slip op. at 4 n.2. It appears that the dissent would consider such a submission (at least by an unrepresented operator) to absolve the operator from the requirement of Commission Procedural Rule 29, 29 C.F.R. § 2700.29, to file an answer to a penalty petition. This approach would also permit Cusic to, in effect, answer a petition for penalty assessment that has not yet been filed.

Commissioners Marks and Verheggen, dissenting:

We dissent. The Commission has always held the pleadings of pro se litigants to less stringent standards than pleadings drafted by attorneys. *Marin v. Asarco, Inc.*, 14 FMSHRC 1269, 1273 (Aug. 1992) (citing *Haines v. Kerner*, 404 U.S. 519, 520 (1972)). In keeping with this principle, we believe that cases involving pro se litigants should be dismissed on a pleading technicality only in the very rarest of cases. Instead, in such cases, judges should ensure that they inform themselves of all the available facts relevant to their decisions, including pro se litigants' versions of those facts. *Perry v. Phelps Dodge Morenci Inc.*, 18 FMSHRC 1918, 1920 (Nov. 1996) (citing *Heckler v. Campbell*, 461 U.S. 458, 470-73 (1983) (Brennan, J., concurring)).

Here, Cusic's case was dismissed because he failed to file an answer to the Secretary's petition for assessment of a penalty. Slip op. at 1; *see* 29 C.F.R. § 2700.29.[1] We note, however, that when he initially notified the Secretary of his intent to challenge her proposed penalty, his statement essentially met the requirements of Rule 29. On remand, we would direct the judge to treat it accordingly, and to allow Cusic the opportunity to pursue his case.[2]

We find the issues in this case not dissimilar from those in *Farmer v. Island Creek* (a case involving a pro se claimant), where the Commission stated: "Given complainant's silence below in the face of the operator's motion to dismiss, this case arrives at the Commission in virtually the same posture as a default. As in any default case, the defaulted party has failed to speak at some crucial juncture." 13 FMSHRC at 1232. After noting "a pro se party's general lack of understanding of appropriate Mine Act and Commission procedure," the Commission held: "We conclude that good cause [for the complainant's delay] has been shown to the extent that, in the interests of justice, the matter should be remanded to the judge so that complainants' explanations can be placed before him for his resolution." *Id.*

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[1] Commission Procedural Rule 29 provides: "A party against whom a petition for assessment of penalty is filed shall file an answer within 30 days after service of the petition for assessment of penalty. An answer shall include a short and plain statement responding to each allegation of the petition."

[2] Our colleagues state that "Cusic has failed to set forth any grounds establishing that Fed. R. Civ. P. 60(b) relief is appropriate." Slip op. at 2. Our focus, however, is different from that of our colleagues. Where they focus on whether Cusic's request for relief meets the requirements of Rule 60(b), we focus on the proceedings below and find that the judge, under the Commission's liberal approach to pro se pleadings, could have treated Cusic's initial filing with the Secretary as the functional equivalent of an answer and gone on with the proceedings. Our colleagues also fault us for taking an approach that would "absolve the operator [not represented by counsel] from the requirement of [Rule 29] to file an answer," and that would permit Cusic to "answer a [penalty] petition . . . that has not yet been filed." Slip op. at 3 n.2. Our point is, however, that Cusic filed a pleading that is, for all intents and purposes, an answer. Faulting him for filing such a paper before a petition was filed appears to us to exalt form over substance.

We believe that the Commission's reasoning in *Farmer* and *Perry* applies here, and we would therefore vacate the judge's dismissal order and remand the case for further evidentiary proceedings.

Marc Lincoln Marks, Commissioner

Theodore F. Verheggen, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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July 28, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : : :	CIVIL PENALTY PROCEEDING
v.	: :	Docket No. SE 99-153-M A.C. No. 08-00008-05572
LIMEROCK INDUSTRIES, INC..	:	

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

ORDER

BY: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 16, 1999, the Commission received a motion from Limerock Industries, Inc. ("Limerock") 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), and to consolidate the citation with other pending cases. Limerock had failed to timely submit a request for hearing to contest the proposed penalty assessments and pursuant to section 105(a), this proposed penalty assessment of $340 became a final order of the Commission thirty days after its receipt by Limerock. On June 10, 1999, the Secretary of Labor filed a response to Limerock's motion, stating that she does not oppose the motion to reopen this case.

In its motion, Limerock contends that its failure to timely file a hearing request to contest the proposed penalty was due to its mistaken belief that the citation at issue would automatically be consolidated with pending cases involving citations from the same inspection giving rise to the subject citation. Mot. at 2. Limerock explains that the proposed penalty was related to two sets of citations issued to it pursuant to section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1). *Id.* at 1-2. Limerock states that it timely filed notices of contests of the proposed penalty assessments related to these two sets of citations in October and November 1998. *Id.* at 4-5. It contends that in January 1999 it received another citation resulting from the same inspection, but that pursuant to discussions with government counsel, it believed that it would automatically be consolidated

with the other outstanding citations. *Id.* at 5. Consequently, it did not file a notice of contest of the subject proposed penalty assessment. Limerock submitted an affidavit from its safety manager, stating that he did not file a notice contesting the subject proposed penalty because of his good faith belief that the letters he had sent contesting the other proposed penalties covered this one as well. Aff. of Gene Pollock.

The Commission has found that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), it possesses jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-90 (May 1993). The Commission has also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), the Commission has previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Peabody Coal Co.*, 19 FMSHRC 1613, 1614-15 (Oct. 1997); *General Chem. Corp.*, 18 FMSHRC 704, 705 (May 1996).

Here, the record indicates that Limerock intended to contest the penalty associated with Citation No. 04359421 and that, but for its reliance on MSHA's statements that all citations would be consolidated, it would have timely submitted the hearing request and contested the proposed penalty assessment. Under these circumstances, Limerock's failure to timely file a hearing request reasonably may be found to qualify as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See National Lime & Stone, Inc.*, 20 FMSHRC 923 (Sept. 1998) (reopening matter when operator's late filing of hearing request was caused by a mutual misunderstanding between counsel for the operator and counsel for MSHA as to need to challenge penalty assessment prior to judge's approval of parties' settlement); *Eagle Energy, Inc.*, 21 FMSHRC 13, 15 (Jan. 1999) (granting unopposed request for relief from order that became final due to a misunderstanding between the operator and an MSHA representative).

Accordingly, in the interest of justice, we grant Limerock's unopposed request for relief and reopen the penalty assessment that became a final order with respect to Citation No. 04359421. We remand the matter for assignment to a judge, who shall rule on Limerock's request to consolidate. The case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

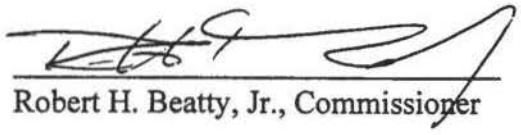
Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Beatty, dissenting:

On the basis of the present record, I am unable to evaluate the merits of Limerock's position and would remand the matter for assignment to a judge to determine whether Limerock has met the criteria for relief under Rule 60(b). *See Randy Coal Co.*, 12 FMSHRC 1760, 1761 (Sept. 1990) (remanding final order where operator's submission reflected possible misunderstanding regarding procedures in civil penalty proceeding).



Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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July 29, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 99-102
	:	A.C. No. 46-06051-03747
CANNELTON INDUSTRIES, INC.	:	

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

ORDER

BY: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On June 3, 1999, the Commission received from Cannelton Industries, Inc. ("Cannelton") 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).[1] The Secretary of Labor did not file an opposition to Cannelton's motion.

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

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[1] The Commission originally received Cannelton's motion in November, 1998. However, because the operator placed on its motion the docket number of the related contest proceeding already assigned to Administrative Law Judge Jacqueline Bulluck, the motion was forwarded to Judge Bulluck. Cannelton's motion again came to the Commission's attention when MSHA faxed a copy of the motion to the Commission after attempting to collect the civil penalty from Cannelton.

In its request, Cannelton asserts that its failure to file a hearing request to contest the proposed penalty for the violation alleged in Citation No. 7160486 was due to circumstances related to its impending sale. Mot. at 3. Cannelton states that it timely filed a notice of contest of the underlying citation. *Id.* at 2. Cannelton alleges that its impending sale had been known for several months and that numerous people left Cannelton's employment and, as a result, job duties shifted among the remaining employees. *Id.* at 3. Cannelton submits that the duties of Joyce Alderson, the employee who normally handled safety matters, were assigned to another employee. *Id.* The operator maintains that it did not learn until it received a delinquency notice that the notice of proposed penalty had been inadvertently filed rather than paid or contested. *Id.* Cannelton also requests that this matter and the related contest proceeding, Docket No. WEVA 98-99-R, be consolidated. *Id.* at 2. Attached to the motion are a copy of Cannelton's request for hearing, a news article discussing Cannelton's sale, and an affidavit by Alderson. Exs. A, B, C.

We have held that, in appropriate circumstances and pursuant to Fed. R. Civ. P. 60(b), we possess jurisdiction to reopen uncontested assessments that have become final by operation of section 105(a). *See, e.g.*, *Rocky Hollow Coal Co.*, 16 FMSHRC 1931, 1932 (Sept. 1994); *Jim Walter Resources, Inc.*, 15 FMSHRC 782, 786-89 (May 1993). We have also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Preparation Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995). In accordance with Rule 60(b)(1), we have previously afforded a party relief from a final order of the Commission on the basis of inadvertence or mistake. *See Unique Mining, Inc.*, 21 FMSHRC 602, 602-04 (June 1999) (granting operator's motion to reopen where operator timely filed notice of contest, but operator's accounting firm misfiled and failed to timely contest the related proposed penalties); *Kenamerican Resources, Inc.*, 20 FMSHRC 199, 200-01 (Mar. 1998) (reopening proceedings when green card not timely filed due to operator's internal processing error).

Here, the record indicates that Cannelton intended to contest the penalties associated with Citation No. 7160486, and that, but for the misfiling, it would have timely submitted the hearing request. In these circumstances, Cannelton's failure to timely file a hearing request reasonably may be found to qualify as "inadvertence" or "mistake" within the meaning of Rule 60(b)(1). *See Kenamerican*, 20 FMSHRC at 200-01.

Accordingly, the interest of justice, we grant Cannelton's unopposed request for relief and reopen the penalty assessment that became a final order with respect to Citation No. 7160486. We also remand this matter for assignment to a judge to determine whether its consolidation with the underlying contest proceeding pending before Judge Bulluck, Docket No. WEVA 98-99-R, is appropriate. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Mary Lu Jordan, Chairman

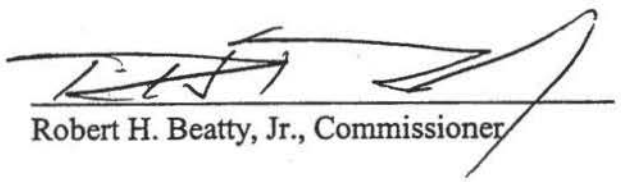
Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Commissioner Beatty, dissenting:

On the basis of the present record, I am unable to evaluate the merits of Cannelton's position and would remand the matter for assignment to a judge to determine whether Cannelton has met the criteria for relief under Rule 60(b). *See Benton County Stone, Inc.*, 21 FMSHRC 5, 7 (Jan. 1999) (remanding final order when operator misfiled green card).



Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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July 29, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of EARL CHARLES ALBU	:	
v.	:	Docket No. WEVA 99-85-D
CHICOPEE COAL COMPANY, INC.	:	

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

DECISION

BY THE COMMISSION:

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"), respondent Chicopee Coal Company, Inc. ("Chicopee") has filed a petition for review of Administrative Law Judge Jerold Feldman's June 30, 1999, Order of Temporary Reinstatement issued pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2) and 29 C.F.R. § 2700.45. 21 FMSHRC 673 (June 1999) (ALJ). We grant respondent's petition for review and, for the reasons that follow, affirm the judge's order requiring the temporary reinstatement of Earl Charles Albu ("Albu").

Complainant Albu was a miner employed by Chicopee until his discharge on January 26, 1999. On April 21, 1999, he filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 105(c) of the Mine Act. Following an investigation, the Secretary of Labor determined that the discrimination complaint filed by Albu was not frivolous. On April 30, 1999, the Secretary filed an application for temporary reinstatement of Albu. On June 2, an evidentiary hearing on the application was held. On June 30, the judge issued his decision in which he concluded that the complaint was not frivolous.

The Secretary alleges that Albu was discharged because of statements that he made during a safety meeting on January 25, 1999. 21 FMSHRC at 678. Respondent contends that Albu was discharged because of his alleged cursing on a Citizen Band radio, and because his

services were no longer needed. C. Pet. at 4.

As the Commission has previously stated, "The scope of a temporary reinstatement hearing is narrow, being limited to a determination by the judge as to whether a miner's discrimination complaint is frivolously brought." *Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd sub nom. Jim Walter Resources, Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990). Judge Feldman held an evidentiary hearing and considered the testimony of four witnesses in addition to the complainant. He determined that the complaint had not been frivolously brought.

The only issue before us is whether Albu's discrimination complaint was frivolously brought. As stated by the judge, evidence exists in the record that Albu engaged in protected activity. 21 FMSHRC at 679. Albu allegedly made complaints during the January 25 meeting that berms were not being replaced, that miners working were not certified, and that some of the equipment used was "junk." *Id.* at 677; Tr. 146-47, 246. Albu's supervisor, Lewis Franklin Bates, testified that, as to the equipment, Albu complained about the conditions of the brakes on the trucks. Tr. 32, 57. In addition, as the judge noted, Albu had a history of complaining about equipment at the site. 21 FMSHRC at 679; Tr. 246, 259. Moreover, there is evidence in the record of adverse employment action, that is, Albu's discharge on January 26. 21 FMSHRC at 679; Tr. 146-47, 246. Finally, there is evidence in the record that the adverse action was motivated in any part by Albu's protected activity. 21 FMSHRC at 679. At the time that he discharged Albu, Gary Rutherford, a foreman employed by Chicopee, allegedly stated, "I just wish that you hadn't said what you said yesterday morning." Tr. 146-47, 235-36. In addition, the time that elapsed between the protected activity and Albu's discharge was very brief, which may demonstrate that the discharge was motivated at least in part by the protected activity. *Secretary on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981); *Donovan v. Stafford Const. Co.*, 732 F.2d 954, 960 (D.C. Cir. 1984) ("the fact that the [c]ompany's adverse action against [a miner] so closely followed the protected activity is itself evidence of an illicit motive").

In its petition for review of the judge's temporary reinstatement order, Chicopee does not dispute the judge's determination that Albu's safety related complaints during the January 25 meeting was protected activity, or that Albu's discharge on January 26 constituted adverse employment action. Rather, it disputes the judge's determination that the adverse action was motivated in any part by the protected activity based on his inference that Paul Moran, Chicopee's president, or Robert Warnick, Chicopee's vice-president, had knowledge that Albu engaged in protected activity. C. Pet. at 1, 5-7. It relies upon evidence in the record in which Warnick denies having any knowledge of Albu's statements during the January 25 meeting. *Id.* at 6; Tr. 237-38, 241. Contrary to Chicopee's assertions, in a temporary reinstatement proceeding the Secretary was not required to prove that Warnick or Moran had knowledge of Albu's protected activity. Rather, she was required to show only that Albu's complaint was nonfrivolous.

On the issue of whether Albu's discharge was motivated in any part by his protected activity, there is both supporting and detracting evidence in the record. As noted by Chicopee, Warnick denied knowing the statements that Albu allegedly made during the January 25 meeting. Tr. 237-38, 241. On the other hand, there is evidence that Rutherford, who appears to have attended the January 25 meeting, stated when he discharged Albu that he wished Albu "hadn't said what [he] said yesterday morning."[1] Gov't Ex.3; Tr. 146-47. Such testimony indicates that a nonfrivolous issue exists as to whether Albu's discharge was motivated in any part by his protected activity. It was not the judge's duty, nor is it the Commission's, to resolve the conflict in testimony at this preliminary stage of proceedings. *See Jim Walter Resources*, 920 F.2d at 744 ("The temporary reinstatement hearing merely determined whether the evidence mustered by the miners to date established that their complaints are nonfrivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement."). We thus conclude that the judge's determination that the complaint was not frivolous is supported by substantial evidence and is consistent with applicable law. We intimate no view as to the ultimate merits of this case.

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[1] On the complaint filed with MSHA, Albu did not mention Rutherford's comment and stated that Rutherford said nothing beyond that Albu was no longer needed. Tr. 172-73. When that inconsistency was brought to Albu's attention, however, he stated that he stood by his testimony that Rutherford made the additional comment. Tr. 173.

Accordingly, the judge's order requiring the temporary reinstatement of Albu is affirmed.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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July 29, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. PENN 98-15-R
CYPRUS CUMBERLAND RESOURCES CORPORATION	: :	

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

DECISION

BY: Jordan, Chairman; Riley and Beatty, Commissioners

In this contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"), Administrative Law Judge Jerold Feldman concluded that, between the time that the Department of Labor's Mine Safety and Health Administration ("MSHA") issued an order to Cyprus Cumberland Resources Corporation ("Cyprus") in June 1997 pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and its issuance of a section 104(d)(2) order on September 25, 1997, MSHA had conducted an inspection of the Cumberland Mine that disclosed no similar violations.[1] 20 FMSHRC 285

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

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

(Mar. 1998) (ALJ). The Commission granted the Secretary's petition for discretionary review of the judge's decision, granted the National Mining Association ("NMA") leave to participate as amicus curiae, and heard oral argument. For the reasons that follow, we vacate the judge's decision and remand for further consideration consistent with this decision.

I.

Factual and Procedural Background

Cyprus operates the Cumberland Mine, an underground bituminous coal mine near Waynesburg, Pennsylvania. 20 FMSHRC at 287. The mine receives four regular AAA inspections,[2] which are conducted over the course of the following quarters: (1) October 1 through December 31; (2) January 1 through March 31; (3) April 1 through June 30; and (4) July 1 through September 30. *Id.* at 287-88. MSHA assigns two inspectors on a full-time basis to conduct each quarterly inspection. *Id.* at 288. The assigned inspectors spend between three to five days per week at the mine, and usually take the full quarter to complete the inspection. *Id.* The assigned inspectors are assisted by other inspectors from MSHA's Waynesburg field office. *Id.* As a result, there is essentially a continuous presence at the mine of at least two inspectors. *Id.* The two assigned inspectors keep a record of the areas that they have inspected by highlighting, and making notations on a mine map. *Id.*; Tr. 101-02. The map does not reflect areas inspected by other inspectors during that quarter. 20 FMSHRC at 288.

During the third quarter, from April 1 to June 30, 1997, MSHA Inspectors Thomas McCort and Barry Radolec were assigned to conduct the regular inspection of the mine. *Id.*; Tr. 96. On June 18, during that inspection, Inspector McCort issued to Cyprus a section 104(d)(1) order for a significant and substantial ("S&S") and unwarrantable violation of 30 C.F.R. § 75.360(b)(1).[3] Jt. Ex. 1, ¶ 11; Gov't Ex. 2.

> Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)(2).

[2] A regular AAA inspection is a "[s]afety and [h]ealth [i]nspection of an entire mine." MSHA, U.S. Dep't of Labor, MSHA Handbook Series, *Coal General Inspection Procedures*, at 8-1 (Sept. 1995).

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

During the fourth quarter, from July 1 to September 30, 1997, MSHA Inspectors Victor Patterson and George Rantovich were assigned to conduct the regular inspection. Tr. 106. On September 24, during that inspection, Inspector Patterson issued a section 104(a) citation for a violation of the roof control standard, 30 C.F.R. § 75.202(a). Jt. Ex. 1, ¶ 18; Gov't Ex. 6. The citation was abated when a hydraulic jack was placed in the cited area to support the roof. Gov't Ex. 6. The next day, on September 25, Inspector Patterson issued a section 104(d)(2) order alleging an S&S and unwarrantable violation of section 75.202(a) when he discovered that the hydraulic jack, which had been used to abate the cited condition, had been removed, and there were indications that miners had worked under the area of unsupported roof. Jt. Ex. 1, ¶¶ 7, 17; Gov't Exs. 7, 8; Tr. 250-51. No other unwarrantable failure orders had been issued at the mine between June 18 and September 25. Jt. Ex. 1, ¶ 13; Tr. 175.

The fourth quarterly regular inspection concluded on the next day, September 26, when Inspector Patterson inspected the 60 West Mains haulage. Jt. Ex. 1, ¶ 16; Tr. 294-95. The 60 West Mains haulage is approximately 4,200 feet long and has been the primary route of travel into and out of the mine since 1983. 20 FMSHRC at 288. Between June 18 and September 25, inspectors traveled through the area "many times," or approximately 60 or more round trips. *Id.*; Jt. Ex. 1, ¶ 15. The inspectors traveled on the tracks by closed mantrips, which travel approximately 15 to 20 miles per hour ("mph"), and by open jeeps, or "crickets," which travel approximately 10 to 12 mph 20 FMSHRC at 289.

Cyprus challenged the section 104(d)(2) order and the matter proceeded to hearing before Judge Feldman. During the hearing, Cyprus stipulated that it had violated section 75.202(a) on September 25, and that the violation was S&S and had been caused by its unwarrantable failure. Tr. 10, 770. The parties also stipulated that the issue before the judge was whether an inspection disclosing no similar violations, or an intervening "clean inspection," had occurred between the time that the section 104(d)(1) order was issued on June 18, and the section 104(d)(2) order was issued on September 26. Jt. Ex. 1, ¶ 12(a). They agreed that if the Secretary failed to prove the absence of an intervening clean inspection, the disputed section 104(d)(2) withdrawal order should be modified. *Id.*

The judge concluded that there had been a intervening clean inspection between the issuance of the sections 104(d)(1) and 104(d)(2) orders. 20 FMSHRC at 294. The judge reasoned that the purpose of an intervening inspection is to disclose whether additional violations caused by unwarrantable failure exist, and that such violations are generally more readily detectible. *Id.* The judge determined that MSHA inspectors' repeated trips through the 60 West Mains haulage in addition to the regular inspection that had occurred prior to September 25 constituted a clean inspection within the meaning of the Act. *Id.* at 294. Accordingly, the judge modified the section 104(d)(2) order to a section 104(d)(1) citation. *Id.* at 295.

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with . . . mandatory health or safety standards." *Id.*

II.

Disposition

A. Section 104(d) Chain

Section 104(d) creates a "chain" of increasingly severe sanctions that serve as an incentive for operator compliance. *See Naaco Mining Co.*, 9 FMSHRC 1541, 1545-46 (Sept. 1987). Under section 104(d)(1), if an inspector finds a violation of a mandatory standard during an inspection, and finds that the violation is S&S and that it is also caused by unwarrantable failure, he issues a citation under section 104(d)(1). 30 U.S.C. § 814(d)(1). That citation is commonly referred to as a "section 104(d)(1) citation" or a "predicate citation." *See Greenwich Colleries, Div. of Pa. Mines Corp.*, 12 FMSHRC 940, 945 (May 1990). If during the same inspection or any subsequent inspection within 90 days after issuance of the predicate citation, the inspector finds another violation caused by unwarrantable failure to comply with a standard, the inspector issues a withdrawal order under section 104(d)(1), sometimes referred to as a "predicate order." 30 U.S.C. § 814(d)(1); *Wyoming Fuel* Co., 16 FMSHRC 1618, 1622 n.7 (Aug. 1994). If an inspector "finds upon any subsequent inspection" a violation caused by unwarrantable failure, he issues a withdrawal order for the violation under section 104(d)(2).[4] 30 U.S.C. § 814(d)(2). The issuance of withdrawal orders under section 104(d)(2) does not cease and an operator remains on probation "until such time as an inspection of such mine discloses no similar violations." *Id.*; *see Naaco*, 9 FMSHRC at 1545.

B. Clean Inspection

The Commission has explained that section 104(d)(2) of the Mine Act establishes three prerequisites for the issuance of an initial section 104(d)(2) withdrawal order: (1) a valid underlying section 104(d)(1) withdrawal order; (2) a violation of a mandatory safety or health standard caused by unwarrantable failure; and (3) the absence of an intervening clean inspection. *U.S. Steel Corp.*, 6 FMSHRC 1908, 1911 (Aug. 1984). Here, the parties dispute the third factor, whether the Secretary has established the absence of an intervening clean inspection.

The Commission has determined that a clean inspection under section 104(d)(2) requires an inspection of a mine in its entirety, noting that such an interpretation is consistent with legislative history and Commission precedent. *Kitt Energy Corp.*, 6 FMSHRC 1596, 1599 (July

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[4] The Commission has interpreted the phrase "similar violations" in section 104(d)(2) (*see* n.1, *supra*) to mean violations of any mandatory standard caused by unwarrantable failure. *Greenwich*, 12 FMSHRC at 945; *see also* S. Rep. 95-181, at 32 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 620 (1978) (providing that "similar violations" in section 104(d)(2) means "'unwarrantable' violations, whether or not the violations found are substantively similar to the violation upon which the order . . . was based.").

1984) (citing *CF&I Steel Corp.*, 2 FMSHRC 3459, 3600 (Dec. 1980)), *aff'd sub nom. UMWA v. FMSHRC*, 768 F.2d 1477 (D.C. Cir. 1985); *see also U.S. Steel Corp.*, 3 FMSHRC 5 (Jan. 1981); *Old Ben Coal Corp.*, 3 FMSHRC 1186 (May 1981). As the Commission subsequently described its holding, "an intervening clean inspection is not limited solely to a complete regularly scheduled inspection, but may be composed of a combination of inspections, so long as taken together they constitute an inspection of the mine in its entirety." *U.S. Steel*, 6 FMSHRC at 1912. The Commission also held that the burden of proving the absence of an intervening clean inspection resides with the Secretary. *Kitt Energy*, 6 FMSHRC at 1600. In proving the absence of a clean inspection, the Secretary must prove that there were portions of the mine that remained to be inspected at the time that the disputed section 104(d)(2) order was issued. *Id.*

In reaching its holding, the Commission expressly reaffirmed the prior consistent interpretation of the same phrase in section 104(c)(2) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act") by the Department of Interior's Board of Mine Operations Appeals.[5] *Id.* at 1598-99 (citing *Eastern Associated Coal Corp.*, 3 IBMA 331 (1974)). In *Eastern*, the Board held that a prerequisite for lifting withdrawal order liability under section 104(d)(2) is "a clean *complete* inspection," rather than a clean spot inspection. *Id.* at 357-58 (emphasis added). It explained that a clean complete inspection requires "a *thorough* examination of the conditions and practices throughout a mine." 3 IBMA at 358 (emphasis omitted and added). The Board later explained its holding that "several completed partial or completed spot inspections of a mine may be required to constitute a "complete inspection" of a mine in order to lift the withdrawal order liability . . . ." *Eastern Associated Coal Corp.*, 3 IBMA 383, 386 (1974) (emphasis omitted).

In affirming *Kitt Energy*, the Court of Appeals for the D.C. Circuit rejected a reading of the Commission's decision that "an inspector's physical presence in each area of the mine — regardless of the object of the inspection or the hazards actually examined for in each particular area — qualifies as an intervening 'clean' inspection." 768 F.2d at 1479. The Court explained that the "Mine Act provides for safeguards against unseen, as well as visible, hazards," and that to "hold that the Secretary need only inspect for obvious hazards to break the 'chain' would disregard those safeguards." *Id.* at 1480. The Court noted that satisfaction of the clean inspection requirement must be decided on a case-by-case basis. *Id.*

We conclude, in the instant case, that the judge erred in his application of Commission precedent. The judge was required to consider whether the Secretary made out her prima facie case establishing the absence of an intervening clean inspection by examining all inspection activity in the mine to determine whether any part of the mine remained to be inspected. *Kitt Energy*, 6 FMSHRC at 1600. The judge correctly stated that the question of whether a clean inspection has occurred must be decided on a case-by-case basis, and that inspections other than regular inspections may enter into that consideration. 20 FMSHRC at 294 (citing *Kitt Energy*;

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[5] Section 104(d)(2) was carried over without substantive change from section 104(c)(2) of the Coal Act.

UMWA v. FMSHRC, 768 F.2d at 1480). In addition, he correctly noted undisputed evidence that, between the time that the sections 104(d)(1) and 104(d)(2) orders were issued, all areas of the mine had been inspected as part of a regular inspection except for the 60 West Mains haulage. 20 FMSHRC at 287; *see also* Jt. Ex. 1 ¶ 13. The judge erred, however, by failing to examine any of the evidence regarding spot or other inspection activity to determine whether the 60 West Mains haulage remained to be inspected. Such an examination was fundamental to determining whether the Secretary met her burden.

Instead, the judge concluded that MSHA inspectors' travel "somewhere between the sixth round trip, and the hundredth round trip" through the 60 West Mains haulage amounted to an inspection of the area within the meaning of section 104(d)(2) because such travel would disclose unwarrantable violations, which he considered to be "generally more readily detectible." 20 FMSHRC at 294. Under *Kitt Energy* and its progeny, an intervening clean inspection must encompass the mine in its entirety, and be thorough and complete, rather than designed to disclose only obvious violations.[6] *Kitt Energy*, 6 FMSHRC at 1601 ("the essential determinant of a clean inspection under section 104(d)(2) is whether the entire mine has been inspected since issuance of a prior 104(d) order with no 'similar' violations cited"); *Eastern*, 3 IBMA at 357-58 (stating that statutory language requires a "clean complete inspection," or a "thorough examination of conditions and practices throughout a mine.") (emphasis omitted). Moreover, the premise for the judge's conclusion is erroneous because any violation potentially may be caused by unwarrantable failure, and factors that contribute to that determination may not be immediately apparent. *See, e.g., Rock of Ages Corp.*, 20 FMSHRC 106, 115-16 (Feb. 1998) (finding unwarrantable failure for foreman's failure to order meaningful search for unexploded bags of pyrodex that were buried under rocks), *aff'd in rel. part*, 170 F.3d 148, 157-58 (2d Cir. 1999).

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[6] We note that witnesses of both parties agreed that there were conditions along the track that could not be inspected from either the mantrip or the cricket when the vehicles traveled at their normal speeds. In order to inspect the haulage, inspectors examined roof conditions; rib conditions; the condition of any ventilated stoppage; the direction of air flow; track conditions, including whether the track is blocked properly and the joints are tight; any manholes; clearances; fire-fighting equipment; and any electrical installations in the area, including cables, wiring, and switches. Tr. 117-18, 287-88, 472-74. MSHA witnesses testified that it was not possible to adequately inspect for some violative conditions from a moving vehicle, particularly violations that are hidden, in the roof, ribs, haulage tracks, stoppings, or those pertaining to ventilation, fire protection, and electrical installations. Tr. 117-19, 145-47, 288, 292, 475, 488-89. Cyprus's safety manager, Robert Bohach also acknowledged that an inspector would have to stop and exit the vehicle in order to inspect a number of conditions, including examining electrical installations, fire fighting equipment, roof and rib conditions, ventilation, and the condition of the track. Tr. 772, 818, 827-29, 844-48. In addition, Michael Konosky, a safety representative at the mine, testified that some of the conditions on the 60 West Mains haulage would require an inspector to exit a moving vehicle in order to more closely examine it. Tr. 684, 735.

In arguing that she met her burden of proving the absence of a clean inspection, the Secretary relies upon testimony by MSHA Supervisory Inspector Robert Newhouse and a log submitted as evidence by Cyprus depicting all inspection activity at the mine, including both state and federal inspections.[7] S. Reply Br. at 3-5; Oral Arg. Tr. 15. Inspector Newhouse's testimony, however, was limited to the regular inspections conducted at the mine. Tr. 110, 119, 152-54. Because evidence is undisputed that the 60 West Mains haulage was not part of a regular inspection from June 18 to September 26, Inspector Newhouse's testimony is not probative of whether the Secretary met her burden. On the other hand, Cyprus's log includes spot as well as regular inspection activity throughout the mine during the time period in question. R. Ex. 1. The log and its various entries must be examined and weighed against other evidence admitted into the record.[8] Such examination and fact-finding more appropriately resides with the judge in the first instance, rather than with the Commission on review. *See Mid-Continent Resources, Inc.*, 6 FMSHRC 1132, 1139 (May 1984) ("It is . . . the judge's duty to draw conclusions from the record . . . ."); *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1283 (Dec. 1998).

Accordingly, we vacate the judge's decision and remand for the judge to consider, consistent with Commission precedent, whether the Secretary met her burden of proving the absence of a intervening clean inspection by examining evidence regarding any inspection activity in the 60 West Mains haulage area during the time period in question.

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[7] At the hearing, the Secretary's counsel stated that MSHA maintains separate records relating to quarterly inspections and relating to how much of the mine has been inspected since the issuance of any section 104(d)(1) order. Tr. 134-35. Curiously, the Secretary failed to admit any records depicting how much of the Cumberland Mine had been subject to inspections, other than regular inspections, since issuance of the section 104(d)(1) order on June 18. We note that in future cases, besides entering into the record an inspection log depicting all inspection activity at the mine since the issuance of a section 104(d)(1) order, such as that admitted by Cyprus, the Secretary may also rely upon inspectors' direct or hearsay (i.e., affidavit) testimony regarding their inspection activity.

[8] During oral argument, Cyprus's counsel clarified one of the log's entries. Oral Arg. Tr. 16-17, 35-36.

III.

Conclusion

For the foregoing reasons, the judge's decision modifying the section 104(d)(2) order issued to Cyprus to a section 104(d)(1) citation is vacated. We remand this matter to the judge for further consideration consistent with this decision.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Marks, concurring in part and dissenting in part:

I agree with the majority that the judge erred in concluding that an inspector's traveling on a moving vehicle through a haulageway constituted an inspection of the area for purposes of section 104(d)(2). Slip op. at 6. I also join with the majority in rejecting the judge's incorrect reasoning that a section 104(d)(2) inspection need only inspect for obvious violations that are the result of unwarrantable failure. *Id.* I write separately however because I believe the Secretary's interpretation of section 104(d)(2) is entitled to deference. Furthermore, I dissent from my colleagues decision to remand because the record in this case supports only one conclusion — that no clean inspection occurred. Therefore, I would reverse the judge.

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question in issue." *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Local Union No. 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990).[1] Cyprus argues that the language and structure of the Mine Act demonstrates that an inspection of the mine in its entirety for all mining hazards was not required to qualify as a clean inspection under section 104(d)(2). C. Br. 11-13. For the most part, it relies on the fact that the phrase "in its entirety" is absent in section 104(d)(2) but is present in section 103(a), indicating to Cyprus that an inspection in section 104(d)(2) means something other than an inspection of the mine "in its entirety." C. Br. at 11. I reject Cyprus' plain meaning approach. The Mine Act contains many references to inspections that are simply not defined, and that may refer to an inspection of a mine in its entirety. *See, e.g.,* sections 103(a), 104(a), 104(d)(1), 103(g)(1), 105(a), 107(a) & (b). Additionally, the use of the phrase, "an inspection of such mine" as opposed to merely "an inspection" or "an inspection in a mine" could easily be read to mean an inspection of an entire mine. Furthermore, the Commission has rejected a narrow, literal interpretation of the term "an inspection" to mean any inspection, including an inspection of only a portion of a mine. *Kitt Energy Corp.*, 6 FMSHRC, 1596, 1599 (July 1984). Accordingly, Congress has not directly spoken to the issue at hand and the Mine Act is ambiguous as to whether "an inspection of such mine which discloses no similar violations" requires an inspection of the entire mine for all hazards, as the Secretary proposes.[2]

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[1] The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *Thunder Basin*, 18 FMSHRC at 584.

[2] I conclude that the Secretary is interpreting the portion of section 104(d)(2) that provides that the chain of withdrawal order liability remains in effect "until such time as an inspection of the mine discloses no similar violations." 30 U.S.C. § 814(d)(2). Such an inspection is commonly referred to as a "clean" inspection of the mine. The Secretary's briefs to the Commission mistakenly cited the portion of section 104(d)(2) involving "any subsequent inspection" *See e.g.*, PDR at 6. However, at oral argument, Counsel for the Secretary clarified that the Secretary was interpreting the section 104(d)(2) provision dealing with clean inspections:

When a statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin Coal Co.*, 18 FMSHRC at 584 n.2. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *Chevron*, 467 U.S. at 843; *Joy Technologies, Inc.* v. *Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied,* 520 U.S. 1209 (1997). *See also Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

Applying this settled law, I conclude that the judge erred when he rejected the Secretary's interpretation of the Act. The judge expressly found the Secretary's interpretation was reasonable. 20 FMSHRC at 289. Because of his finding of reasonableness, he was required under *Chevron* principles to adopt the Secretary's interpretation. *See Secretary of Labor v. FMSHRC*, 111 F.3d 913, 916 (D.C. Cir. 1997) (where the Secretary and the Commission disagree over the interpretation of the statute, deference is owed to the Secretary); *Secretary of Labor ex rel. Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1435 (D.C. Cir. 1989) (same).[3]

In addition, I also find the Secretary's interpretation to be reasonable. The Secretary asserts that a clean inspection requires an inspection of the entire mine for all hazards. PDR at 6. As the judge recognized, the legislative history supports an interpretation that a clean inspection

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"an inspection of such mine which discloses no similar violations." Oral Arg. Tr. 5-6, 40-41. The Secretary also based her arguments to the judge on the same section 104(d)(2) provision: "an inspection of such mine which discloses no similar violations." S. Post-Hr'g Br. at 11.

[3] Cyprus and amicus The National Mining Association incorrectly argue that the Supreme Court case of *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200 (1994), which was not a deference case, somehow changed this well-established deference principle. *See* C. Br. at 18-24; NMA Br. at 4-12. However, well after the *Thunder Basin* decision, the courts of appeals have consistently applied the rule that when the Secretary and the Commission diverge on ambiguous statutory or regulatory provisions, it is the Secretary to whom deference is owed. *Secretary v. FMSHRC*, 111 F.3d at 920; *Joy Technologies*, 99 F.3d at 995; *Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 114-16 (4th Cir. 1996). Indeed, neither dissenting Commissioner Verheggen nor counsel for Cyprus provide us with citation to a case where a court of appeals deferred to an interpretation of the Commission, when the interpretation of the Secretary and that of the Commission differed. Oral Arg. Tr. at 26. Additionally, my dissenting colleague's reliance on *The Helen Mining Co.*, 1 FMSHRC 1796 (Nov. 1979), to discredit the principle of *Chevron* deference is faulty. *See* slip op. at 16-17. *Helen* was issued five years prior to the *Chevron* case and therefore the Commission did not have the benefit of Supreme Court guidance on this issue.

must be complete and cover the entire mine. 20 FMSHRC at 289; *Kitt Energy*, 6 FMSHRC at 1598-1600. The Senate Report for the Mine Act provides that "the inspector shall promptly issue a withdrawal order under [section 104(d)(2)] on each such occurrence until an inspection of the mine *in its entirety* shows 'no similar violations.'" S. Rept. 95-181 at 31; *Legis. Hist.* at 619 (emphasis added.) That same report repeats that "an inspection of the mine *in its entirety*" is necessary "in order to break the sequence of the issuance of orders." S. Rept. 95-181 at 34; *Legis. Hist.* at 622 (emphasis added).

Not only is the Secretary's interpretation consonant with the legislative history of the Mine Act, it is also consistent with Commission and court precedent. In *Kitt*, the Commission recognized that "an inspection of such mine" has been consistently "construed to require the inspection of a mine *in its entirety*." 6 FMSHRC at 1599 (emphasis in original). In *UMWA v. FMSHRC*, 768 F.2d 1477, 1480 (D.C. Cir. 1985), the court affirmed the Commission's *Kitt* decision, but clarified that "[t]he only rational reading of the intervening 'clean' inspection requirement is that all areas of a mine must be inspected for all hazards during the time period in question." The D.C. Circuit rejected the approach that a clean inspection could be based on an inspector's physical presence in each area of the mine, specifically declining to give significance to any portion of the Commission's *Kitt* decision that suggested that inspector presence in an area was enough for a clean inspection. *Id.* at 1479.

Finally, such a construction is consistent with the remedial and safety promoting goals of the Act. *Cannelton*, 867 F.2d at 1437 (because Mine Act is a statute that is intended to protect health and safety of miners, it must be interpreted in a broad manner to actually achieve that goal); *Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 161 (2d. Cir. 1999) (interpretation correctly took into account Mine Act's goal of preventing "mine accidents"). Cyprus asserts that something less than what the Secretary proposes, such as an inspection for only obvious hazards, would satisfy the clean inspection requirement. *See* Oral Arg. Tr. at 28-29. However, Cyprus' construction contravenes the purpose of the clean inspection requirement, which is to save lives and prevent injuries.[4] Instead it is the Secretary's construction of a clean inspection, which requires an examination of an entire mine for all hazards, that is the reasonable one under the Act. In holding that a clean inspection necessarily entails a complete mine inspection, the predecessor of the Commission, the Department of Interior's Board of Mine

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[4] In 1998, there were 80 fatalities in coal and metal and non-metal mines. As of July 26, 1999, 47 fatalities from mining have been reported. MSHA, 1999 Fatalgrams and Fatal Investigation Reports Metal and Nonmetal Mines (visited July 27, 1999) <http://www.msha.gov/FATALS/FABM99.HTM>; MSHA, 1999 Fatalgrams and Fatal Investigation Reports Coal Mines (visited July 27, 1999) <http://www.msha.gov/FATALS/FABC99.HTM>. As these figures reveal, despite efforts to improve safety in mining, fatalities continue to mount. Therefore, it remains crucial to construe the Mine Act in a manner that promotes miner safety. As Mine Act section 2(a) provides: "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource — the miner." 30 U.S.C. § 801(a).

Operation Appeals in *Eastern Associated Coal Corp.*, 3 IBMA 331, 358 (1974) (case cited with approval by Commission in *Kitt*), explained that:

> the intensive and quite possibly prolonged scrutiny seems entirely called for in the case of an operator which may have repeatedly demonstrated its indifference to the health or safety of miners and where its record suggests that other equally grave infractions resulting from unwarrantable failures to comply may exist elsewhere in the mine.

I could not agree more with the Board's explanation.

Thus, I conclude that deference is owed to the Secretary's interpretation that a clean inspection under section 104(d)(2) requires an inspection of the entire mine for all hazards. Applying that interpretation to case before us, it is abundantly clear that a clean inspection did not occur.

The parties agree that between June 18 and September 25, Cumberland had received a complete quarterly inspection except for the 60 West Mains haulage. 20 FMSHRC at 287; Jt. Ex. 1, ¶ 13. The 60 West Mains haulage was not inspected as part of a regular inspection until September 26, 1997, the day after the subject 104(d)(2) Order was issued. 20 FMSHRC at 289; Tr. 154.[5] In addition, the record showed that the 60 West Mains haulage had not been the subject of any other inspection during the time in question. Cyprus admitted into evidence a log of all inspection activity in the mine. R. Ex. 1. That log showed that there were no inspections listed for the area of 60 West Mains haulage between the period of June 18, 1997, and September 25, 1997. *Id.*[6]

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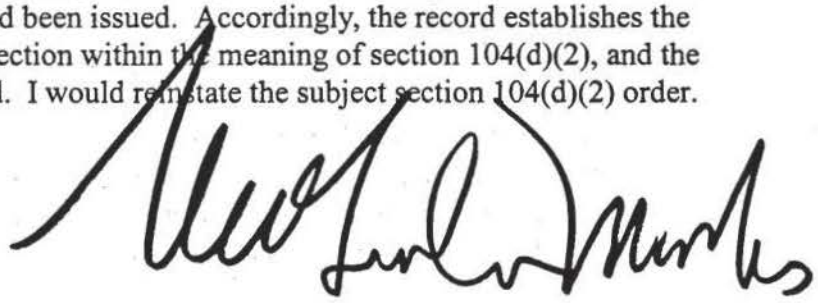
[5] Dissenting Commissioner Verheggen takes issue with the Secretary's decision to inspect the 60 West haulage at the end of her inspection. Slip op. at 15 n.1. It seems inappropriate for this reviewing body to second guess the everyday enforcement decision of the Secretary and her agents.

[6] I reject Cyprus' contention, adopted by dissenting Commissioner Verheggen (slip op. at 15), that the Secretary must prove that none of the inspectors in the mine stopped their vehicles at any time to inspect the haulage. Even if an inspector stopped his vehicle to examine a condition in the haulage between June 18 and September 25, such conduct would not amount to an inspection for purposes of section 104(d)(2), because such an inspection would not be complete and cover all hazards in the area. *See also UMWA v. FMSHRC*, 768 F.2d at 1479 (an inspector's presence in an area of a mine when he is not examining for all hazards does not amount to a sufficient inspection for purposes of section 104(d)(2)).

Accordingly, I conclude that the record only supports the conclusion that the entire mine had not been inspected for all mining hazards between June 18 and September 25 because the 60 West Mains haulage had not been the subject of a regular or other inspection until after the disputed section 104(d)(2) order had been issued. Accordingly, the record establishes the absence of a clean intervening inspection within the meaning of section 104(d)(2), and the judge's decision should be reversed. I would reinstate the subject section 104(d)(2) order.



Marc Lincoln Marks, Commissioner

Commissioner Verheggen, dissenting:

This case presents the issue of whether the Secretary proved that there was no "clean inspection" of the Cumberland Mine between September 25, 1997, when Inspector Patterson issued the section 104(d)(2) order challenged by Cyprus Cumberland, and June 18, 1997, when the previous section 104(d) order had been issued. My colleagues in the majority conclude that the judge failed to examine this issue adequately. Slip op. at 6. I conclude that the record compels the conclusion that the Secretary failed to meet her burden of proof. I would affirm the judge in result, and therefore, respectfully dissent.

It is well established that "[t]he burden of establishing the validity of [a section 104(d)(2) withdrawal] order, *necessarily including proof that an intervening clean inspection has not occurred*, appropriately rests with the Secretary." *Kitt Energy Corp.*, 6 FMSHRC 1596, 1600 (July 1984) (emphasis added), *aff'd sub nom. UMWA v. FMSHRC*, 768 F.2d 1477 (D.C. Cir. 1985). In *Kitt*, the Commission clearly explained this burden:

> It is not necessary to view this burden . . . as requiring proof of a negative. Rather, the Secretary must only demonstrate that when [her] inspector issued the contested order, portions of the mine remained to be inspected. . . . In order to carry out [her] statutory duties properly, the Secretary maintains records of all inspections conducted in a mine and the extent of those inspections. The contention that the Secretary or [her] representative cannot determine the areas of a mine that have been inspected in any given period, or the areas that remain to be inspected in a future period, gives us great concern. The very same record keeping, which the Secretary claims to be burdensome, is necessary in order to support the claim that a "regular" clean inspection has not occurred. . . . [P]roper administration of the Mine Act requires that the Secretary maintain a workable mine inspection record keeping system.

Id. (footnote omitted). Thus, under *Kitt*, the Secretary is required to maintain detailed records of inspections, and to adduce these records in some fashion when defending the validity of a section 104(d)(2) order.

Here, however, the Secretary singularly failed to follow the evidentiary requirements of *Kitt*. There is no dispute that MSHA had inspected all areas of Cyprus' Cumberland Mine except the 60 West Mains track haulage entry. 20 FMSHRC at 287; Jt. Ex. 1 ¶ 13. As for the 60 West Mains, the Secretary adduced no clear, unequivocal evidence that the track haulage "remained to be inspected" (6 FMSHRC at 1600), despite the fact that several inspectors made scores of trips along the entry. *See* 20 FMSHRC at 294. Yet under the liberal evidentiary rules governing Commission proceedings, the Secretary should have been able to meet the *Kitt* burden with ease. For example, any one of the Secretary's witnesses (such as Supervisory Coal Mine Inspector

Robert Newhouse) could have interviewed all the inspectors who ever traveled along the 60 West Mains (which would have been easy enough to accomplish over the telephone) to determine whether any had inspected the area, and the nature of any such inspections. The witness could then have testified regarding the results of his or her investigation. *See* 29 C.F.R. § 2700.63(a) (hearsay admissible in Commission proceedings, under which rule Secretary's counsel would not have had to resort to calling each inspector to the stand). Or the Secretary's counsel could have assembled affidavits from all the inspectors and introduced the affidavits into evidence through an appropriate sponsoring witness. *Id.*; *cf.* slip op. at 7 n.7.

Indeed, the record is devoid of any evidence on this question. I find this void in the record difficult to justify in light of the statement at trial by the Secretary's counsel that "[f]ollowing the *Kitt* decision[,] now, MSHA is forced to keep track of . . . two different sets of inspection data, their quarterly inspections and . . . how much of the mine has been inspected." Tr. 134-35. No such records were introduced into evidence. Instead, the Secretary offered only maps (Gov't Exs. 3, 4) tracking the activities of but two of the several inspectors who were actively inspecting the Cumberland Mine, and the testimony of Inspector Newhouse which my colleagues find "is not probative of whether the Secretary met her burden." Slip op. at 7.

My colleagues in the majority focus on the inspection log maintained by Cyprus and conclude that it "must be examined and weighed against other evidence" on remand. *Id.* After examining this log, and in light of statements made by Cyprus' counsel at oral argument, it is abundantly clear to me, however, that no inferences can be drawn from the log that the 60 West Mains were not inspected. All the log shows is the areas to where inspectors traveled to conduct inspections. It does not indicate what any inspectors did in transit. Given the extensive amount of travel in the 60 West Mains, I find that it was incumbent upon the Secretary to establish that none of her inspectors examined the track haulage for hazards, a point on which Cyprus' log is silent.[1]

The judge based his decision largely on his finding that "somewhere between the sixth round trip [through the 60 West Mains track entry] and the hundredth round trip, . . . the inspection requirements of [section 104(d)(2)] were complied with." 20 FMSHRC at 294. In light of the evidentiary weaknesses of the Secretary's case, I find that the judge did not need to make such a finding. Nor do I need to reach the merits of this finding. Instead, I find that the Secretary failed to establish a prima facie case, *see U.S. Steel Corp.*, 6 FMSHRC 1908, 1914 (Aug. 1984) (Secretary failed to meet burden of proving validity of section 104(d)(2) order where evidence was "entirely too vague and uncertain"), and on this ground alone, I affirm the judge's decision in result.

Given my finding that the Secretary's case failed at the outset when she failed to meet her

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[1] I find it curious that the Secretary would have saved for last an area which saw such a heavy volume of mine traffic. It only stands to reason that one should inspect the entrance to a mine before going any further so as to ensure that travel through the entrance is safe.

burden under *Kitt*, I normally would go no further. I would like to respond, however, to some points made by my colleague Commissioner Marks in his dissent. He bases much of his dissenting opinion on his belief that "the Secretary's interpretation of section 104(d)(2) is entitled to deference" under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984), and its progeny. Slip op. at 9. I respectfully disagree with this basis for his decision.

Before the judge, the Secretary asserted that "the 'clean inspection' requirement to break the [section] 104(d) chain in this case required a detailed inspection of the 60 West Mains entry conducted on foot." 20 FMSHRC at 289. The judge rejected this interpretation of section 104(d), even though he found it "plausible." *Id.* at 294. In reaching this conclusion, the judge relied on the Commission's decision in *The Helen Mining Co.*, 1 FMSHRC 1796 (Nov. 1979), which rejected arguments made by the Secretary that her interpretations of the Mine Act are due considerable deference. *Id.* at 1798-1801. Citing what he terms the "settled law" of deference, Commissioner Marks argues that the judge erred. Slip op. at 10 (citing *Chevron* and its progeny).

I find, however, that the judge was correct. I believe that the reasoning set forth in *Helen Mining* is as valid today as when written, and was not superseded by *Chevron* when that decision was handed down in 1984. *Chevron* deference principles[2] were tailored by the Supreme Court for other federal courts of general jurisdiction. The *Chevron* decision itself drives this point home, a decision in which the federal courts were faced with the task of reviewing a highly complex regulatory program promulgated by the Environmental Protection Agency. 467 U.S. at 840, 845-59. In *Chevron*, the Court recognized that the federal courts must not become mired in detailed review of such programs. *Id.* at 865-66.

The Commission, however, is not a federal court of general jurisdiction, as the judge correctly pointed out. *See* 20 FMSHRC at 290. Under the plain terms of the Mine Act, the Commission is a specialized body, 30 U.S.C. § 823(a), charged by Congress with the specialized tasks of "assessing civil penalties for violations of safety and health standards, [of] reviewing the enforcement activities of the Secretary of Labor, and [of] protecting miners against unlawful discrimination." Nomination Hearing Before the Senate Committee on Human Resources, 95th Cong. at 1 (1978). It is at the very heart of our statutorily mandated purpose to concern ourselves with detailed review of the Secretary's programs, and even more so, interpreting the Mine Act. *Helen Mining*, 1 FMSHRC at 1801 ("Resolution of . . . questions [of statutory interpretation] is a primary role of the Commission.").

The Commission was correct in *Helen Mining* when it held:

> [W]e will accord special weight to the Secretary's view of the

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[2] Which must be distinguished from another principle set forth in *Chevron* that when a statute is clear and unambiguous, effect must be given to its language. 467 U.S. at 842-43.

> [Mine] Act and the standards and regulations [she] adopts under them. [Her] views will not be treated like those of any other party, but will be treated with extra attention and respect. Although this weight may vary with the question before the Commission, especially where the Secretary has gained some special knowledge or experience through [her] inspection, investigation, prosecution, or standard-making activities, it will not rise to the inappropriate level the Secretary has sought here.

1 FMSHRC at 1801 (citing Mine Act legislative history in which Congress stated that the Commission would "accord weight to the Secretary's views").

But as I stated above, the judge did not have to reach the issue of whether the Secretary's interpretation of section 104(d)(2) was due deference. Instead, he ought to have dismissed the Secretary's case on purely evidentiary grounds. Thus, I choose to limit my discussion of deference to the preceding general principles. I need not, and do not, reach the merits of whether any weight is owed to the Secretary's interpretation here.

Theodore F. Verheggen, Commissioner

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July 29, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. SE 94-244-R
JIM WALTER RESOURCES, INC.	:	

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

DECISION

BY: Jordan, Chairman; Marks and Beatty, Commissioners

This contest proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA"), alleging a violation of 30 C.F.R. § 75.400[1] because of a trash accumulation in an entry of the No. 7 Mine of Jim Walter Resources, Inc. ("JWR"). Administrative Law Judge Gary Melick concluded that the violation was neither significant and substantial ("S&S") nor due to JWR's unwarrantable failure. 16 FMSHRC 1511 (July 1994) (ALJ). The Commission affirmed the judge's determination. 18 FMSHRC 508 (Apr. 1996). The Secretary appealed, and the court of appeals affirmed the Commission's S&S determination but reversed the unwarrantable failure determination and remanded the case for further proceedings. *Secretary of Labor v. FMSHRC and Jim Walter Resources, Inc.*, 111 F.3d 913 (D.C. Cir. 1997). The Commission then vacated its unwarrantable failure determination and remanded the issue. 19 FMSHRC 1377 (Aug. 1997). On remand, the judge again concluded that

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[1] 30 C.F.R. § 75.400 states:

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

"Active workings" is defined in 30 C.F.R. § 75.2 as "[a]ny place in a coal mine where miners are normally required to work or travel."

the violation was not due to the operator's unwarrantable failure. 19 FMSHRC 1646 (Oct. 1997) (ALJ). The Commission granted the Secretary's petition for review. For the reasons that follow, we vacate the judge's decision and remand for further consideration.

I.

Factual and Procedural Background

On January 24, 1994, MSHA Inspector Thomas Meredith cited JWR for a violation of section 75.400 because of a trash accumulation in the No. 2 entry at JWR's No. 7 Mine near Birmingham, Alabama. 18 FMSHRC at 509. On January 31, Meredith conducted a follow-up inspection to ascertain whether JWR had abated the conditions that led to the January 24 citation. *Id.* While in the No. 3 entry, Meredith observed trash around a check curtain, which provided ventilation to the face and separated the active outby section from the inactive inby section. *Id.* Essentially, the check curtain ran across the top of a pile of trash dividing the pile in two parts. 111 F.3d at 916. The bulk of the trash, which extended for 250 feet and included paper bags, rags, rock dust bags, wooden pallets and large cable spools, was on the inby inactive side of the curtain. 18 FMSHRC at 509. A smaller amount of trash, including a garbage bag containing sandwich wrappers and oily rags, rock dust bags, a cardboard box, and sandwich bags, was on the outby active side of the curtain. *Id.*; 16 FMSHRC at 1512; 111 F.3d at 916. The materials on both sides of the curtain were combustible. 18 FMSHRC at 509.

Inspector Meredith issued a withdrawal order and a citation charging a violation of § 75.400 because of the trash on both sides of the curtain. *Id.* at 509; 111 F.3d at 916. Meredith designated the citation S&S[2] and determined that it was the result of JWR's unwarrantable failure to comply with the standard.[3]

JWR filed a notice of contest and a hearing was held before an administrative law judge. The judge affirmed the citation as to the outby area but vacated the citation as to the inby area, because the inby area was not in the "active workings" of the mine as specified by § 75.400. 16 FMSHRC at 1512. The judge concluded that the evidence was insufficient to support either the S&S or unwarrantable failure designation of the citation based on the few items of trash that were in the outby section. *Id.* at 1512-14.

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

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

The Secretary appealed the judge's S&S and unwarrantability determinations. The Commission affirmed the judge's determination that the violation was not S&S, holding that the judge correctly refused to consider evidence of the non-violative trash accumulation on the inby inactive side of the curtain. 18 FMSHRC at 510-11. With regard to the unwarrantable failure determination, the Commission concluded that the judge also properly limited his consideration to the trash accumulation in the outby active area. *Id.* at 511-13. The Commission further held that JWR's prior violation of § 75.400 and a remark by JWR's longwall coordinator regarding JWR's cleanup efforts were insufficient to support the unwarrantable failure designation. *Id.*

The Secretary appealed the Commission's decision to the U.S. Court of Appeals for the District of Columbia Circuit. The court affirmed the Commission's holding that the violation was not S&S and rejected the Secretary's argument that in making that determination the Commission should have considered the surrounding non-violative trash accumulation in the inby area. 111 F.3d at 917-18. On the question of unwarrantability, the court concluded that the Mine Act was ambiguous on whether the non-violative conditions could be considered. *Id.* at 914-15. Accordingly, the court determined that it was required to defer to a reasonable interpretation of the Secretary. *Id.* at 914-15, 919-20, *citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984). The court held that the Secretary's interpretation, which allowed consideration of conditions that do not violate health and safety standards, was a reasonable construction of the Mine Act. 111 F.3d at 919-20. The court remanded the case to the Commission to determine whether, applying the Secretary's interpretation of the statute, "the record contains sufficient evidence of causation and culpability to support an 'unwarrantable failure' finding." *Id.* at 920.

Following the court's remand, the Commission vacated its prior decision and remanded the proceeding to the judge to consider the non-violative accumulations in the inactive area of the mine in determining whether the violation was unwarrantable. 19 FMSHRC at 1378. Specifically, the Commission directed the judge to consider the "massive" accumulations in light of the factors that the Commission may examine in determining whether a violation is unwarrantable, "including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order." *Id.* at 1379 (citations omitted).

On remand, the judge stated :

> Before proceeding with an analysis of the issues on remand it should be observed that two issues in this case have now been resolved through the appellate process, i.e., that the accumulations cited in the inactive area were not violations and that the violative accumulations in the active area were not the result of "unwarrantable failure" or high negligence based upon consideration of those violative conditions alone. Accordingly, those issues are not

reconsidered here.

> The limited issue on remand, then, is whether or not the non-violative accumulations were the result of operator negligence (culpability) and, if so, whether that negligence was of such an aggravated nature as to constitute more than ordinary negligence. If such non-violative accumulations were the result of such negligence, the issue then is whether the record contains sufficient evidence of causation to support an "unwarrantable failure" finding as to the violative condition.

19 FMSHRC at 1648-49 (footnote omitted).

In addressing the non-violative accumulations, the judge noted that the duties of a mine operator are defined by regulation and the absence of a legally defined duty may be considered on the issue of negligence. *Id.* at 1650. The judge concluded that the operator was "at least minimally negligent to have allowed the non-violative accumulations to exist." *Id.* The judge considered the amount of the trash accumulation and the length of time that it might have existed. *Id.* With regard to the prior withdrawal order involving trash accumulations, the judge noted that it involved an active area and would not have provided notice that the operator needed to clean up non-violative trash accumulations. *Id.* The judge concluded that the facts fell short of establishing reckless disregard or gross indifference with regard to the non-violative accumulation. *Id.* at 1650-51. Finally, the judge found that the Secretary had failed to address the issue of causation, which was an essential element in the court's remand. *Id.* at 1651. However, the judge noted that, even if the Secretary had a theory of causation, it would be irrelevant because the level of negligence was minimal. *Id.* Thus, the judge concluded the level of negligence associated with the non-violative accumulations "would not enhance the negligence in regard to the violative accumulations sufficiently to justify unwarrantable failure findings." *Id.*

The Secretary appealed to the Commission, stating that the judge's decision was legally erroneous and not supported by substantial evidence, S. PDR at 1, and the Commission granted review.

II.

Disposition

The Secretary argues that the judge erred when he examined the operator's negligence only in relation to the non-violative accumulation. S. PDR at 10-11.[4] Further, the Secretary argues that when the judge found the operator's negligence mitigated, he relied too heavily on the fact that the accumulation in the inby area was not violative. *Id.* at 12-13. Rather than just looking at whether

[4] The Secretary designated her petition for discretionary review as her brief.

the non-violative accumulations were unwarrantable, the Secretary argues, the judge should have looked at the facts in relation to both the violative and non-violative accumulations to ascertain whether the operator's conduct was "aggravated." *Id.* at 13-14. The Secretary contends that the judge did not consider that the operator had received a withdrawal order for a trash accumulation in an adjacent area just seven days before the issuance of the citation at issue. *Id.* at 15-16. The Secretary argues that the judge failed to address or inadequately addressed other evidence relating to the operator's unwarrantable failure, including the operator's knowledge of the violation and lack of corrective action to clean it up. *Id.* at 16-20. Finally, the Secretary contends that she did not waive the issue of causation and that, more significantly, the Commission's remand order did not direct the judge to separately consider the issue of causation. S. Reply Br. at 1-4.

In response, JWR argues that substantial evidence supports the judge's decision. JWR Resp. Br. at 4-5. JWR further argues that the judge's decision must be affirmed because the Secretary failed to address the issue of "causation" with regard to the non-violative accumulations. *Id.* at 5-6. Further, JWR contends that the judge did not err by looking primarily at the non-violative accumulations in determining unwarrantability and that he properly considered the non-violative accumulations in light of the unwarrantability factors. *Id.* at 6-8. JWR also argues that the prior withdrawal order provided no notice relating to the accumulations in inactive areas that were legal. *Id.* at 8-9. Lastly, JWR contends that, contrary to the Secretary's argument, the judge considered and addressed evidence relating to JWR's knowledge of the accumulation, testimony regarding JWR's efforts to clean up the trash accumulation, and the length of time during which the trash had accumulated. *Id.* at 9-11.

We conclude that the judge erred by analyzing the operator's conduct under the law of negligence to the exclusion of any examination of the criteria that the Commission generally considers in an unwarrantable failure analysis. Further, the judge misstated the issue before him on remand and failed to consider the impact of the violative, as well as the non-violative, conditions.

The judge defined the issue on remand as whether or not the non-violative accumulations resulted from operator negligence and, if so, whether it was aggravated negligence. 19 FMSHRC at 1648-49. By focusing only on the non-violative accumulations, the judge erred. The primary issue in this case since the judge's initial decision has been the extent to which the non-violative accumulations could be considered in conjunction with the violative accumulations to ascertain unwarrantability.[5] *See* 18 FMSHRC at 510-513; 111 F.3d at 919-20. Even JWR concedes that "the unwarrantability factors by definition apply only to the actual *violative* conditions, . . . which remain the focal point of this entire matter." JWR Resp. Br. at 4 n.3 (emphasis in original). Thus, it is

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[5] We disagree with the dissent that the judge was simply following the Commission's remand instructions when he examined only the non-violative accumulations. Slip op. at 13. The remand clearly directed the judge to consider the non-violative accumulations "in light of the other factors that the Commission may examine in determining whether a violation is unwarrantable," including various factors relating to the violative accumulations. 19 FMSHRC at 1378-79.

apparent from the judge's decision that the scope of his factual analysis was too narrow. The judge's overly restrictive examination of the trash accumulations led him to place undue emphasis on the fact that those accumulations in the inby inactive areas were not in violation of the regulation and, therefore, erroneously concluded that JWR's "negligence was . . . strongly mitigated." 19 FMSHRC at 1650.

In addition to this clear error, the judge focused on traditional concepts of negligence — causation and culpability — while largely ignoring the factors that the Commission directed him to consider in its decision directing remand.[6] The Commission instructed the judge to consider the factors set forth in *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994), including "the extent of [the] violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order." 19 FMSHRC at 1379. While the judge referenced these factors in his decision, 19 FMSHRC at 1649 n. 2, he made no considered analysis of them in relation to the record evidence. For instance, the judge never discussed whether the operator was put on notice of the trash accumulation as a result of the inby conditions or whether the accumulation was obvious because of the inby conditions.[7] The judge also does not appear to factor into his analysis of the unwarrantability of the violation his own conclusions that management "knew or should have known" of the inby trash and that the trash was extensive. 19 FMSHRC at 1650. Moreover, the judge's error in focusing solely on the non-violative accumulations led him to discount the prior withdrawal order resulting from trash accumulations in an adjacent entry ("presumably in an active area," *id.*). *See Peabody Coal Co.,* 14 FMSHRC 1258, 1263-64 (Aug.

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[6] In addressing the court's decision, the dissent has presented an overly narrow impression of what the judge was required to do. Thus, we disagree with the dissent's view that the judge, by focusing on culpability and causation, was simply following remand instructions of the D.C. Circuit that somehow altered or superseded the existing Commission test for determining whether a violation is unwarrantable. Slip op. at 12, 13. The court's reference to causation and culpability occurs in the context of a more comprehensive discussion of unwarrantability, with a citation to the Commission's seminal decision in *Emery Mining Corp.,* 9 FMSHRC 1997 (Dec. 1987). In addition, both the Secretary and JWR fully briefed and argued the applicability of the *Mullins* factors to the court. In this circumstance, we do not read the court's references to causation and culpability in its remand instructions as anything more than a shorthand reference requiring a comprehensive analysis to determine whether the violation was the result of the operator's unwarrantable failure. *See* 111 F.3d at 919-20.

[7] The evidence suggests that, because of the inby conditions, the violation was obvious and JWR must have been aware of it. For instance, the inspector testified without contradiction that the operator had placed a ventilation curtain on top of the trash accumulation, splitting open a garbage bag and spilling its contents on the outby side of the curtain. Tr. 19-20, 65. The inspector testified that the accumulation that was outby the curtain was "just the continuation of everything that was inby the curtain." Tr. at 19.

1992) (repeated similar violations may be relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance).

JWR argues that the judge's remand decision in which he addressed only the non-violative inby accumulations must be read in conjunction with his July 1994 decision, in which he addressed only the violative outby accumulations.[8] *See* JWR. Br. at 6-7, 9-11. However, we vacated the prior unwarrantability determination (19 FMSHRC at 1378) because the judge and the Commission had applied an interpretation of unwarrantability that the court of appeals rejected. *See* 16 FMSHRC at 1513-14. The bifurcated approach suggested by JWR is contrary to the Secretary's interpretation approved by the court of appeals. Accordingly, it is necessary for the judge to evaluate the totality of the operator's conduct on remand, including both the violative and non-violative accumulations, in order to make an unwarrantability determination.

JWR also argues that, in his remand decision, the judge fully considered the record evidence concerning unwarrantability. JWR R. Br. at 9-11. However, to the extent that the judge considered this evidence, he did so only in weighing the operator's negligence in relation to the non-violative accumulations, which, as we have stated, was too narrow in scope.[9]

In addition, although the issue was neither raised nor briefed by the parties, the dissent questions whether JWR's due process rights were violated because it did not have an opportunity to adequately defend against "a retroactive application of the Secretary's expansive interpretation of section 104(d)." Slip op. at 14.[10] There is good reason why JWR has not raised this issue. From the

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[8] The judge's only consideration of key testimonial evidence concerning whether JWR was on notice of the accumulations and what effort had been made to clean them up was in his first decision that was vacated. *See* 16 FMSHRC at 1514.

[9] Our dissenting colleagues err in quoting from the court's decision (slip op. at 16) to support their argument that the Secretary somehow improperly relies on non-violative conditions to support an unwarrantability determination. As the dissent recognizes, this quotation pertains to the Secretary's S&S analysis, not the unwarrantability analysis at issue here. 111 F.3d at 916-17. In contrast to the section of the opinion cited by the dissent, the court concluded, in a subsequent passage, that the Secretary's interpretation of section 104(d)(1), 30 U.S.C. § 814(d)(1), to include consideration of inby, non-violative trash accumulations was "reasonable." 111 F.3d at 920.

[10] The dissent suggests (slip op. at 14 n. 8) that the judge's passing reference to "due process" in regard to whether non-violative coal accumulations presented a hazard (19 FMSHRC at 1650 & n. 3) is sufficient to preserve this question for Commission review, even though no party has raised the issue. This approach is at odds with the Mine Act, 30 U.S. C. § 823(d)(2)(A)(iii), and with well-settled appellate procedures. *See Wyoming Fuel Co.*, 16 FMSHRC 1618, 1623 (Aug. 1994). While the dissent's citation of the "due process" reference in the judge's decision suggests that the judge's concern was with "the Secretary's new and

beginning of this proceeding, MSHA cited JWR because it permitted trash accumulations on the inby and outby sides of a check curtain. 18 FMSHRC at 509; Pl. Ex. 2 (Citation No. 3182848). MSHA included with the citation its determination that the violation was the result of JWR's unwarrantable failure. 18 FMSHRC at 509. The dissent simply fails to accept the factual predicate of this proceeding — which has always been that both the inby and outby accumulations were the basis for the unwarrantability determination. Accordingly, the dissent's suggestion that JWR did not have an opportunity "to make a record" on the impact of the inby accumulations on the issue of unwarrantable failure (slip op. at 15) is at odds with the history of the case. Moreover, the dissent's approach would have us ignore the D.C. Circuits's decision, which adopted the Secretary's interpretation, reversed the Commission on this issue, and is the law of the case. This we will not do.[11]

Moreover, we have no difficulty rejecting the dissent's concern that this amounts to an impermissible retroactive application. *See Sewell Co. Co. v. FMSHRC*, 686 F.2d 1066, 1070 (4th Cir. 1982) ("retroactive application of a novel principle expounded in an adjudicatory proceeding does not infringe the rights secured by the due process clause").[12] We simply note that the issue has

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expansive reading of section 104(d)(1)," the judge was actually referring to the question of the operator's negligence in allowing the non-violative accumulations to exist. 19 FMSHRC at 1650 & n. 3.

[11] The dissent's further suggestion that application of the Commission's "reasonably prudent person" test shields JWR from liability for unwarrantable failure is also misplaced. Slip op. at 15-16 n. 10. The Commission's reasonably prudent person test pertains to whether an operator had fair notice of an agency's *regulatory interpretation. E.g., General Electric Co. v. EPA,* 53 F.3d 1324, 1330-31 (D.C. Cir. 1995); *Ideal Cement Co.,*12 FMSHRC 2409, 2415 (Nov. 1990) (interpreting and applying broadly worded standards). This case, in contrast, presents the issue of whether the facts surrounding a violation establish aggravated conduct rising to the level of unwarrantable failure. *See, e.g., Emery Mining Corp.,* 9 FMSHRC 1997.

[12] Commissioner Beatty notes that, to support their retroactivity/due process argument, Commissioners Riley and Verheggen rely on their dissenting opinion, and his concurring opinion, in *Topper Coal Co.*, 20 FMSHRC 344, 371, 378-79 (Apr. 1998). In *Topper*, Commissioner Beatty agreed with Commissioners Riley and Verheggen that it would be unfair on review to apply a presumption that a violation was S&S where the Secretary's counsel had first argued for the application of a presumption in her post-hearing brief, thereby depriving the operator the opportunity to adduce evidence at the hearing to rebut the presumption. *Id.* Commissioner Beatty concludes that *Topper* is not controlling here, since it is distinguishable from this case in several important respects. First, as shown above, unlike the operator in *Topper*, JWR did have an opportunity to make a record on the impact of the inby accumulations on the issue of unwarrantable failure. Although the Secretary's theory of how those accumulations might support a finding of unwarrantability necessarily changed as a result of the

been fully briefed and argued to both the Commission and the D.C. Circuit. Additionally, as discussed above, the Secretary's retroactive application of its theory of unwarrantability has the express approval of, and is in fact directed by, the reviewing court on appeal.

In sum, because the judge did not analyze the unwarrantability factors and the operator conduct that he was directed by the Commission to consider, his decision must be vacated and the proceeding remanded. *See Doss Fork Coal Co.,* 18 FMSHRC 122, 125-26 (Feb. 1996). On remand, in making an unwarrantable failure determination for the violation at issue, the judge must consider the violation and "mine conditions beyond the violation itself, including conditions not themselves violating mine safety and health standards." 111 F.3d at 920.

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judge's initial decision, it is unlikely that the evidence that JWR would have introduced to show that those accumulations were not indicative of unwarrantable failure would have been any different. More importantly, *Topper* involved a far different issue, the retroactive application of a presumption — a procedural device designed to "'shift[] the burden of producing *evidence*.'" *Id.* at 378 (*quoting* 2 *McCormick on Evidence* § 343, at 454) (emphasis in original). This case, by contrast, involves the "retroactive application of a novel principle expounded in an adjudicatory proceeding," which has been consistently held not to violate due process rights. *Sewell Coal Co. v. FMSHRC*, 686 F.2d at 1069-70 (*citing NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *SEC v. Chenery Corp.*, 332 U.S. 194 (1947)); *see also Molina v. INS*, 981 F.2d 14, 23 (1st Cir. 1992) ("retroactive application of new principles in adjudicatory proceedings is the rule, not the exception.") (*citing SEC v. Chenery*, 332 U.S. 194 (1947)).

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision and remand the proceeding to the judge for further consideration consistent with this decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioners Riley and Verheggen, dissenting:

The majority fails to provide a meaningful basis for its remand order sending this case back to the judge once again. We therefore respectfully dissent. For the reasons set forth below, we would affirm the judge's decision.

In a decision issued on May 2, 1997, the U.S. Court of Appeals for the District of Columbia Circuit remanded this case to the Commission with instructions "to determine whether, applying the Secretary's interpretation of the statue, the record contains sufficient evidence of causation and culpability to support an 'unwarrantable failure' finding." *Secretary of Labor v. FMSHRC*, 111 F.3d 913, 920 (D.C. Cir. 1997).[1] The Commission, in turn, issued its decision and instructions to the administrative law judge as follows:

> Pursuant to the court's order, we vacate the judge's unwarrantable determination and remand to the judge to consider the non-violative accumulations in the inactive area of the mine. The judge is to consider these accumulations, which his decision refers to as massive, in light of the other factors that the Commission may examine in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition made prior to the issuance of the citation or order.

19 FMSHRC at 1378-79 (citations omitted).

In accordance with these instructions, the judge addressed the non-violative trash accumulations in the inactive area of the mine. 19 FMSHRC at 1648-49. He considered those facts and circumstances relevant to a determination of unwarrantable failure, including the extent and duration of the accumulations, and found that the operator "was not without negligence in allowing these non-violative accumulations to exist." *Id.* at 1650. However, as to culpability, the judge concluded that the operator's conduct, while negligent, did not rise to the level of aggravated conduct[2] because there was no legal duty on the part of the operator to prevent such accumulations.

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[1] According to the court, the Secretary's interpretation of section 104(d)(1) of the Mine Act allows consideration of "mine conditions beyond the violation itself, including conditions not themselves violating mine safety and health standards," in determining whether a violation is the result of unwarrantable failure. 111 F.3d at 920.

[2] Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence, and is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*,

19 FMSHRC at 1650. Finally, the judge noted that the Secretary failed to offer any evidence on the issue of causation, and considered this failure an abandonment of her claim and a default. *Id.* at 1651.

We find that the judge's decision closely adheres to both the court's and the Commission's instructions, which are the binding law of the case. *See Lion Mining Co.*, 19 FMSHRC 1774, 1777 (Nov. 1997). The judge limited his inquiry on remand to the non-violative trash accumulations in the inactive area of the mine, as directed by the Commission. 19 FMSHRC at 1648-49. He also fully considered those factors, as directed by the Commission, relevant to determining "unwarrantable failure," including extent, duration, notice, and efforts to abate. *Id.* at 1650.

The judge's finding with respect to the operator's culpability, made at the direction of the appeals court, is also legally sound. It is undisputed that the operator had no legal duty to remove or clean up trash in the inactive workings of the mine. In the absence of a legal duty, there can be no finding of aggravated conduct. *See Lafarge Construction Materials*, 20 FMSHRC 1140, 1148 (Oct. 1998) ("The aggravated conduct required for a finding of unwarrantable failure is the kind of conduct that . . . results in a breach of duty."). The appeals court also directed the Commission (and hence, the judge) to make a finding with respect to causation (111 F.3d at 920), but on remand the Secretary declined to address the issue. 19 FMSHRC at 1651. Since the Secretary failed to adduce any evidence with respect to causation, which the appeals court specifically directed the Commission to consider in its unwarrantability determination, she failed to meet her burden of proof in this case. *Peabody Coal Co.*, 18 FMSHRC 494, 499 (Apr. 1996) ("Commission precedent has established that the Secretary bears the burden of proving that an operator's conduct, as it relates to a violation, is unwarrantable."). On this basis alone we would affirm the judge's decision.

The majority, however, asserts that the judge committed two errors, neither of which have any basis in the record before us. First, our colleagues assert that "the judge erred by analyzing the operator's conduct under the law of negligence to the exclusion of any examination of the criteria that the Commission generally considers in an unwarrantable failure analysis." Slip op at 5. The judge, they argue, "focused on traditional concepts of negligence — causation and culpability — while largely ignoring the factors that the Commission directed him to consider." *Id.* at 6.

The judge, however, cannot be faulted for "focusing" on the "traditional" negligence concepts of causation and culpability for the simple reason that the District of Columbia Circuit specifically directed the Commission to bring such a focus to bear on this case. Indeed, the judge was duty bound to "determine whether . . . the record contains sufficient evidence of causation and culpability to support an 'unwarrantable failure' finding." 111 F.3d at 920. Nor can it be said that the judge failed to examine the criteria used by the Commission to weigh allegations of unwarrantable failure. In fact, the judge analyzed a number of the factors as directed by the Commission. As to extent and duration of the non-violative trash accumulations, the judge found

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9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991).

them to be extensive and that some of the materials may have accumulated over a period as long as a week. 19 FMSHRC at 1650. As to notice, the judge acknowledged that another withdrawal order had been previously issued for accumulations in an adjacent entry, but found that this order would not have put the operator on notice that accumulations in an inactive area of the mine had to be removed. *Id.* Finally, with respect to abatement efforts, the judge found no evidence that the operator attempted to clean up the non-violative accumulations. *Id.* To say that the judge "largely ignor[ed] the factors," or "made no considered analysis" of them (slip op. at 6), is simply inaccurate.[3]

Secondly, our colleagues argue that the judge erred "[b]y focusing only on the non-violative accumulations." Slip op. at 5. Yet, this is *precisely* what we directed the judge to do. The Commission's remand instructions direct "the judge to consider the non-violative accumulations in the inactive area of the mine," and do not refer to the violative accumulations in the active outby section.[4] 19 FMSHRC at 1378. Notwithstanding these instructions, our colleagues argue that the non-violative conditions should have been considered "in conjunction with" the violative conditions, since even the operator concedes that this case is really about whether the latter is unwarrantable. Slip op. at 5. Clearly, the judge recognized this when he concluded that his findings with respect to the non-violative accumulations "would not enhance the negligence in regard to the violative accumulations sufficient to justify unwarrantable failure findings." 19 FMSHRC at 1651. Based on the Commission's own instructions,[5] the judge properly limited his consideration to the non-violative conditions.

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[3] A judge is not required to consider all of the unwarrantability factors, but only those that are relevant to the facts and circumstances of a particular case. *Lafarge*, 20 FMSHRC at 1147. It is also worth noting that our instructions were at best less than a model of clarity, if not downright confusing and inconsistent with the direction of the court. While we directed the judge to consider the non-violative conditions, our instructions with respect to the factors refer only to violative conditions, not non-violative conditions. *See* 19 FMSHRC at 1379 (directing the judge to consider "the extent of a *violative* condition, the length of time *it* has existed, whether the *violation* is obvious or poses a high degree of danger . . . and the operator's efforts in abating the *violative* condition.") (emphases added). Thus, even if the judge had declined to give any consideration to the factors — which he most certainly did not in this case — his decision would have been consistent with the Commission's remand order, and he would not have committed any error.

[4] Nonetheless, our colleagues, with the benefit of hindsight, now direct the judge to evaluate "both the violative and non-violative accumulations" (slip op. at 7) despite the fact our original instructions provided no such direction.

[5] If any deficiency is to be found here, it is not in the judge's decision but rather in the lack of clarity in our original instructions to the judge. The majority attempts to explain these instructions as follows: "The remand clearly directed the judge to consider the non-violative accumulations 'in light of the other factors that the Commission may examine in determining whether a violation is unwarrantable,' including various factors relating to the violative accumulations." Slip op. at 5 n.5 (quoting 19 FMSHRC at 1379). What exactly this means is hardly clear. In fact, we find it as confusing and inconsistent as we find the original remand instructions.

The majority's remand is all the more unnecessary given the judge's ruling on causation. In the unlikely event, based on the majority's remand instructions, the judge reverses his culpability finding, the result of his decision will remain unchanged. He still has no basis for making a finding on causation, because the Secretary has provided none.[6] The Secretary claims she did not waive the causation issue, but at the same time inconsistently argues that, in fact, she need not address it. S. Resp. Br. at 1-3 & n.2. According to the Secretary, unwarrantable failure cases have never required a showing of causation separate from culpability. *Id.* However, the appeals court clearly required such a showing in this case.[7] The Secretary's complaint that such a showing is unnecessary is a complaint more appropriately directed at the court. The judge in this case, however, was duty bound to follow the law of the case and make a determination on causation.

Even had the judge been able to make such a finding, however, his analysis would still not have been complete. If he had found that the violation was due to the operator's unwarrantable failure, he still would have been required to determine whether the operator was ever afforded the opportunity to defend itself against the Secretary's interpretation of the statute (i.e., that non-violative conditions should be considered in determining unwarrantable failure), or whether instead the operator's due process rights would be violated by what would amount to a retroactive application of the Secretary's expansive interpretation of section 104(d). *See* 19 FMSHRC at 1650 n.3 ("this issue was first raised by the Secretary on appellate review and was not squarely presented at trial . . . . Because of the result in this case, however, 'due process' concerns in this regard are moot").[8] As the Supreme Court has held, "[r]etroactivity is not favored in the law," *Bowen v.*

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[6] Our colleagues inexplicably decline to address directly the issue of causation in their opinion, even though it is one of the two issues the court directed the Commission to consider. Instead, our colleagues claim in a footnote that the court's specific direction to make findings on causation is merely a "shorthand reference" for a comprehensive unwarrantable failure analysis. Slip op. at 6 n.6. In other words, the majority claims that the court said what it really did not mean.

[7] Notwithstanding the arguments of the Secretary and the majority to the contrary, the appeals court clearly directed the Commission to make a specific finding on causation, namely, to "determine whether . . . the record contains sufficient evidence of causation." 111 F.3d at 920. Indeed, it is clear that the court envisioned causation to be an integral element of an unwarrantable failure analysis. Section 104(d)(1) requires the Secretary to find "such violation to be *caused* by an unwarrantable failure of [the] operator to comply with such mandatory health and safety standards." 30 U.S.C. § 814(d)(1) (emphasis added). According to the court, the language of this section "directs decisionmakers to consider the *cause* of the violation." 111 F.3d at 920 (emphasis added).

[8] On this point, the majority states that the judge's due process concern was not with the Secretary's interpretation, but that instead he "was actually referring to the question of the operator's negligence in allowing the non-violative accumulations to exist." Slip op. at 7 n.10. This assertion is logically flawed. The judge on remand would never have even passed on "the

Georgetown University Hosp., 488 U.S. 204, 208 (1988) (citations omitted), a maxim the Court has repeatedly reaffirmed. *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997); *Lynce v. Mathis*, 519 U.S. 433, 439 (1996); *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994). *Cf. Topper Coal Co.*, 20 FMSHRC 344, 371, 378-79 (Apr. 1998) (majority of Commissioners rejecting retroactive application of S&S presumption because operator "had no notice" of the Secretary's theory at trial (Commissioner Beatty, concurring with Commissioners Riley and Verheggen)).

As the majority concedes (slip op. at 8-9), the Secretary failed to advance her interpretation in the adjudicatory proceeding in which the record of the case was made. The operator was never presented *at trial* with the issue of how non-violative conduct could be used by the Secretary to prove unwarrantable failure, nor was the operator ever given the opportunity to defend itself against an allegation based on such a theory. Put another way, as we review on appeal the Secretary's new interpretation of section 104(d)(1), we have no evidentiary record adduced at trial addressing the elements of the Secretary's theory.[9] To now apply this theory against the operator without providing it any opportunity to make a record to the contrary we find unfair and inequitable.[10]

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operator's negligence in allowing the non-violative accumulations to exist" had it not been for the Secretary advancing her new interpretation of section 104(d)(1) on appeal to the D.C. Circuit and the Commission. The majority also states that our focus on due process concerns "would have [the majority] ignore the D.C. Circuit's decision, which adopted the Secretary's interpretation, reversed the Commission on this issue and is the law of the case." Slip op. at 8. Our concerns, however, are not inconsistent with the law of the case as handed down by the D.C. Circuit. Instead, while acknowledging that the Secretary's interpretation is the law of the case, like the judge, we recognize that the next step in the analysis — a step the D.C. Circuit never had to reach and a step the majority ignores — is to determine whether retroactive imposition of any legal requirements arising from the Secretary's interpretation conforms to the law of retroactivity as set forth in *Bowen* and its progeny.

[9] As the majority concedes, this issue has only been "briefed and argued to both the Commission and the D.C. Circuit" (slip op. at 9), but *not* tried before a judge in a Commission hearing.

[10] On the question of notice, which is closely related to the problem of retroactivity, the Commission has applied an objective standard, i.e., the reasonably prudent person test. *See, e.g., Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990); *Otis Elevator Co.*, 11 FMSHRC 1896, 1906 (Oct. 1989), *aff'd*, 921 F.2d 1285, 1291 (D.C. Cir. 1990); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (Dec. 1982). Under this legal framework, we find it difficult, if not impossible, to imagine circumstances that could support a finding that a reasonably prudent person familiar with the mining industry would have been aware of the Secretary's interpretation here, particularly when a majority of this Commission initially found it to be an impermissible reading of the statute. 18 FMSHRC at 512.

Finally, we believe that a remand is unwarranted here because this case has simply gone on too long. It has been over five years since the Secretary cited the operator. The reason this litigation has taken so long is due at least in part to the Secretary's failure at the outset to appeal the judge's initial determination that the inby accumulation was non-violative. *See* 18 FMSHRC at 514 (Commissioner Riley, concurring). Since then, the Secretary has spent years trying to fit the square peg of non-violative conduct (accumulations outside the active workings) into the round hole of a section 75.400 violation applying only to active workings. At every step of the process, the Commission and the courts have warned of the inadequacy of this regulation, warnings which bear repeating one more time. As the District of Columbia Circuit stated when referring to the significant and substantial finding in the Commission's original decision:

> Underlying the Secretary's arguments, both statutory and evidentiary, is [her] concern that dangerous accumulations of trash outside active workings will go unchecked if the Commission's decision is allowed to stand. If collections of trash outside active workings can be both permissible and hazardous, the fault lies neither with the Mine Safety Act nor with the Commission's legal reasoning, but with the Secretary's combustible materials regulation, which forbids accumulations of combustible materials in active workings. The regulation does not prohibit such accumulations in inactive areas. We think . . . "the regulation may not fully effectuate statutory purposes. However, if the Secretary sincerely believes the regulation is deficient, [she] should clarify its language through rulemaking, rather than ask the [decisionmaker] to rewrite the regulation by adjudication."

111 F.3d at 918 (citations omitted). These words remain equally applicable today, where accumulations outside active workings but near enough to present a risk to miners can still be both "permissible and hazardous." *Id.*

Rather than perpetuate this misbegotten litigation, in the interests of justice and for all of the foregoing reasons, we would affirm the judge's decision.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

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July 30, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 98-189-RM
BHP COPPER, INC.	:	

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

DECISION

BY: Jordan, Chairman; Marks and Beatty, Commissioners

This contest proceeding brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") against BHP Copper Inc. ("BHP"). The citation charged BHP with violating section 103(a) of the Mine Act,[1] 30 U.S.C. § 813(a). Administrative Law Judge Richard Manning granted BHP's motion for summary judgment and dismissed the citation. 20 FMSHRC 634 (June 1998) (ALJ). Following the judge's decision, the Commission granted sua sponte review, pursuant to section

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[1] Section 103(a) of the Mine Act 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 (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, . . . and (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, . . . any authorized representative of the Secretary . . . shall have a right of entry to, upon, or through any coal or other mine.

113(d)(2)(B) of the Act, 30 U.S.C. § 823(d)(2)(B).[2] For the reasons that follow, we reverse the judge's determination.

I.

Factual and Procedural Background[3]

On March 4, 1998, a fall of ground at BHP's San Manuel Mine in Arizona resulted in the death of one miner and serious injury to a second, Ronald Byrd, who was hospitalized following the accident. 20 FMSHRC at 634-35. On March 5, MSHA supervisor Richard Laufenberg and Inspector Arthur Ellis came to the mine to begin their investigation into the accident and made a physical inspection of the accident site. *Id.* at 635. On March 6, the MSHA representatives interviewed a number of BHP employees and reviewed BHP documents relating to the accident. *Id.* However, they were unable to interview Byrd, the miner injured in the accident, because he was hospitalized. *Id.* Consequently, they intended to contact Byrd's family and interview him in the hospital. S. Cross Mot. for Partial Summ. Dec., Laufenberg Decl. ¶ 4 [hereinafter "Laufenberg Decl."]. When BHP representatives informed Laufenberg that Byrd was going to be released from the hospital that day, Laufenberg asked for Byrd's home address and telephone number. 20 FMSHRC at 635. BHP's counsel responded that BHP considered its employees' telephone numbers and addresses confidential and that it would not provide that information. *Id.* No one from BHP offered to contact Byrd to ascertain whether he would consent to BHP's supplying MSHA his telephone number and address.[4] *Id.*; Laufenberg Decl. ¶ 7. However, Ward Lucas, BHP safety manager at the San Manuel Mine, told Laufenberg that he thought that Byrd lived in Superior, Arizona. 20 FMSHRC at 636.

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[2] Following the Commission's direction of review, BHP filed a petition for writ of mandamus from the United States Court of Appeals for the Ninth Circuit in which it requested, inter alia, that the court order the Commission to vacate its direction of review. The court denied BHP's petition in an order dated September 8, 1998.

[3] Because the case was decided on a motion for summary decision, the facts, as found by the judge, were taken from the affidavits submitted by BHP and the Secretary. Where there were conflicts in testimony, the judge stated that he accepted the account provided by the Secretary, the party against whom summary decision was granted. 20 FMSHRC at 635, 638.

[4] The judge noted in his decision that there was disputed testimony about whether there was an offer to contact Byrd at the meeting on March 6. 20 FMSHRC at 635. BHP's corporate safety manager, Warren Traweek, stated in his affidavit that BHP offered to contact Byrd to see whether he would consent to BHP giving his telephone number and address to MSHA. BHP Mot. for Summ. Dec., Ex. D ¶ 5 [hereinafter Traweek Decl.].

On March 7, Ellis and Laufenberg again met with BHP officials, who did not disclose Byrd's address or telephone number or indicate that anyone had sought to obtain his consent to release the information. Laufenberg Decl. ¶ 8. Following the meeting, Laufenberg traveled to Superior, Arizona to attempt to locate Byrd. 20 FMSHRC at 636. Laufenberg was unable to locate Byrd's telephone number in the telephone book for Superior. *Id.* He asked a local police officer for help in locating him, but to no avail. *Id.* He then contacted BHP Safety Manager Lucas at his home and told him that he was having difficulty locating Byrd. *Id.* Lucas responded that Byrd might be staying with relatives. *Id.* Laufenberg told Lucas that he would try calling persons listed in the telephone book with the surname "Byrd," but that if he was unsuccessful he would turn the matter over to the Solicitor's office. *Id.* Although Lucas did not offer to provide the telephone number or address, he told Laufenberg to call him back if the could not locate Byrd.[5] *Id.* After Laufenberg spoke with Lucas, he called a "Robert Byrd" listed in the telephone book. *Id.* Robert Byrd was a relative of Ronald Byrd and was able to supply the necessary information so that Laufenberg could contact him. *Id.*

On March 12, MSHA issued a citation charging BHP with a violation of section 103(a) of the Act. *Id.* at 634. The citation stated that BHP impeded MSHA's accident investigation by withholding the address and telephone number of Ronald Byrd, whom MSHA needed to interview because he was an essential witness in the investigation. *Id.*

Thereafter, BHP filed a notice of contest challenging MSHA's citation, and the matter was assigned to an administrative law judge. Stating that the essential facts were not in dispute, BHP filed a motion for summary decision. The Secretary opposed BHP's motion, arguing that there were disputed issues of fact. In the alternative, the Secretary filed a cross motion for summary decision. The judge concluded that there was no genuine issue of material fact and that summary decision in favor of BHP was appropriate. 20 FMSHRC at 638. The judge noted that neither the Act nor the Secretary's regulations (30 C.F.R. Part 50) required mine operators to maintain a list of employees with addresses and phone numbers. *Id.* Thus, the issue, as the judge analyzed it, was whether section 103(a),[6] when read with section 103(h),[7] requires mine operators

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[5] Lucas stated in his declaration that he told Laufenberg that he did not have Byrd's telephone number and address but that he would try and find it. BHP Mot. for Summ. Dec., Ex. E ¶ 6 [hereinafter "Lucas Decl."]. He further stated that he then contacted BHP offices and obtained the information but that Laufenberg never called back. *Id.* at ¶ 7.

[6] The judge specifically quoted the language of section 103(a)(4), which governs the Secretary's right to conduct inspections at mines to determine whether there are violations of standards, instead of section 103(a)(1), which specifies the Secretary's right to conduct investigations to obtain information relating to the causes of accidents. 20 FMSHRC at 635; *see* 30 U.S.C. § 813(a).

[7] Section 103(h), 30 U.S.C. § 813(h), provides:

to immediately provide MSHA with the names and telephone numbers of its employees, who are potential witnesses to a fatal accident, without their consent. *Id.* at 638. The judge concluded that BHP did not impede MSHA's investigation in violation of section 103(a) when it refused to provide MSHA with the address and telephone number of Byrd without first obtaining his consent. *Id.* at 638-39.

In support of his conclusion, the judge reasoned that, while the Secretary's right to inspect mines without a search warrant has been broadly construed, the Secretary does not have broad authority to search an operator's business records without his consent. *Id.* at 639. "MSHA cannot require mine operators to immediately provide confidential information from mine personnel files under the warrantless inspection authority of section 103(a) in the absence of compelling circumstances." *Id.* Rather, the judge held that a mine operator has the "right" to protect the privacy of its employees and to require that the miner consent before confidential information is disclosed. *Id.* The judge noted that Inspector Laufenberg did not ask BHP to attempt to obtain Byrd's consent to release his address and telephone number. *Id.* at 640. The judge further found that BHP's refusal to provide the information did not impede the investigation, noting that MSHA obtained the information through other means in about 24 hours. *Id.* at 640-41. The judge vacated the citation and dismissed the proceeding. *Id.* at 641.

II.

Disposition

A. Adequacy of Direction for Review and BHP's Motion to Strike

Initially, BHP argues that the Commission's sua sponte direction for review was impermissibly vague because "the Commission simply restates the question that had been put before [the judge] below." BHP Br. at 5. BHP argues that the Commission failed to specify the

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> In addition to such records as are specifically required by this Act, every operator of a coal or other mine shall establish and maintain such records, make such reports, and provide such information, as the Secretary or the Secretary of Health, Education, and Welfare may reasonably require from time to time to enable him to perform his functions under this Act. The Secretary or the Secretary of Health, Education, and Welfare is authorized to compile, analyze, and publish, either in summary or detailed form, such reports or information so obtained. Except to the extent otherwise specifically provided by this Act, all records, information, reports, findings, citations, notices, orders, or decisions required or issued pursuant to or under this Act may be published from time to time, may be released to any interested person, and shall be made available for public inspection.

legal or policy error that was the basis for its review under the Act, 30 U.S.C. § 823(d)(2)(B). *Id.* at 5-8. In response, the Secretary argues the Commission's direction for review is not vague, noting that the judge's decision adequately framed the legal issues on review. S. Resp. Br. at 2-4.

BHP previously filed a motion to dismiss the direction for review on the same grounds that it now presents in its brief. The Commission denied that motion by Order, dated September 2, 1998. We see no reason to overturn that order. We note that the Direction for Review stated that review was ordered because the judge's decision may be contrary to law or presents a novel question of policy. The direction further stated that review is directed on "the issue of whether an operator impeded an accident investigation in violation of section 103 of the Mine Act, 30 U.S.C. § 813, when it refused to release the address and telephone number of an injured miner, who also was a witness in the investigation." Order dated July 22, 1998. We agree with the Secretary that the direction for review, particularly when read against the backdrop of the judge's decision, more than adequately informs the parties of the issues before the Commission.

BHP also filed a motion to strike portions of the Secretary's opening brief. Specifically, BHP asserts that the Secretary's brief raised "a host of new arguments, and references a variety of new evidence and expert testimony." BHP Mot. to Strike at 1-2; *see also* BHP Suppl. Mot. to Strike at 2.

In *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1319-21 (Aug. 1992), the Commission refused to consider a new theory (a presumption regarding an S&S designation of a violation, rather than application of the record facts under the Commission's test in *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984)), not previously presented to the administrative law judge. In rejecting consideration of the Secretary's new theory, the Commission stated that a matter raised on review must have been at least "implicitly" raised below or "intertwined" with an issue tried before the judge in order to be considered on appeal. *Id.* at 1321.

The Secretary's arguments made to the judge and the Commission address the meaning and interpretation of section 103(a). While the points raised by the Secretary before the Commission are not identical to those raised before the judge, they are "sufficiently related" to those raised in support of the Secretary's interpretation of section 103(a) that the Commission can consider them. *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10 n.7 (Jan. 1994). None of these arguments are comparable to the novelty of the legal theory raised for the first time on appeal in *Beech Fork.* Accordingly, we deny BHP's motion to strike the Secretary's legal arguments regarding section 103(a).[8]

In its Supplemental Motion to Strike, BHP also requests that the Commission strike from the record the Secretary's statement that BHP possessed Byrd's home telephone and address.

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[8] We do not reach the Secretary's additional argument that the scope of review for sua sponte review pursuant to section 113(d)(2)(B) is different than the scope of review for a direction for review pursuant to section 113(d)(2)(A). S. Resp. to Mot. to Strike at 2-8.

BHP Suppl. Mot. to Strike at 2-3. However, BHP's request to strike is at odds with Lucas' declaration in which he stated that he obtained Byrd's address and telephone number from the person at BHP who handled its industrial claims but that Laufenberg never called him back. Lucas Decl. ¶ 7. Therefore, we deny the motion to strike that statement. Lastly, as to BHP's motion to strike the secondary materials cited in the Secretary's brief (BHP Mot. to Strike at 2, 9-10), we have disposed of the legal issues in the case without resort to those materials. It is therefore unnecessary to rule on this aspect of BHP's motion to strike. *Southern Ohio Coal Co.*, 12 FMSHRC 1498, 1502 n.7 (Aug. 1990).

B. Violation of Section 103(a)

The Secretary contends that sections 103(a) and (h) of the Act obligate a mine operator to provide the address and telephone number of a miner where that information is necessary to enable MSHA to conduct an effective accident investigation in a timely manner. S. Br. at 5-8, 10; S. Resp. Br. at 1. The Secretary asserts that, if section 103(h) cannot be read to create such an obligation, then section 103(a), which grants MSHA a broad investigatory mandate, should be read to create the obligation because locating and interviewing miner witnesses is an essential part of an accident investigation. S. Br. at 7, 14. The Secretary further argues that it would be impossible to include in her regulations every type of information that could be the subject of a mine accident investigation. S. Resp. Br. at 4-5; *see id.* at 10-14. The Secretary relies on *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to support her position.

BHP contends that *Chevron* deference is due only to duly promulgated regulations and published statements of policy, not to arguments made in litigation. BHP Resp. Br. at 5-7; BHP Reply Br. at 2-6. BHP asserts that nothing in the Act or regulations requires that mine operators maintain records with miner addresses and telephone numbers and, therefore, there is no obligation to supply them on demand. BHP Br. at 9; BHP Resp. Br. at 4, 7-14; BHP Reply Br. at 6-9. BHP further contends that the Secretary may not have access, without a search warrant, to any information that an operator is not required by regulation to maintain. BHP Br. at 9-10; BHP Resp. Br. 13-14 & nn.15, 17. BHP argues that the Secretary was required by the Act to seek injunctive relief, pursuant to section 108 of the Mine Act, 30 U.S.C. § 818, in order to obtain the requested information.[9] BHP Br., Ex. 2 at 6-8.

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[9] BHP argues in its motion to strike that the Secretary improperly raised on review the issue of resort to injunctive relief pursuant to section 108. BHP Suppl. Mot. to Strike at 3-4. However, the Secretary made this argument *in response* to a point made by BHP in its opening brief. S. Resp. Br. at 14-18. Accordingly, BHP has waived any objection to the Commission's consideration of the argument. More significantly, the judge considered section 108(a) and its injunctive relief provisions in his decision (20 FMSHRC at 639), and it is therefore appropriate for the parties to address it. *See Morton Int'l, Inc.*, 18 FMSHRC 533, 536 n.5 (Apr. 1996).

The Secretary responds that she was not required to resort to the injunctive relief provisions of the Act prior to issuing a citation for an operator's refusal to provide the requested information. S. Resp. Br. at 14-18. The Secretary challenges BHP's arguments that a mine operator has a legal duty to protect information in employee personnel files and that a miner's right to privacy and confidentiality can outweigh MSHA's right to conduct a mine accident investigation. S. Br. at 20-29 & n.9. Finally, the Secretary argues that the judge ignored Mine Act policy favoring a miner's right to participate in investigations in weighing the miner's right to privacy in not having his home address disclosed. *Id.* at 18-19. The Secretary therefore concludes that BHP's refusal to turn over the requested information or to even request the miner's permission to release the information unlawfully impeded MSHA's ability to investigate the accident. *Id.* at 30-32.

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron,* 467 U.S. at 842; *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 *(*Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union No. 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990).[10] If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *See Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997), *citing Chevron*, 467 U.S. at 843; *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).[11]

Although it is not apparent from the plain language of section 103(a) of the Act, we agree with the Secretary that section 103(a) can be reasonably interpreted to require a mine operator to disclose information such as that sought here that enables MSHA to conduct an accident

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[10] The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *See Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

[11] BHP's argues that *Chevron* deference is due only to "statutory interpretations embodied in the agency's duly promulgated, long-standing regulations and published policy statements." BHP Resp. Br. at 5 (emphasis omitted). Under analogous circumstances, however, the Secretary's litigation position has been found to be entitled to deference under the Occupational Safety and Health Act. *Martin v. OSHRC*, 499 U.S. 144, 156-57 (1991).

investigation in an expeditious manner. *See Chevron*, 467 U.S. at 842-43.[12] Section 103(a) provides, inter alia, that the Secretary is authorized to conduct inspections and investigations to "obtain[], utiliz[e], and disseminat[e] information relating to health and safety conditions, [and] the causes of accidents." 30 U.S.C. § 813(a). To that end, the Secretary's Program Policy Manual provides that an operator may not interfere, directly or indirectly, with MSHA's right to inspect or investigate. I MSHA, U.S. Dept. of Labor, *Program Policy Manual*, I.103-1 (1996). Information that allows MSHA to identify and contact witnesses to mine accidents is absolutely essential to MSHA's ability to conduct a thorough and effective investigation. In this connection, the Program Policy Manual also provides, "[b]ecause observations can be distorted with time and because conditions can change, all witnesses to the accident should be interviewed as soon as possible." *Id.* at I.103-4a (1988). In addition, the MSHA Handbook Series (No. I-1 July 1988), *Investigation of Mining Accidents*, emphasizes the importance of witness statements (*id.* at 12-13), and provides for interviews of witnesses who are injured or hospitalized because of their involvement in an accident (*id.* at 35-36).

The legislative history of the Mine Act supports a broad interpretation of the Secretary's power to investigate mine accidents and to obtain assistance from the operator. The Senate Report explicitly articulates the Secretary's responsibility "to determine the cause of the accident and thereby prevent the future occurrence of a similar accident." S. Rep. No. 181, 95th Cong., 1st Sess. 29 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978) ("*Legis. Hist.*"). The Senate Report also emphasized the importance of the Secretary's investigative power, stating: "Section [103](a) authorizes the Secretary . . . to enter upon, or through any mine for the purpose of making any inspection or investigation under this Act. This is intended to be an absolute right of entry without need to obtain a warrant." *Legis. Hist.* at 615. In addition, the Conference Report provides in regard to present section 103(j):[13] "Both the Senate bill and the House amendment contained substantially similar provisions, . . . requiring operators to take steps to assist in the investigation of accidents." *Legis. Hist.* at 1325. While that statement pertains to another provision in section 103 dealing with the investigation of accidents and the preservation of evidence, Congressional intent to require operator assistance under section 103 in the investigation of mine accidents is clear.

Commission precedent also supports the Secretary's position regarding access to accident witnesses. In *U. S. Steel Corp.*, 6 FMSHRC 1423 (June 1984), the Commission considered

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[12] Because we base our holding on section 103(a), we do not address the Secretary's alternative argument that section 103(h) obligated BHP to disclose the miner's address and telephone number.

[13] Section 103(j), 30 U.S.C. § 813(j), provides in relevant part that, in the event of a mine accident the operator "shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof."

whether an operator violated section 103(a) when it restricted access to an accident scene and insisted on the presence of corporate counsel during an investigative interview of one of its foremen. In ruling that the operator violated the Act when it denied access to the MSHA investigator (who was at the mine conducting a regular inspection), we held that section 103(a) conferred broad authority on MSHA to conduct mine inspections. *Id.* at 1430-31. We also concluded that the operator violated section 103(a) when it insisted that its attorney be present during MSHA's interview of a foreman pursuant to an accident investigation, and then failed to produce the attorney or specify when he or she would be available. We held that this impeded the accident investigation in violation of section 103(a). *Id.* at 1433.

Unless the Secretary's right to be on mine property and investigate accidents is a hollow one, it must carry with it the right to interview witnesses. In the present proceeding, MSHA was lawfully at the mine site, pursuant to section 103(a)(1), to conduct an accident investigation. BHP's blanket refusal to provide Byrd's telephone number and home address, coupled with its failure to contact Byrd to get his permission to release the information (Traweek Decl. ¶ 5; Lucas Decl. ¶¶ 4-5), had the effect of unreasonably delaying the accident investigation. As a result of BHP's conduct, MSHA experienced a delay of at least one day in obtaining sufficient information to contact Byrd. 20 FMSHRC at 640-41; *see* Laufenberg Decl. ¶¶ 5, 9-12. BHP's actions in denying MSHA the information necessary for it to contact an eyewitness to a fatal accident impeded the investigation and therefore violated the Mine Act.

We are not persuaded by BHP's argument that, during an investigation, section 103(a) only requires an operator to supply MSHA with information that it is required by regulation to maintain. Nothing in section 103(a) or any other provision of the Mine Act limits the Secretary's investigative powers to such information. Moreover, it would be contrary to the purposes and policies of the Mine Act to interpret the Act in a manner that encumbers the Secretary's ability to effectively and expeditiously investigate accidents.

In opposing the Secretary's interpretation of section 103(a), BHP relies on *Donovan v. Dewey*, 452 U.S 594 (1981), to argue that the Mine Act does not grant the Secretary authority to demand employee addresses and telephone numbers without utilizing the injunction provisions of section 108. BHP Br., Ex. 2 at 6-9. Contrary to BHP's argument, the Secretary's decision to proceed against it with a citation and penalty, instead of an injunction under section 108, is proper. In the *Dewey* case, the Secretary had successfully sought injunctive relief requiring an operator, Waukesha Lime and Stone Company, to permit entry to MSHA inspectors without a warrant. Subsequently, in *Waukesha Lime & Stone Co.*, 3 FMSHRC 1702 (July 1981), the Commission held that, even though the Supreme Court in *Dewey* had upheld the validity of warrantless inspections at Waukesha under the injunctive relief section of the Mine Act, the Commission was still required to determine whether the operator's refusal to permit an inspection was a violation of the Act for which a penalty must be imposed. *Id.* at 1703. The

Commission rejected the argument that the Secretary's exclusive remedy was under section 108(a) and held that dual remedies exist. *Id.* at 1704; *see also Tracey & Partners*, 11 FMSHRC 1457, 1462 n.3 (Aug. 1989).[14]

In *Dewey*, the Supreme Court upheld the Secretary's authority to periodically inspect mines, pursuant to section 103(a) of the Mine Act, without obtaining a search warrant. 452 U.S. at 602. In approving the Secretary's authority to engage in warrantless inspections of mines, the Court noted in particular the strong federal interest in improving the health and safety of mines, which a warrant requirement might impede, and the pervasive federal regulatory scheme with which mine operators must comply. *Id.* at 602-603. We recognize, as did the Court in *Dewey*, that the bounds of the Secretary's authority are not without limits, and that section 103 provides the "certainty and regularity of its application" that is a substitute for a warrant. *Id.* at 603. In this regard, section 103(a) limits the Secretary's investigatory authority to "obtaining, utilizing, and disseminating information relating to . . . the causes of accidents." 30 U.S.C. § 813(a). The telephone number and home address of a miner witness sought in the instant proceeding falls well within those bounds. By its nature, the scope of an accident investigation will be broader than a quarterly inspection. However, it is still the case that "the standards with which a mine operator is required to comply are all specifically set forth in the Act or in Title 30 of the Code of Federal Regulations." *Dewey*, 452 U.S. at 604. Those standards govern the general course of MSHA's investigation and the issuance of citations. Thus, as the Court further stated in *Dewey*: "The discretion of Government officials to determine what facilities to search and what violations to search for is . . . directly curtailed by the regulatory scheme." *Id.* at 605.[15]

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[14] The "procedural safeguards provided in the Act that allow the operator to raise privacy concerns prior to the imposition of sanctions," which BHP states are necessary to make the Secretary's inspection authority constitutional (BHP Br. at 12), are present regardless of whether the Secretary proceeds under section 108 or by issuing a citation under section 104(a). An operator who has been issued a citation can contest it, along with any proposed penalty, before an administrative law judge, as BHP did here, subject to discretionary review by the Commission and an automatic right of review by the court of appeals. *See Dewey*, 452 U.S. at 597 & n.3 and 604-05.

[15] BHP relies on *Sewell Coal Co.*, 1 FMSHRC 864 (July 1979) (ALJ), to support its argument that MSHA cannot obtain information concerning employees that neither the Mine Act or regulations require it to keep. At issue in *Sewell* was the Secretary's right to review employee personnel files to verify the mine operator's accident, illness and injury reporting under Part 50. *Id.* at 865. The judge concluded "that the Mine Safety and Health Act does not authorize wholesale warrantless, nonconsensual searches of files and records in a mine office." *Id.* at 872. This case, in contrast, presents a limited request for information that would have assisted MSHA in making expeditious contact with an eyewitness to a fatal accident. MSHA is not requiring BHP or any other mine operator to maintain records or disclose information that would establish a violation of the Mine Act or the regulations. *Compare Sewell*, 1 FMSHRC at 873. Consequently, our holding is fact-specific and we do not address disclosure of other information

BHP further defends its refusal to supply Byrd's home address and telephone on the basis of its claim that the Secretary's interpretation and application of section 103(a) impinges on employee privacy and confidentiality. We conclude that, in the circumstances present here, concerns about employee privacy and confidentiality do not insulate BHP from providing a home address and telephone number for an employee who was essential to MSHA's investigation of a fatal accident.

In addressing the constitutional right of privacy,[16] "[t]he Supreme Court has limited the . . . right . . . to interferences with 'a person's most basic decisions about family and parenthood . . . as well as bodily integrity.'" *California v. FCC*, 75 F.3d 1350, 1361 (9th Cir. 1996) (citations omitted), *cert. denied*, 517 U.S. 1216 (1996), *quoting Planned Parenthood v. Casey*, 505 U.S. 833, 849 (1992). However, it is generally accepted that "[a] phone number is not among the select privacy interests protected by a federal constitutional right to privacy." *Id.* The result is no different for an unpublished telephone number. *See id.* at 1362. Similarly, an individual's name and address is a matter of public record in motor vehicle registration and licensing records and therefore not encompassed within the right of privacy because there is no expectation of confidentiality. *Condon v. Reno*, 155 F.3d 453, 464-465 (4th Cir. 1998).

BHP has not cited any authority contrary to these principles. Instead, it cites to cases arising under the Privacy Act, 5 U.S.C. § 552a (1988 ed.) and the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1997). However, these laws apply only to the dissemination of information by federal agencies. Thus, neither these statutes nor the cases litigated under them are determinative of the propriety of BHP's refusal as a private sector employer to release the telephone numbers and home address of one of its employees to MSHA during an investigation under the Mine Act.[17]

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not at issue in this case. We also note that *Sewell*, which predates *Dewey*, was not reviewed by the Commission and, therefore, is not binding precedent. Commission Procedural Rule 72, 29 C.F.R. § 2700.72.

[16] In addressing the individual's constitutional right of privacy, although not free from doubt, there appears to be sufficient authority to support BHP's standing to assert the right of privacy of its employees, as it did in the instant proceeding. *See United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 574 (1980); *see also NLRB v. British Auto Parts, Inc.*, 266 F. Supp. 368, 373 (C.D. Cal. 1966), *aff'd* 405 F.2d 1182 (9th Cir. 1968) (assuming without deciding that an employer had standing to raise the constitutional rights of its employees).

[17] We find more analogous and persuasive case law under the National Labor Relations Act, involving private sector employers. When employees file a petition requesting an election to vote on union representation (*see generally* 29 U.S.C. § 159(e)), the National Labor Relations Board ("NLRB") requires an employer to supply a list of the employees in the bargaining unit in which a union election will occur and their home addresses. The NLRB, in turn, supplies that list to the petitioning union. *See Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966). In *NLRB v.*

Consequently, BHP's reliance on *Department of Defense v. FLRA*, 510 U.S. 487 (1994), is misplaced. In that case, the Court held that FOIA did not require the agencies to divulge addresses, and that, accordingly, the Privacy Act prohibited their release. *Id.* at 502. However, the Court's decision was in large part based on "the negligible FOIA-related public interest in disclosure" in that case. *Id.* In contrast, as we have made clear, there is a compelling interest in MSHA's ability to conduct a thorough investigation of a mine accident. In short, BHP has not persuaded us that its employees have a right to confidentiality or privacy[18] with respect to their phone number or home address that trumps the broad wording of section 103(a).

We conclude that, on the record before us, the judge erred in concluding that BHP's refusal to disclose an employee's address and telephone number did not violate section 103(a). While in this case MSHA was ultimately able to obtain Byrd's whereabouts through a relative, investigations into fatal accidents should not turn on such circumstances when an operator can supply the needed information.[19]

British Auto Parts, 266 F. Supp. at 373, an employer challenged the disclosure of its employees' names and addresses to the NLRB on the grounds that it violated the employees' right of privacy. The court rejected this challenge, reasoning that the NLRB's *Excelsior* rule, which mandated access to the electorate by all participants in an NLRB-conducted election, did not disclose employees' beliefs or associations, and did not require employees who were visited by union members at their homes to allow them in. *Id.* The court also dismissed the employer's argument that there was an implied right of confidentiality in the information. *Id.* at 374.

[18] In addition to the federal constitutional right of privacy, an individual may have a common law tort action for damages suffered as a result of an improper invasion of privacy. Concerning this common law right of privacy, the "mere publication of a person's address, no matter what the circumstances, could not constitute an invasion of his privacy." Philip E. Hassman, Annotation, *Privacy — Publication of Address as well as Name of Person as Invasion of Privacy*, 84 A.L.R. 3d 1159, 1160 (1978). A plaintiff with an unlisted telephone number failed to make out a case of invasion of privacy where he sued the telephone company that released his address. *Montinieri v. Southern New England Tel. Co.*, 398 A.2d 1180 (Conn. 1978), *cited in* 1 A.L.R. 4th, 209, 215-216; *see* Charles C. Marvel, Annotation, *Telephone Company's Liability for the Disclosure of Number or Address of Subscriber Holding Unlisted Number*, 1 A.L.R. 4th 218 (1980). Finally, BHP has not cited any case in which an employee brought an action against an employer for release of information similar to that which was sought here.

[19] Contrary to our dissenting colleague's suggestion (slip op. at 15), we do not find that the record supports that MSHA's attempt to obtain the address and telephone number of a witness to a fatal accident was "confrontational." Nor do we agree that the requested information was an "ancillary" issue (slip op. at 15), since the information was necessary to locate a key witness in an accident investigation.

III.

Conclusion

For the foregoing reasons, we reverse the judge's decision and remand the proceeding to the judge for imposition of an appropriate penalty.

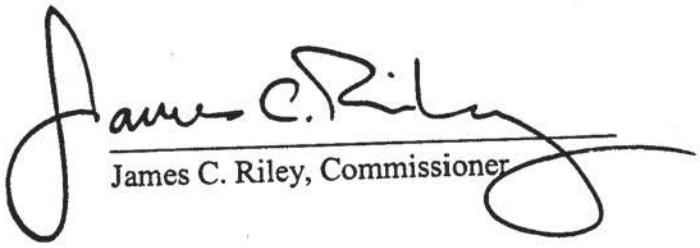
Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

Robert H. Beatty, Jr., Commissioner

Commissioner Riley, concurring in part and dissenting in part:

I agree with my colleagues on the analysis and interpretation of section 103(a). However, based on the facts of this case even taken in a light most favorable to the Secretary, I cannot agree that the Secretary established that BHP impeded or interfered with MSHA's investigation. The delay in obtaining the information necessary to contact Byrd was insubstantial. Moreover, like the judge, 20 FMSHRC at 641, I note that MSHA could easily have contacted Byrd's union representative to locate him. Nor is it apparent that MSHA, working with information provided by BHP, could not have expeditiously used other sources of information, including the Internet and state drivers' license data bases, to locate Byrd without having to travel to Superior, Arizona or waiting 24 hours. Thus, I would affirm the judge in result.



James C. Riley, Commissioner

Commissioner Verheggen, dissenting:

I agree with my colleague Commissioner Riley that, for the reasons stated in his decision, the Secretary failed to prove that BHP materially impeded her investigation. *See Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987) ("In an enforcement action before the Commission, the Secretary bears the burden of proving any alleged violation"); *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1294 (Aug. 1992). I therefore join with Commissioner Riley in affirming the judge in result.

But I do not join Commissioner Riley and the rest of my colleagues in their decision that the Secretary's interpretation of section 103(a) is correct. In light of my disposition of this case, I need not, and do not, reach the merits of this issue. I note with regret, however, that the majority has neglected to place any limits on the ruling it announces today. I fear that this may be a case where bad facts make bad law.

I believe that we should encourage through our decisions the consensual exchange of information between MSHA and operators, especially when the information has anything to do with an accident at a mine. In this case, I fault MSHA for failing to attempt to obtain information on Byrd's whereabouts in a less confrontational manner[1] — for example, by asking BHP to help arrange a meeting with Byrd.[2] The judge noted that Inspector Laufenberg "[did] not recall [BHP's representatives] offering to contact Byrd to obtain his permission to release his phone number." 20 FMSHRC at 639. But I also fail to find anything in the record to suggest that MSHA made any such request — and the agency, after all, was supposedly in the best position to make such a request initially. MSHA's job was to obtain information regarding a fatal accident, not to take a stand on an ancillary issue such as this.

I also fault BHP for failing to offer "to contact Byrd to obtain his permission to release his phone number." *Id.* Given the lack of any privacy interest in addresses and phone numbers (slip op. at 11), which I regard as a matter of common sense given the ease with which such information can be obtained over the Internet or elsewhere, I find BHP's conduct in this case unfortunate. I fully appreciate the need for operators to proceed with caution in their dealings with MSHA during accident investigations because the operators and their agents face potential

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[1] Confrontational, that is, insofar as a citation was issued and a litigation pursued over information that was obtained quickly from other sources with relative ease.

[2] Ironically, even had BHP immediately acceded to MSHA's request, it is not at all certain that the inspectors would have found Byrd any quicker because apparently, he may have been staying with relatives. 20 FMSHRC at 636. It also appears that BHP may have needed some time to obtain the information MSHA requested. *See* Lucas Decl. at ¶ 7. Indeed, I find the majority's statement that "[a]s a result of BHP's conduct, MSHA experienced a delay of at least one day in obtaining sufficient information to contact Byrd" (slip op. at 9) an overstatement that is unsupported by the record.

section 104 or 110(c) liability. But here, BHP's confrontational actions go beyond any reasonable degree of caution.

From this scenario, today's decision would have better served the interests of the consensual exchange of information by assigning blame where it belongs — on *both* parties — for allowing this dispute to grow far out of proportion. Instead, the majority makes the broad pronouncement that "section 103(a) can be reasonably interpreted to require a mine operator to disclose information such as that sought here that enables MSHA to conduct an accident investigation in an expeditious manner." Slip op. at 7-8. The Mine Act places strict limits on how the Secretary may obtain information that is not required to be kept under the Act. *See, e.g.*, 30 U.S.C. §§ 813(b) and 818(a).[3] I believe that we must adjudicate disputes over where these limits lie with far greater care than that shown by the majority today.

Having found the need to reach the ultimate issue here, despite the evidentiary weaknesses of the Secretary's case, the majority ought to have at least limited the scope of its decision to addresses and phone numbers. I fear that by failing to do so, the majority has invited the Secretary to push the limits of the Mine Act further by demanding, for instance, warrantless access under section 103(a) to disciplinary and medical records contained in personnel files — and no one can deny that enormous privacy interests surround such information.[4]

Theodore F. Verheggen

Theodore F. Verheggen, Commissioner

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[3] I hope that in the wake of this dispute, the Secretary will move to amend her accident report regulation under which operators must investigate mine accidents and report the results of their investigations to MSHA. *See* 30 C.F.R. § 50.11(b). Section 50.11 provides that any such report must include "[t]he name, occupation, and experience of any miner involved" in the accident. The Secretary should amend this regulation to say "name and contact information" instead, under which provision BHP would have been obligated to provide to MSHA the information at issue here.

[4] I also find the majority's reliance on *U.S. Steel Corp.*, 6 FMSHRC 1423 (June 1984), misplaced. This case arose over a disagreement concerning the ability of MSHA to obtain information without a warrant which the operator maintained in its personnel files. The *U.S. Steel* case, on the other hand, involved an operator denying MSHA physical entry to an area of its mine, as well as stalling MSHA's investigation by insisting on a right to counsel, then failing to supply such counsel in a timely fashion. I fail to see how any two cases could be any more different.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 6, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-82-M
Petitioner	:	A. C. No. 14-01463-05510
v.	:	
	:	Portable Plant No. 2
MIDWEST MINERALS, INC.,	:	
Respondent	:	

DECISION

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Midwest Minerals, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges two violations of the Secretary's mandatory health and safety standards and seeks a penalty of $37,000.00. For the reasons set forth below, I affirm the citations and assess a penalty of $20,750.00.

Citation No. 7925924 was the subject of a contest proceeding. In a decision following a hearing, the citation was modified from a 104(d)(1) citation, 30 U.S.C. §.814(d)(1), to a 104(a) citation, 30 U.S.C. § 814(a), by deleting the "unwarrantable failure" designation. *Midwest Minerals, Inc.*, 21 FMSHRC 301 (March 1999). The modified citation was affirmed as being "significant and substantial," but, because it was not necessary to the decision, no determination was made concerning the level of negligence. *Id.* at 306 n.3. The decision was not appealed and has now become final.

The parties have agreed to settle Citation No. 7925923, which alleges that the company violated section 50.10 of the Secretary's regulations, 30 C.F.R. § 50.10, because: "On June 22, 1998, at 1425 hours, a plant superintendent suffered serious multiple injuries which had the potential to cause death. The accident was not reported until June 23, 1998, at 1025 hours. The accident was not immediately reported to MSHA as required. The victim died on 7/20/98 as a result of his injuries." Section 50.10 requires that: "If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine." The Secretary has agreed to reduce the penalty for this violation from $2,000.00 to $750.00 because "[p]reparation for the hearing has revealed that the negligence . . . was less than originally assessed."

With regard to Citation No. 7925924, the parties have entered into stipulations and submitted briefs setting out their positions as to what the penalty should be. The Secretary continues to assert that the proposed penalty of $35,000.00 is appropriate. The company argues that it should be substantially reduced.

Civil Penalty Assessment

It is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996). Concerning civil penalties, section 110(i) provides that:

> 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 attempting to achieve rapid compliance after notification of the violation.

The facts, such as they are, are set out in detail in the contest decision. *Midwest Minerals*, 21 FMSHRC at 301-03. Briefly stated, William F. Feathers, the 67 year old superintendent of Midwest's Portable Plant No. 2, suffered injuries that ultimately proved fatal while attempting to start a 1955 Caterpillar D-7 bulldozer. Other than Feathers, there were no witnesses to the accident. The only statement that Feathers made concerning the accident was: "Someone must have put it in reverse." *Id.* at 302.

In connection with the penalty criteria, the parties have stipulated that: (1) the operator demonstrated good faith in abating the violation; (2) Portable Plant No. 2 had 45,479 hours worked, and Midwest Minerals, Inc., had 143,178 hours worked, in 1997; and, (3) Midwest Minerals' ability to continue in business would not be affected if the maximum penalty of $55,000.00 were to be assessed. From this, I find that Midwest demonstrated good faith in attempting to abate the violation; that while Portable Plant No. 2 is a small operation, Midwest is a medium size operation; and, that Midwest's ability to remain in business will not be affected by any penalty that may be adjudged in this case.

Based on Midwest's violation history, I find that the company has a very low history of prior violations.

Considering the fact that this violation was "significant and substantial" and resulted in a death, I find that its gravity is very serious.

That leaves negligence to be considered. In the contest case, I concluded that the violation "involved negligence of some degree," but that, because of the lack of evidence, it was not possible to conclude that the negligence rose "to the level of an 'unwarrantable failure.'" *Id.* at 306. Thus, the negligence is either "low" or "moderate." From his statement at the time of the accident that someone must have left the bulldozer in reverse, I infer that Feathers did not check to make sure that the bulldozer was not in gear when he started the pony motor. Feathers had been operating the bulldozer for three years, had never started it in gear before, and should have known better. Accordingly, I conclude that he was "moderately" negligent.

Midwest contends that Feathers' negligence cannot be imputed to it under the so-called *Nacco* defense. The Commission has summarized the imputation of negligence and the *Nacco* defense as follows:

> It is well established that the negligent actions of an operator's foremen, supervisors, and managers may be imputed to the operator in determining the amount of a civil penalty. *See, e.g., Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (August 1982). In *Nacco Mining Co.*, 3 FMSHRC 848 (April 1981), the Commission recognized a narrow and limited exception to this principle. The Commission held that the negligent misconduct of a supervisor will not be imputed to an operator if: (1) the operator has taken reasonable steps to avoid the particular class of accident involved in the violation; and (2) the supervisor's erring conduct was unforeseeable and exposed only himself to risk. 3 FMSHRC at 850. The Commission emphasized, however, that even a supervisory agent's unexpected, unpredictable misconduct may result in a negligence finding where his lack of care exposed others to risk or harm or the operator was otherwise blameworthy in hire, training, general safety procedures, or the accident or dangerous condition in question. 3 FMSHRC at 851.

Wilmot Mining Co., 9 FMSRHC 684, 687 (April 1987).

I find that the *Nacco* defense is not applicable in this case. While the evidence at the hearing established that Midwest had taken reasonable steps to avoid the particular class of accident involved in the violation and that Feathers' conduct was unforeseeable, it did not show that Feathers exposed only himself risk. The out-of-control bulldozer traveled 126 feet in reverse, striking Feathers' pick-up truck and coming to rest against the plant fence after crossing the main entrance road to the plant. Fortunately, no one was on the road at the time, although the

road is used by both customers and employees. In addition, Floyd Ash, who saw the bulldozer when he heard it hit the pick-up, testified that his first intent was to attempt to stop the bulldozer.

Clearly Feathers' lack of care exposed others to the risk or harm of being struck by the bulldozer. *See Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 198 (February 1991). Accordingly, I conclude that Feathers' negligence is imputable to Midwest.

Taking all of the penalty criteria into consideration, I conclude that a penalty of $20,000.00 is appropriate for Citation No. 7925924 and the agreed on penalty of $750.00 is appropriate for Citation No. 7925923.

Order

The citations are **AFFIRMED** and Midwest Minerals, Inc., is **ORDERED TO PAY** a civil penalty of **$20,750.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution:

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/nj

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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July 6, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 98-172-M A. C. No. 10-01817-05515
v.	:	
OWYHEE CALCIUM PRODUCTS INCORPORATED, Respondent	:	Owyhee Calcium Inc.

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Charles L. Honsinger, Esq., Ringert Clark, Chartered, Boise, Idaho, for Respondent.

Before: Judge Cetti

This case is before me upon the petition for civil penalty filed by the Secretary of Labor against Owyhee Calcium Products, Inc., pursuant to Section 105(d) and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," alleging 14 violations of mandatory standards and seeking a civil penalty of $6,580.00 for those violations. The general issue before me is whether Owyhee Calcium Products, Inc., committed the violations as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

Citation Nos. 7959803, 7959804, 7959805 and 7959806 - Guards Not in Place

Four of the citations involve guards not in place. Citation No. 7959803 alleges a violation of 30 C.F.R. § 56.14107(a) and each of the other three citations, referenced above, allege a violation of 30 C.F.R. § 56.14112(b).

30 C.F.R. § 56.14107(a) cited in Citation No. 7959803 provides:

> (a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

Citation No. 7959803 designates the operator's negligence as moderate and reads as follows:

> The self cleaning tail pulley on the primary feed conveyor was not guarded. The pinch points were approximately one foot off of the ground and accessible to the employee.

The "employee" refers to the owner-operator, Mr. Melton, who is also the only employee of this very small ½ acre quarry. The evidence clearly established that the guard was missing on the sides of the tail pulley as shown in the photograph received as Exhibit G-3. There was no contrary evidence. Respondent's defense to all four of the guards not in place violations was that the machinery was not operating. This defense will be discussed later under the heading Respondent's Defense.

Citations 7959804, 7959805 and 7959806 each allege a violation of 30 C.F.R. § 56.14112 which reads as follows:

> (b) Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

Citation No. 7959804

With respect to Citation No. 7959804 the inspector presented undisputed evidence that the guard for the Cedar Rapids roll crusher was not in place. It was lying closeby on the ground. The exposed pinch-points on the crusher's large diameter flywheel were approximately three feet above the ground and were accessible to Mr. Melton, the owner, operator and sole employee. The violation is established. The citation is affirmed.

Citation No. 7959805

With respect to Citation No. 7959805 the inspector presented undisputed evidence that the guard for the short conveyor located under the roll crusher was not in place. The pinch-points were accessible to the employee. The inspector observed the guard lying behind the tail pulley. The violation is established. The citation is affirmed.

Citation No. 7959806

With respect to Citation 7959806 the inspector presented undisputed evidence that the guard for the long conveyor to the sizing screen was not in place. It was sitting near the pulley. The pinch-points were at ground level and were accessible to Mr. Melton who was the only employee, as well as the only owner/operator of this very small quarry.

Respondent's Defense to Guarding Citations

Respondent's defense to each of the four guarding citations discussed above was that the mine machinery was not operating on the day of inspection. Mr. Melton, the owner/operator/employee testified that he had shut the mine down about three days prior to the inspection to clean and maintain the mine machinery and equipment so as to protect it from the anticipated freezing cold winter weather. Mr. Melton testified he shuts down the mine to do the cleaning and maintenance work every fall. He testified that he never operates the mine machinery without the guard being in place.

Inspector Usselman testified that based upon the observations he made on arriving at the mine site, he determined that the mine machinery was operating when he arrived at the mine at 10:30 a.m. to make his October 8 inspection. The inspector observed a large cloud of dust going straight up into the air from where the crusher was located. It appeared to him the same as on the other occasions when he inspected the mine and observed the dust produced by the mine machinery in operation. The inspector also testified he heard some noise that sounded like machinery operating. Even though a shovel was observed lying behind the tail pulley, the inspector did not see any indication of any cleaning being done. There is no evidence that Mr. Melton, at the time of inspection, said anything to the inspector about the mine being shut down for cleaning or maintenance. I credit the inspector's testimony and based upon his testimony, find that the preponderance of the credible evidence established that the machinery was in operation without the guards in place and thus established a violation, as charged, in each of the four citations issued for guards not in place.

Citation No. 7959807

Citation No. 7959807 alleges a violation of 30 C.F.R. § 56.12004. The citation reads as follows:

> A black and yellow colored extension cord leading to the Michigan loader was in poor condition. The outer jacket was pulled back from the plug, exposing the conductors.

This exposure of the conductors is shown in the photograph received into evidence as Gov't Exhibit 7 and Resp. Exhibit 6. The inspector testified, the outer jacket protects the inner cables from being damaged. Thus, the pull back of the outer jacket from the plug exposed the

conductors to mechanical damage. A non S&S violation of 30 C.F.R. § 12004, as charged in the citation, was established with respect to the extension cord to the Michigan loader. The citation is affirmed.

Citation No. 7959809

Citation No. 7959809 alleges a violation of the same safety standard quoted above, 30 C.F.R. § 56.12005, which mandates protection of electrical conductors exposed to mechanical damage. The Secretary presented undisputed evidence that a black and yellow extension cord, lying across a roadway, leading to a Caterpillar dozer was not bridged or protected. There were vehicular tire tracks showing that a vehicle passed directly over the cord. No protection was provided against damage that could result from a vehicle passing over the cord. The inspector testified the cord was in poor condition. He observed that in some places on the cord the conductors were sticking out of the cord's insulating jacket. The evidence clearly established a violation of 30 C.F.R. § 58.12005. The citation is affirmed.

Citation No. 7959810

This citation charges Respondent with the violation of 30 C.F.R. § 56.4201(a)(2) which provides in part as follows:

> (a) Firefighting equipment shall be inspected according to the following schedules: . . .
> (2) At least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively.

The inspector, based on his observation and inspection of the fire extinguisher, determined that no 12-month maintenance check had been made on the mechanical parts, the amount and condition of the extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers would operate effectively as required by part 2 of section (a) of the cited standard. There was no tag or any other indication that any maintenance check had been made. Respondent did not offer any contrary evidence. The violation of 30 C.F.R. § 56.4201(a)(2) was established. The citation is affirmed.

Citation No. 7959811

This citation charges Respondent with the violation of 30 C.F.R. § 56.12028 which requires continuity and resistance of grounding systems be tested immediately after installation, repair, or modification, and annually thereafter. The regulation specifically requires that a record of the resistance measured during the most recent tests shall be kept and made available to the

mine inspector. The inspector, on checking the electrical system, determined that the required annual testing had not been done and instructed Mr. Melton about the need to do grounding and continuity testing on an annual basis, and the need to have records to show that this had been done. The violation was timely abated a few days after the inspection by Respondent having a grounding test performed.

Respondent did not present any evidence contrary to the inspector's testimony and conclusion and did not produce any records or other evidence indicating the required testing had been done. The violation of the cited safety standard was established. The citation is affirmed.

Citation No. 7959812

This citation alleges a 104(a) S&S violation of 30 C.F.R. § 56.12041. That standard reads as follows:

> Switches and starting boxes shall be of safe design and capacity.

The citation charges that the disconnect switch, also described as an electrical box, located in the No. 2 motor control van was not of safe design. The inspector testified that the switch did not protect an employee from contacting the connecting lugs. It is undisputed that Respondent did not construct or design the disconnect switch or the electrical box.

Mr. Melton testified the electrical box, for which the citation was issued, was an old unused electric box. It had not been used for a long time before the inspection. He testified that no electrical current had run through the box or the disconnect switch in question for a two-year period before the October 1997 inspection. There was no contrary evidence. After the inspector complained about the box, Respondent removed the box and "got rid" of it.

The inspector, on redirect examination by his attorney, testified he did not know whether there was or had been any electrical current running through the electrical box. In view of Mr. Melton's testimony and the inspector's testimony, on redirect examination, the preponderance of the evidence did not establish that the switch in question was in use or had any electric current running through it at any relevant time. The citation is vacated.

Citation No. 7959813

This citation charges the Respondent with the violation of 30 C.F.R. § 56.1101 which requires safe means of access to be provided and maintained to all working places.

The citation reads as follows:

> The walkway leading up to the screw conveyor was not completed. Handrails and walkway did not continue over to the Quonset hut

where a ladder way went into it. It was approximately 20 feet to the ground below. Apparently the employee walked the covered screw conveyor for approximately 10 feet to the hut.

It is clear from Mr. Melton's testimony, what the inspector thought was a ladder from the screw auger to the top of the Quonset hut was not a ladder. It was only a brace anchored on top of the Quonset hut to hold up the end of the screw conveyor on top of the Quonset hut.

The first part of the 20-foot walkway leading to the screw conveyor motor was 36 inches wide and had a 4-foot high handrail on both sides. Access to the screw conveyor's motor then continued from the 36-inch wide railed walkway along the 2-foot wide top cover of the enclosed screw conveyor. There were no handrails along that portion of the access to the screw conveyor motor that consisted of the 2-foot wide top cover for the enclosed screw conveyor. The only thing one could grasp to prevent a fall from this part of the access route was a 3/4 inch cable guy wire that slanted down from about a 4-foot height, where the handrail of the first part of the walkway ended to ankle height of the end of the screw conveyor cover, where the screw conveyor motor was located. Thus, the guy wire was too low to provide satisfactory safe access to a person who had to work on the motor located at the far end of the screw conveyor. This can be seen in the photograph received as Exhibit G-12. Clearly there was a hazard of an accidental fall to the top of the Quonset hut or possibly a 20-foot fall to the ground below to a person working on the motor.

Mr. Melton, the sole owner, operator and sole employee indicated he rarely had to access the screw conveyor motor but added that, just a few days before the inspection, he had to replace a burned-out motor with a new motor. He testified this only occurs about once in 10 years. He also testified that on a prior inspection, the MSHA inspector had okayed putting a 4-foot high cable across the walkway where the handrails ended. The purpose of this 4-foot high cross cable was to bar any further access along that part of the access-way that did not have a hand rail. This cross cable had been taken down at the time Mr. Melton replaced the old motor. Mr. Melton had neglected to re-secure the barring cross-cable. I found no merit in Mr. Melton's contention that there was no violation as the plant was not in operation at the time of inspection.

On evaluation of the evidence presented, I find the preponderance of the credible evidence established the violation of the safe access standard 30 C.F.R. § 56.1101. The citation is affirmed.

Citation No. 7959814

Citation No. 7959814 alleges a violation of 30 C.F.R. § 56.16005.

The citation reads as follows:

> An oxygen cylinder had not been secured in a safe manner. The capped cylinder was lying on the ground at the quarry site.

Inspector Usselman testified that the oxygen cylinder was lying on the open ground at the quarry site as shown in the photograph received as Exhibit G-10. (Tr. 56). The cylinder was lying on its side within a couple of feet of a roadway. (Tr. 57). The cylinder was not secured in any way.

The safety regulation §56.16005 in its entirety simply states "Compressed and liquid gas cylinders shall be secured in a safe manner." The regulation makes no exception as to empty cylinders. An empty unsecured cylinder lying on its side near a roadway is a potential hazard. The evidence established a violation of 30 C.F.R. § 56.1101 as alleged. The citation is affirmed.

Citation No. 7959815

On October 8, 1997, at the conclusion of his inspection of the mine site at 1:15 p.m., the inspector issued this citation which is in effect a duplication of all the citations issued during the inspection of this very small half-acre quarry. The citation charges "The operator was not doing an examination of work places on a daily basis and then taking action to correct hazards on the mine property."

Asked by his counsel what led him to this conclusion, the inspector testified.

> A. The violations that I had observed indicated that a daily inspection was not being conducted of the mine operation.
>
> Q. How did your observations lead you to the conclusion?
>
> A. Well, any time you have a number of violations that I find during my inspection, it indicates that the mining operator is not conducting a daily visit and looking at those objects and comparing those items during his visits and writing them in a logbook. (Tr. 58).

In this case, the owner/operator is the only employee so every time there is employee activity at the mine, he is that activity and presumably has to have his eyes open in each and every area where employee activity is going on. It is equally clear that the owner/operator/employee was not taking prompt or timely action to correct the hazards or violations he observed. However, as best can be determined from this record, Respondent was issued a citation for every violation that was observed on this half-acre mine site and, therefore, Citation No. 7959815 with its S&S finding and its $903.00 proposed penalty is a duplication of

all the "uncorrected" violations that are specifically cited in Citation Nos. 7959803 through 7959814. Citation No. 7959815 should be, therefore, vacated as it is a duplication of the all the citations issued and their related MSHA proposed penalties. The citation is vacated.

Citation No. 7959802 - Berms

The inspector testified the berms on the roadway leading up from the office to the quarry site was not being properly maintained. He observed some erosion of the berms and believed the eroded berms did not provide adequate protection for vehicles running "into" the berms or "off the side of the roadway." He took two photographs of the berm in one area which were received into evidence as Gov't. Exhibit 1 and Exhibit 2, the inspector testifies the berm in that area was 6 to 8 inches high and in some places was less than that.

The terrain between the upper and lower road was rough and rugged with potholes and sagebrush. The inspector was of the opinion that the drop-off was sufficient to cause a vehicle to overturn.

By way of mitigation, it is undisputed that the only vehicle that is ever driven on the road in question is a very small Yamaha ATV, All Terrain Vehicle, driven by the 64 year old owner, operator and sole employee, Mr. Melton. Evidence was presented that this ATV shown in the photograph, Resp. Exhibit 5, is four feet wide and approximately 36 inches high with 16 inch diameter wheels, that is 16 inches from the top of the tire to the bottom of the tire. It has a 4 wheel drive. The roadway is 16 to 20 feet wide and was constructed by Mr. Melton with a 16-foot blade dozer. Mr. Melton testified that in the 32 years he operated the quarry, he never had an accident and never had "as much as a cut finger."

The inspector testified he was not good at estimating "distances" and on redirect examination was asked by counsel for the Secretary these somewhat leading questions:

> Q. Now, you indicated that you're not particularly good at estimating distances. How sure are you of your estimate at the height of the wheel on the all-terrain vehicle was 16 inches?
>
> A. I'm not.
>
> Q. Might it have been as much as 20 inches?
>
> A. That's correct.
>
> Q. Isn't it true there's a substantial amount of foliage along the berms which you observed on the roadway leading up to the upper portion of the quarry?

A. That's correct.

Q. What would the presence of foliage on the berms indicate to you?

A. That it had been a long time since anybody had done anything to the berms.

A violation of the cited safety standard was established. The preponderance of the evidence, however, did not establish the third element of the *Mathies* formula which is discussed in greater detail below under the heading S&S Violations.

Significant and Substantial Violations

A number of citations issued as a result of the October 7th inspection are alleged to be S&S violations. A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contributed to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4(January 1984), the Commission explained.

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

See also Austin Power Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988) *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8,12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

Citation Nos. 7959803, 7959804, 7959805 and 7959806 - Guards Not in Place, S&S Violations Affirmed

Inspector Usselman designated the four violations charged the operator with operating mine machinery without the guard in place as significant and substantial. The guards were closeby but not secured in place. Mr. Melton testified that he never operated the machinery without the guards in place. This may well be true generally but based on the inspector's testimony, I find that on this one occasion, at least, he slipped up and had the machinery running without the guards in place. As stated above, the likelihood of injury must be evaluated in terms of continued mining operation without any assumption of abatement. With this in mind, I find the third and fourth elements of the *Mathies* formula have been met, as well as the more obvious first and second elements of the *Mathies* formula. The evidence established an S&S violation in all four of the guards not in place citations.

Citation No. 7959802 - Not S&S

It is well established that in cases decided under *National Gypsum* and *Mathies*, S&S determinations are based upon the particular facts surrounding the violation in issue. E.g., *Texasgulf, Inc.*, 10 FMSHRC 498, 500-01 (April 1988).

In this case, the only vehicle to travel the roadway from the office to the upper quarry site was a small Yamaha ATV, an all terrain vehicle. This four-wheel drive vehicle is only four feet wide and the roadway is 16 to 20 feet wide. The vehicle was driven by the 64-year old owner, operator and sole employee, Mr. Melton, who has operated the quarry for 36 years without an accident. Under the particular facts of this case, I find that the evidence established only a possibility and not a reasonable likelihood that the hazard contributed to, will result in an injury. The S&S designation is deleted and the citation, thus modified, is affirmed.

Citation No. 7959813 - S&S Finding Affirmed

Citation No. 7959813 alleges an S&S violation of the safety standard requiring that safe means of access be provided and maintained. In this case there was no safe access to the 20-foot high screw conveyor motor. Although access to the motor was very seldom required, the access was clearly not safe. The evidence presented established all four elements of the *Mathies* formula. I agree with the inspector that this violation is significant and substantial.

Appropriate Civil Penalty Assessment

It is well established that while the Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986), such discretion is not unbounded, however, and must reflect proper consideration of the

six penalty criteria set forth in section 110(i),[1] as well as the deterrent purpose of the Act. I have considered the statutory criteria as well as the deterrent purpose of the Mine Act. Having done this, I conclude that the MSHA proposed penalties are the appropriate penalties for the violations set forth in Citation Nos. 7959807, 7959808, 7959809, 7959810 and 7959811.

I find the operator was moderately negligent in each of the affirmed violations and the gravity was moderate. With respect to all the citations, the operator demonstrated good faith in achieving rapid compliance after notification of the violation.

I place considerable weight, in this case, on the statutory criteria requiring the penalty to be appropriate to the size of the business. The mine is described by the inspector as a very small operation. The mine site covers approximately one-half acre located near Grandview, Idaho. It is a one-man operation. Mr. Melton is the owner, operator and sole employee. This small operation produces agricultural limestone for cattle feed. (Tr. 108).

ORDER

Having considered the statutory criteria in section 110(i) of the Act and the deterrent purpose of the Act, I assess the civil penalties for each of the affirmed citations as follows:

Citation No.	Penalty
7959802	$ 100.00
7959803	400.00
7959804	400.00
7959805	400.00
7959806	400.00
7959807	50.00
7959808	50.00
7959809	50.00
7959810	50.00

[1] The six statutory criteria are:

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

7959811	50.00
7959813	400.00
7959814	50.00
TOTAL	$2,400.00

It is **ORDERED** that within 30 days of the date of this decision, Owyhee Calcium Products, Inc., **PAY** to the Secretary of Labor the penalties set forth above totaling $2,400.00. It is further **ORDERED** that Citation Nos. 7959812 and 7959815 be **VACATED** and that Citation No. 7959802 be modified by deleting the S&S designation. That citation is affirmed as so modified. Upon timely compliance with this Order, this case is dismissed.

August F. Cetti
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

July 7, 1999

LOUIS W. DYKHOFF, JR.,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEST 99-26-DM
	:	MSHA Case No. WE MD 98-17
U.S. BORAX INCORPORATED,	:	
Respondent	:	Mine ID No. 04-00743
	:	Boron Operations

DECISION

Appearances: Louis W. Dykhoff, Jr., *pro se*, North Edwards, California, for the Complainant;
Neil M. Herring, Esq., on the brief, Sebastopol, California, for the Complainant;
Andrew T. Kugler, Esq., O'Melveny & Myers LLP, Los Angeles, California, for the Respondent.

Before: Judge Feldman

This case is before me based upon a discrimination complaint filed on October 19, 1998, with this Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (the Act). The complaint was filed by Louis W. Dykhoff, Jr., against the respondent, U.S. Borax Incorporated (Borax). This matter concerns Dykhoff's claim that the March 6, 1998, disciplinary notice for excessive absenteeism, given to him by Borax on March 12, 1998, violated the anti-discriminatory provisions of section 105(c) of the Act because the disciplinary action was motivated by his concern for his personal safety.[1] Consequently, the relief sought in this matter is the removal of the disciplinary action from Dykhoff's personnel records.

---

[1] Dykhoff's complaint which serves as the jurisdictional basis for this case was filed with the Secretary of Labor on July 20, 1998, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Dykhoff's complaint was investigated by the Mine Safety and Health Administration (MSHA). On September 9, 1998, MSHA advised Dykhoff that its investigation did not disclose any section 105(c) violations. On October 19, 1998, Dykhoff filed his discrimination complaint with this Commission which is the subject of this proceeding.

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

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

This case was heard on April 27, 1999, in San Bernardino, California. Dykhoff appeared in his own behalf. Dykhoff was assisted at the hearing by Ray Panter, the Business Agent for Local 30 of the International Longshoremen's and Warehousemen's Union (the ILWU). Neil M. Herring, as Dykhoff's counsel, filed Dykhoff's post-hearing brief on June 15, 1999. Borax's post-hearing brief was filed on June 16, 1999.

Dykhoff's discrimination complaint primarily is based on his allegation that the March 6, 1998, Corrective Notice issued to him by Borax on March 12, 1998, for excessive absenteeism was motivated by his protected refusal to come to work during the period March 3 through March 6, 1998. Specifically, Dykhoff asserts he was absent from work during this period because he was under the influence of Percodan, a narcotic pain reliever prescribed for a jawbone infection. Consequently, Dykhoff contends he would have been a danger to himself or others at his job as a shipping fork-lift operator because he was heavily medicated. In addition, while not specifically advanced in his initial complaint, Dykhoff now claims Borax's disciplinary action concerning his absenteeism was also motivated by his history of a variety of periodic union related safety and health complaints that he made from 1994 to 1998.

For the reasons discussed below, Dykhoff's discrimination complaint is dismissed because it is undisputed that his reason for not reporting to work, *i.e.*, because he was incapacitated because he was taking a narcotic medication, was not communicated to Borax prior Borax's decision to issue the March 6, 1998, Corrective Notice. Moreover, even Dykhoff had communicated his reported inability to work due to his dental treatment prior to his written discipline, his work refusal is not protected under the Mine Act because it concerns his personal condition, rather than his exposure to a hazardous condition of employment. Finally, given Dykhoff's history of excessive absenteeism, the issuance of the Corrective Notice immediately following his latest period of absenteeism, and the lack of any evidence of disparate treatment, there is no basis for concluding that Dykhoff's long history of union related safety activities was a motivating factor in the March 6, 1998, disciplinary action complained of.

Preliminary Findings Of Fact

U.S. Borax Incorporated is a publicly-held corporation that operates a borax mine and processing facility in Boron, California. For purposes of collective bargaining, nonmanagement personnel working at the plant are represented by the ILWU.

Borax employees accrue 80 hours of sick leave a year and can carry over up to one week of unused sick leave into the following year until they accrue a maximum of nine weeks. After nine weeks are accrued employees can accrue an additional one week of sick leave per year. Adding one week of accrued sick leave each year to the base nine week maximum, an employee can accrue an unlimited amount of sick leave.

Borax has no written excessive absenteeism policy and administers disciplinary action on a case-by-case basis because there are too many variables to establish a set policy. (Tr. 55). The collective bargaining agreement provides that absences more than two years old may not be the basis for disciplinary action. Absences necessitated by *bona fide* illness, even if certified by a physician, are considered for excessive absenteeism disciplinary purposes, while absences due to vacation, union business, funeral leave, industrial injury, or leave granted under the Family Medical Leave Act, are not counted. Personnel Manager Darryl Caillier testified, as "a rule of thumb," six "incidents", or 12 days of absence, within a 12 month period, could be deemed excessive. (Tr. 43). An "incident" is comprised of any number of days of consecutive absences. Although the company uses this threshold standard to initiate checking an employee's attendance record, Caillier conceded employees are not generally familiar with any set company sick leave abuse policy or standard.

Borax has a progressive system of disciplining employees with excessive absenteeism. The first step is verbal counseling. The second step is a Corrective Notice. If the problem persists, the third step is a written warning. If the problem is not corrected, the next steps are disciplinary time off and ultimately discharge. During the period June 1987 through January 1998, eleven employees were discharged for excessive absenteeism. The discharged employees had received Corrective Notices and a series of additional disciplinary warnings prior to their discharge. (Tr. 48-50; Resp.'s Ex. 3).

There are four steps in the union's grievance procedure. Step One is a verbal meeting with the employee's immediate supervisor. Step Two is meeting with the supervisor after a verbal and written warning. Step Three is a meeting with the company's Human Resources Department. Step Four is arbitration.

Dykhoff has been employed by Borax since January 2, 1979. He is currently employed as a shipping operator in Plant 9. Dykhoff's responsibilities as a shipping operator include operating a fork-lift for the purpose of loading packed product into railcars and trucks. Dykhoff's duties also had included lifting heavy objects and climbing stairs. However, since undergoing knee surgery in July 1994, Dykhoff has experienced increasing difficulties performing the full range of his duties due to a deteriorating bilateral knee condition. To accommodate Dykhoff's physical limitations, pursuant to the recommendations of Dykhoff's private physician, Borax modified Dykhoff's shipping duties to reduce the amount of lifting and climbing required of him. The accommodations apparently were accorded to Dykhoff consistent with the provisions of The Americans With Disabilities Act.

In addition, since 1995, consistent with the recommendation of Dykhoff's physician, in order to avoid the possibility of Dykhoff sustaining an injury due to his bilateral instability, Borax required Dykhoff to wear bilateral knee braces as a condition of his employment. Dykhoff's knee braces were custom made in order to generate an exact fit based on a cast of each leg. A pair of braces cost approximately $1,200 and they were paid for, and replaced when necessary, by Borax's insurance carrier. The braces had to be replaced periodically. In such circumstances it took approximately one month to obtain a new pair. During such periods, Dykhoff was prevented from working without the braces. Dykhoff stated the insurance company would not pay for, and he could not afford, a back-up pair of braces that would prevent his absence from work for extended periods of time. Dykhoff kept the company informed during periods when he could not report to work because his braces were unavailable.

In December 1996, Dykhoff's supervisor, Chuck Amento, requested Personnel Manager Caillier to obtain a copy of Dykhoff's attendance record. On December 6, 1996, Dykhoff's personnel record reflected Dykhoff had been absent for 7 incidents totaling 21 days in the preceding 12 month period. (Resp.'s Ex. 4). Although Caillier believed a Corrective Notice was warranted, Amento verbally warned Dykhoff about his absenteeism. (Tr. 52-55).

Mike King was Borax's shipping foreman from January 1997 until he was replaced by David Leach in January 1998. During this time, King was responsible for keeping Dykhoff's attendance records. Although King was aware of accommodations that were made for Dykhoff due to his knee impairments, King was not aware of any special exceptions that had been granted to Dykhoff concerning leave. On or about October 20, 1997, King verbally warned Dykhoff about excessive absenteeism. (Tr. 120-24; Resp.'s Exs. 8, 9). King testified it was his decision to verbally warn Dykhoff about his absenteeism, and that he had not been requested to do so by any other company official. (Tr. 124). At the time of the warning, Dykhoff told King that the company could not count his absenteeism that was caused by his knee problems. King told Dykhoff he was not aware of such a company policy. (Tr. 120-24).

On March 3, 1998, Dykhoff reported to work and worked one hour. He then advised his supervisor, David Leach, that he was taking sick leave due to a dental problem. Dykhoff also did not report for work on March 4, March 5 or March 6. Although Dykhoff stated he told Leach he was taking sick leave because of dental problems, Leach did not remember such a conversation. However, Borax does not question Dykhoff's reported dental treatment and it does not contend that Dykhoff's March 3 through March 6, 1998, sick leave was not approved.

Leach was aware that Dykhoff had frequently been absent from work. Consequently, on March 6, 1998, Leach requested Borax's Personnel Department to check Dykhoff's absenteeism record. The Personnel Department determined Dykhoff had missed 71 full days of work and 13 partial days of work in the previous 21 months. Consequently, a Corrective Notice was written for Dykhoff on March 6, 1998. The Notice was signed by Leach and Caillier. It stated:

> Corrective Notice for excessive absenteeism. In the last 21 months you have missed 71 days on 10 incidents plus 13 partial days over the past 6 months. This record is not acceptable and must be corrected immediately or stronger action will be taken. (Resp.'s Ex. 6).

The Corrective Notice was given to Dykhoff by Leach during a March 12, 1998, meeting. The meeting was also attended by Union Shop Steward Gary Baxter. Baxter testified that he could not recall Dykhoff providing any reasons for his latest absences from March 3 through March 6, 1998. (Tr. 173). The March 12, 1998, meeting apparently was Step Two in the union grievance procedure.

Step Three of the grievance process was conducted in a June 18, 1998, meeting with Human Resources. The personnel relations official representing the company was Kevin Long. Dykhoff was accompanied by James Bates, a Borax warehouseman who was the Secretary-Treasurer of the union. Bates testified that he recalled Dykhoff asking Long if Long wanted him to come to work even if he was under the influence of Percodan. Bates stated Long responded that he wanted Dykhoff at work. Consistent with Bates testimony, Dykhoff stated that he initially raised the issue of working under the influence of Percodan in the June 18, 1998, Step 3 grievance meeting with union and company officials. (Tr. 176-83).

Dykhoff filed his initial discrimination complaint that serves as the basis for this proceeding on July 20, 1998. He requested that the disciplinary notice be removed from his record. His complaint, in pertinent part, states:

> On March 12, 1998, I was disciplined for excessive absenteeism. On at least three of the incidents, I had major dental work done and a massive jawbone infection. The Dentist had prescribed Percodan, which is a triple form, highly controlled narcotic for pain. Due to the fact that I could not function safely while taking this prescribed medication, and on two of the occasions I had only slept 3 hours out of 72 hours, I stayed home. The grievance meeting was not scheduled until June 18, 1998 for reasons beyond my control. At the meeting, I explained to Mr. Kevin Long (Manager/Human Resources), why I missed time on these specific dates. I referred to page 175, Sec.20001 of 30 CFR/56/57/58, and asked him if he wanted me working in the plant in that condition. His response was, 'we want you at work'. I then asked him if I came to work in that condition and got hurt or hurt somebody, would I be in trouble. His answer was the same. I also asked him if I came to work in that condition and had an accident and was drug tested under the Company's Drug Testing Policy, would I have to go through the 5 year Rehab period or worse, be terminated. Again his only response was, 'we want you to come to work'.

Dykhoff has been an active union member, previously serving as the Secretary-Treasurer of Local 30 of the ILWU, as well as a shop steward in the shipping department. During the

period 1994 through January 1998, Dykhoff was involved in a variety of union related health and safety complaints. With the exception of the subject March 6, 1998, Corrective Notice, it has neither been contended nor shown that Dykhoff has ever experienced any adverse action as a result of his union activities. In fact, although the ILWU filed a union grievance alleging the March 6, 1998, Corrective Notice was issued without just cause, there is no evidence that the union contended Dykhoff's disciplinary notice was in any way related to his union safety related activities. Moreover, after Borax denied the union's grievance at Step 3 of the grievance process, the union decided not to pursue the matter further by electing not to take Dykhoff's grievance to arbitration.

Further Findings and Conclusions

Dykhoff, as the complainant in this case, has the burden of proving a *prima facie* case of discrimination under section 105(c) of the Mine Act. In order to establish a *prima facie* case, Dykhoff must establish that his failure to come to work from March 3 through March 6, 1998, constituted a protected work refusal, and, that the adverse action complained of, in this case the March 6, 1998, Corrective Notice, was motivated, in some part, by that protected activity. *See Secretary on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary on behalf of Thomas Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Borax may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or, that the adverse action was not motivated in any part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. The respondent may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity and that it would have taken the adverse action for the unprotected activity alone. *See also Jim Walter Resources*, 920 F.2d at 750, *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

The gravamen of Dykhoff's discrimination complaint is that Borax's disciplinary action was motivated by Dykhoff's protective work refusal. Although the Act grants miners the right to express safety and health related concerns, it does not expressly grant the right to refuse to work under such circumstances. Nevertheless, the Commission and the Courts have recognized the right to refuse to work in the face of perceived dangers. *See Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 519-21 (March 1984), *aff'd mem.*, 780 F.2d 1022 (6th Cir. 1985); *Price v. Monterey Coal Co.*, 12 FMSHRC 1505, 1514 (August 1990) (citations omitted). In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Id.*; *Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C. Cir. 1989). The complaining miner has the burden of proving both the good faith and the reasonableness of his belief that a hazard existed. *Robinette*, 3 FMSHRC at 807-12; *Secretary of Labor on behalf of Bush v. Union Carbide Corp*, 5 FMSHRC 993, 997 (June 1983).

Assuming, solely for the sake of argument, that Dykhoff's refusal to report to work from March 3 through March 6, 1998, because he was under the influence of a prescribed narcotic medication is entitled to Mine Act protection, it is fundamental that, for a work refusal to be protected, a miner must first communicate his safety concerns to some representative of the operator. *Secretary of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (February 1982). In this regard, the Commission has held that, "[p]roper communication of a perceived hazard is an integral component of a protected work refusal, and responsibility for the communication of a belief in a hazard underlying a work refusal lies with the miner." *Conatser,* 11 FMSHRC AT 17, *citing Dillard Smith v. Reco, Inc.,* 9 FMSHRC 992, 995-96 (1987). "[T]he communication requirement is intended to avoid situations in which the operator at the time of a refusal is forced to divine the miner's motivations for refusing work." *Smith,* 9 FMSHRC 995. The miner's failure to communicate his safety concern denies the operator an opportunity to address the perceived danger and, if permitted, would have the effect of requiring the Commission to presume that the operator would have done nothing to address the miner's concern. *Id.* Thus, a failure to meet the communication requirement may strip a work refusal of its protection under the Act.

Consequently, before addressing whether the reasons for a work refusal are protected, we must consider, as a threshold matter, whether the reasons for refusing to work were communicated to the operator. Here, union steward Baxter, called as a witness for Dykhoff, testified Dykhoff did not communicate to Leach during the March 12, 1998, Step 2 grievance meeting that Dykhoff's absence was necessitated by his use of a narcotic drug. In fact, Dykhoff concedes the issue of his use of Percodan as the reason for his absence was not communicated to company officials until the June 18, 1998, Step Three grievance meeting. As a consequence, the issue of the protected nature of Dykhoff's work refusal based on his use of Percodan is not material because Dykhoff's Percodan use was unknown to management when the Corrective Notice was prepared on March 6, 1998. Thus, it could not have motivated, in any part, the adverse action complained of by Dykhoff.

Notwithstanding the communication issue, a work refusal based on illness or physical impairment is not protected by the Mine Act. The parameters for a protected work refusal were initially addressed in the report of the Senate committee that primarily was responsible for drafting the 1977 Mine Act. That report states, "[section 105(c) of the Mine Act] is intended to give miners, their representatives, and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law." (Emphasis added). S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35-36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-24 (1978).

Thus, even if the nature and extent of Dykhoff's physical impairment had been communicated to Borax as the basis for his refusal to come to work, exposure to hazards because of a miner's idiosyncratic physical impairment, where the working conditions and practices of the mine operator are otherwise safe, does not give rise to a protected work refusal. *See Paula Price v. Monterey Coal Company*, 12 FMSHRC 1505, 1519-20 (August 1990) (concurring opinion); *see also Sam Collette v. Boart Longyear Company*, 17 FMSHRC 1121, 1125-26 (July 1995) (ALJ). While it is true that miners have an absolute right to make good faith safety or health related complaints, this absolute right applies to complaints about hazardous mine practices or conditions over which the operator has control.[2] *Pasula,* 2 FMSHRC at 2793; *Robinette* 3 FMSHRC at 807. Dykhoff does not contend that the fork lift he was operating was unsafe, or, that the generic performance of his job duties was hazardous. Accordingly, the reasons for Dykhoff's work refusal are not protected even if they had been communicated to mine management.

In the final analysis, this Commission's jurisdiction is limited to ensuring that miners' rights under the Mine Act are protected. The Commission's role is not to pass on the wisdom or fairness of the asserted justifications for a particular business decision, but rather to determine if such business justifications are credible and would have motivated the operator as claimed. *See Lonnie Ross and Charles Gilbert v. Shamrock Coal Company, Inc.*, 15 FMSHRC 972, 975 (June 1993) *citing Bradley v. Belva Coal Company*, 4 FMSHRC 982, 993 (June 1982). In this regard, "the Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity." *Marvin E. Carmichael v. Jim Walter Resources*, 20 FMSHRC 479, 486-87, n.13 (May 1998) (citations omitted).

The credibility and reasonableness of Borax's asserted business justification for disciplining Dykhoff for excessive absenteeism, despite Dykhoff's physical impairments, are self evident. In fact, the Commission has recently rejected a discrimination claim filed by a complainant with a back impairment, noting that actions taken by an operator because a miner cannot meet the physical requirements of a job are legitimate business decisions that are not subject to Mine Act intervention. *Secretary of Labor o.b.h. William Kaczmarczyk*, 21 FMSHRC __ , *slip op.* at 10 (June 15, 1999). Any recourse Dykhoff may have under the Americans With Disabilities Act is beyond the scope of this mine safety proceeding.

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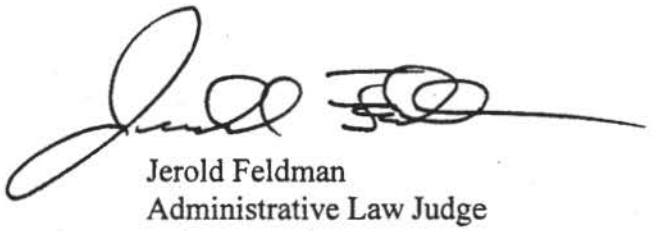
[2] There may be circumstances where a mine condition or practice contributes to a miner's physical limitations. For instance, fatigue caused by an operator's insistence that a miner work extended periods of overtime may give rise to a protected work refusal. In such circumstances it is the mine condition or practice that creates the hazard. *Secretary of Labor o.b.o. Lonnie Bowling and Darrell Ball v. Mountain Top Trucking Co., Inc., et al.*, 19 FMSHRC 166, 196 (January 1997) (ALJ) (citations omitted); *rev'd on other grounds*, 21 FMSHRC 265 (March 1999). However, such circumstances are not applicable in the present case.

Finally, Dykhoff asserts, despite his total 71 days of absence preceding the Corrective Notice, that the Corrective Notice was motivated by his safety related union activities. As noted above, even the union grievance did not allege that Dykhoff's March 1998 disciplinary notice was motivated by his union activities that date back to 1994. Nor is there any evidence of disparate treatment that would warrant a finding that the Corrective Notice was a subterfuge that was actually motivated by a desire for retaliation because of Dykhoff's safety complaints. In fact, several of the employees previously discharged for absenteeism had significantly fewer absences than Dykhoff. (*See* Resp.'s Ex 3). Thus, there is no credible evidence that Dykhoff's past safety complaints played any part in his discipline for excessive absenteeism.

In summary, as previously noted, "the Commission has no responsibility to assure fairness in employment relations or to determine whether an employee was discharged for cause, but only to protect miners exercising their rights under the Act." *Jimmy Sizemore and David Rife v. Dollar Branch Coal Company*, 5 FMSHRC 1251, 1255 (July 1983) (ALJ). Dykhoff's history of protected safety complaints made in his capacity as a union official cannot insulate him from conduct that is not protected by the Mine Act, *i.e.*, a poor attendance record, that, in the exercise of business judgment, provides a reasonable basis for disciplinary action.

ORDER

In view of the above, Louis W. Dykhoff, Jr., has failed to carry his burden of proving that the March 6, 1998, Corrective Notice for excessive absenteeism was motivated, in any part, by any activity that is protected under section 105(c) of the Mine Act. Accordingly, Dykhoff's discrimination complaint **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 16, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 98-293-M A. C. No. 41-03920-05502
v.	:	
HIGHWAY 195 CRUSHED STONE, INC., Respondent	:	Highway 195 Crushed Stone

DECISION

Appearances: David C. Rivela, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of the Petitioner;
John Yearwood, Safety Coordinator, Highway 195 Crushed Stone, Inc., Georgetown, Texas, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the Petition for Civil Penalty filed by the Secretary of Labor against Highway 195 Crushed Stone, Inc. (Crushed Stone) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," alleging three violations of mandatory standards and seeking civil penalties of $191.00 for those violations. The general issue before me is whether Crushed Stone violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

James Goodale, a "metal/non-metal" inspector for the Department of Labor's Mine Safety and Health Administration (MSHA) was performing a regular inspection at the Crushed Stone facility on March 26, 1998. Goodale has been employed by MSHA since 1987 and has 17 years mining industry experience. The subject facility is a crushed stone operation. Material is hauled from a pit area to a feeder and crusher and is then screened for size and stockpiled for sale and distribution. At the time of Goodale's inspection the plant was temporarily shut down for maintenance.

Citation No. 7709180

This citation alleges a violation of the standard at 30 C.F.R. § 56. 14107(a) and charges as follows:

> The right side of the self cleaning tail pulley for the under crusher belt was not guarded to prevent contact with the pinch points or moving parts. The tail pulley was at ground level. The area was located where no travel by employees when the plant is operating.

The cited standard provides, in relevant part, that "[m]oving machine parts shall be guarded to protect persons from contacting . . . tail, and takeup pulleys, . . . and similar moving parts that can cause injury."

According to Inspector Goodale there was no guard on the right side of the cited tail pulley. Although Goodale believed that a fatal injury could occur if someone fell into the pulley, he acknowledged that any injury was unlikely. The tail pulley was admittedly in a remote area and no one would be expected to be in the vicinity of this pulley while the plant was in operation. Goodale also acknowledged that it would, in any event, be difficult for anyone to be exposed to this condition because it was a "tight fit - - you would have to shinny down" to get close enough to be hazardous.

John Yearwood, co-owner of the cited facility, testified that he began construction of this facility in July 1996 and began production in September 1996. Before commencing operations MSHA Inspector Ed Lilly twice visited the plant for Courtesy Assistance Visits (CAV's). Yearwood was new to the business and wanted to start out "correctly and in compliance." On his first post-CAV inspection on September 25, 1996, Lilly gave Yearwood what Yearwood characterized as a "good-to-go" inspection. Lilly made it clear to Yearwood that he was in compliance with the regulations. It is undisputed that the condition now cited was the same as when Lilly inspected the premises and at the time of subsequent MSHA inspections on January 30, 1997, April 30, 1997 and January 15, 1998 (See Resp.'s Exhs. Nos. 2, 3, 4 and 5). In spite of those inspections no citations had ever been issued for the presently cited condition.

Yearwood argues that there was no violation of the cited standard because the condition comes within two exceptions provided by MSHA. The first exception, set forth in 30 C.F.R. § 56.14107(b), provides that only moving parts within seven feet of walking/working surfaces must be guarded. The Secretary acknowledges this exception but claims that the record evidence does not support Respondent's factual claims. I disagree. Yearwood's credible testimony that the cited area was seven feet eleven inches from the walkaway is not directly disputed in the record. Accordingly, Respondent has established this affirmative defense.

The second exception is explained in MSHA's pamphlet entitled "Guide to Equipment Guarding for Metal and Non-metal Mining" (Resp.'s Exh. No. 9 pg. 8). It is stated therein that "remote areas protected by location need not be guarded." According to Inspector Goodale's own testimony the subject tail pulley was in a remote location. Accordingly this exception also provides a valid defense to the alleged violation in this case.

Under all the circumstances I do not find a violation as charged in Citation No. 7709180 and the citation must be vacated.

Citation No. 7709183

This citation alleges a "significant and substantial" violation of the same standard, 30 C.F.R. § 56.14107(a), and charges as follows:

> The back and underneath of the self cleaning tail pulley for the over screen belt was not provided with a guard to prevent contact with the pinch points or moving parts. The tail pulley was approximately four and one-half feet above ground level. Employees travel this area daily by bending over and walking under the tail pulley.

It is undisputed that the cited pulley was partially guarded by wire mesh (See Gov. Exhs. Nos. 3 and 4). However, it is also undisputed that an area of about four inches on each side of the pulley between the self cleaning fins and the guard, remained exposed from below. It is further undisputed that the area below the pulley was used as a travelway with only four and a half feet of clearance from the ground to the pulley.

Goodale concluded that the violation was of high gravity and "significant and substantial" because of the limited clearance between the walkway and the exposed hazard directly above and because of the likelihood of persons slipping, tripping or falling in this area and attempting to grab onto something. Under the circumstances he concluded that permanently disabling or fatal injuries were reasonably likely.

A violation is "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

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

See also Austin Power Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

The testimony of Inspector Goodale in this regard is undisputed and I therefore conclude that the violation was indeed, "significant and substantial" and of high gravity.

Goodale also believed that the operator "should have known" of this violation as it was "readily visible" and therefore concluded that it was the result of "moderate" negligence. However, it is undisputed that this same condition existed at the time of the two prior CAV's and four prior regular inspections without being cited. It is clear that the operator relied upon these prior CAV's and inspections in setting-up and operating his plant. I therefore conclude that it is chargeable with but little negligence.

Citation No. 7709187

This citation alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56. 9300(a) and charges as follows:

> The elevated roadway going onto the scales and exiting the scales were not provided with a berm to prevent overtravel of equipment being used on the roadway. The roadway was approximately five to six feet above the ground. The scales area used daily by haul trucks. [*sic*].

The cited standard provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

It is undisputed that this condition had also existed at the time of the two CAV's and the four prior MSHA inspections and had never previously been cited. According to the undisputed testimony of Yearwood, similar conditions also existed at mine sites throughout the area.

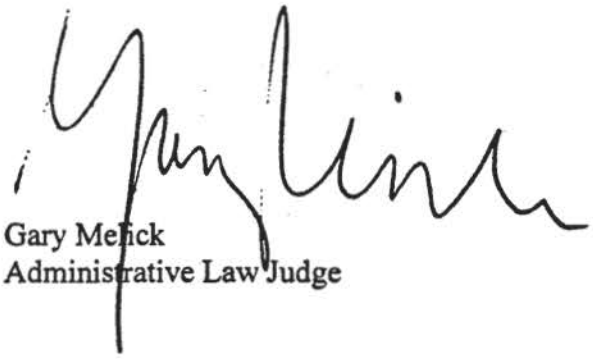
According to Inspector Goodale there was no berm or other guarding as he charged in the citation. He made a "judgment call" that a vehicle could roll over the sloped embankment thereby causing serious injuries. Trucks including 18-wheel tractor trailers traveled this area on a daily basis. Yearwood disagreed that the slope presented a hazard noting that it was only elevated four feet two inches above the surrounding area and not the five or six feet the inspector estimated. Yearwood also testified that the trucks traveled very slowly in this area - - only 3.2 to 3.9 miles per hour on average. He noted that there was also a "dog leg" on the road designed to slow down traffic.

I find that the cited standard suffers from ambiguity and vagueness and therefore to provide adequate notice must be viewed from the position of a reasonably prudent person familiar with the mining industry and the protective purposes of the standard. *Ideal Cement Company*, 12 FMSHRC 2409, 2416 (November 1990); *Lanham Coal Company*, 13 FMSHRC 1341, 1343 (September 1991). While it is implicit in Yearwood's testimony that he did not believe there was any hazard in the unguarded elevated roadway at issue, I give greater weight to the testimony of Inspector Goodale who has significantly more experience both as an inspector and in the mining industry. Clearly, Goodale qualifies as a "reasonably prudent person" and under the circumstances I give his testimony on this issue the greater weight. Accordingly, I find that the violation is proven as charged. Based on Goodale's testimony I also find that the violation was "significant and substantial" and of high gravity. However, in light of the prior CAV's and inspections of this condition without citations and the evidence that other operations in the area had similar unbermed roadways, I find that the operator is chargeable with but little negligence.

In assessing civil penalties herein, I have also noted the small size of the operator, the absence of any prior violations, evidence of good faith abatement and the absence of evidence that the penalties herein would affect the operator's ability to remain in business.

ORDER

Citation No. 7709180 is vacated. Citations No. 7709183 and 7709187 are affirmed and Highway 195 Crushed Stone Incorporated is hereby directed to pay civil penalties of $60.00 for each violation within 40 days of the date of this decision.



Gary Melick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 23, 1999

THE DOE RUN COMPANY, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. CENT 98-81-RM Citation No. 7859810; 2/24/98
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. CENT 98-82-RM Citation No. 7859811; 2/24/98
	:	Casteel-Buick Mine Mine ID No. 23-00457
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 98-277-M A. C. No. 23-00457-05589
v.	:	
THE DOE RUN COMPANY, Respondent	:	Casteel-Buick Mine

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Dept. of Labor, Denver, Colorado, on behalf of Secretary of Labor:
R. Henry Moore, Esq., Buchanan Ingersoll, P.C., Pittsburgh, Pennsylvania, on behalf of The Doe Run Company.

Before: Judge Melick

These consolidated cases are before me pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," to dispute a citation and withdrawal order issued by the Secretary of Labor to The Doe Run Company (Doe Run). The Secretary has charged Doe Run with two violations of mandatory standards and seeks a civil penalty of $100,000.00 for those violations.[1] The general issue before me is whether Doe Run

[1] A third violation, charged in Order No. 7859812, was vacated in a partial summary decision issued December 14, 1998.

violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act. Additional specific issues will be addressed as noted.

On January 19, 1998, Jeffrey Sadler, a senior surveyor for the Buick Mine was crushed and fatally injured by a ground fall in the center heading of the 81V20 stope. The charges herein arise from that incident. The Buick Mine is an underground room and pillar lead mine. It was originally developed separately but was later interconnected with the Casteel and Camino mines and consolidated into one mine operated by Doe Run. Material is removed at this mine by drilling and blasting. The blasted material or "muck" is then loaded out and the roof in the blast area is scaled, usually with a mechanical scaler, in stages. The entries are generally about 16 to 18 feet high and 32 feet wide.

The area of the accident had been mined in mid-November 1997. On January 16, 1998, the Saturday before the accident, the center heading, inby the 3113b intersection, had been drilled and shot. A crosscut to the right (or west) of the intersection had also been drilled and shot for ventilation purposes. The shot in the crosscut had not required the drilling of holes to the normal depth and only about half the normal amount of explosives were used.

On the day of the accident, Sadler, along with assistant surveyor Jason Wruck, proceeded underground to the 81V20 stope to update the mine map. Sadler and Wruck parked their truck in the 3101c crosscut and walked to the 3109a heading where drill operator Alvin McWilliams was moving his drill to the face in 3127a. Earlier that morning, scaler operator Thad Pettit had driven down the center heading examining for loose material and then scaled the center heading where it had been shot.

The surveyors returned to the center heading after Pettit's examination and scaling. Wruck was then elevated in a bucket so he could repair spad 4572 located in the roof of the subject intersection. In the process of repairing the spad, Wruck, who was wearing a cap lamp, examined the roof from only inches away. He was so close he hit his head on the roof. He found no conditions, such as cracks in the roof, dry spots or noise from the roof "working," which would have indicated that sounding the roof was necessary. It was his practice when observing signs of roof deterioration to sound the roof. After repairing the spad, Wruck moved the truck and Sadler set up his instrument under this spad. Shortly thereafter the roof fell in the immediate area of the spad, fatally injuring Sadler. Although Wruck was walking toward Sadler at the time, he did not see the actual fall. After the accident but before the Secretary's investigation, the fall area and adjacent areas were scaled to remove rock left hanging from the roof.

Citation No. 7859810, issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.3401 and charges as follows: [2]

> A fatal accident occurred at this operation on 1/19/98, when a large slab fell on a miner who was setting up a surveying instrument at intersection 3113b in stope 81V20. The slab was approximately 10 feet wide, 20 feet long and was up to 17 inches thick. The ground at this location had been visually examined, but testing for loose ground had not been done. Significant amounts of loose ground had been scaled in the intersections east and west of the fall during the weeks prior to the accident, which was indicative of loose ground conditions in this area of the mine. The mine operator was aware of the loose ground conditions in this part of the mine and failed to adequately test in the intersection where the accident occurred. This is an unwarrantable failure to comply with a mandatory safety standard.

The cited standard provides as follows:

> "Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting . . . "

The Secretary acknowledges in the citation and in her post-hearing brief that the cited area, i.e., intersection 3113b in Stope 81V20, had been visually examined in compliance with the

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[2] Section 104(d)(1) of the Act provides as follows:

"If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated."

cited standard. The parties also agree that no one "tested" the intersection of 3113b following blasting in the crosscut to the west of the intersection on January 17, 1998, and before the fatal accident on January 18, 1998. The issue is whether "testing" was required by 30 C.F.R. § 57.3401 in the cited intersection before the surveyors performed their work.

More particularly the Secretary maintains that it is the second part of the sentence of the cited standard that was violated, i.e., "appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift" (emphasis added). As noted by Doe Run however, the insertion by the Secretary of the phrase "where applicable" creates such ambiguity in the language of the standard as to necessitate application of the "reasonably prudent person" test. I agree. When faced with a challenge to a safety standard on the grounds that it fails to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, i.e., the reasonably prudent person test. *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129-30 (December 1982), *Secretary v. Asarco Inc.,* 14 FMSHRC 941 (June 1992). The Commission has summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Company,* 12 FMSHRC 2409, 2416 (November 1990). The test establishes an objective standard of notice so that if an operator, based on the training, experience and information available to it, does not believe an unsafe condition exists and no other guidance or criteria is available, such as industry standards, proper notice has not been given. *Energy West Mining Company,* 17 FMSHRC 1313, 1318 (August 1995).

I note preliminarily that the testimony of the Secretary's experts, civil and structural engineer George Karabin and MSHA supervisory special investigator Daniel Haupt, that testing should always be conducted after blasting, completely ignores the qualification in the standard that such testing need be performed only "where applicable." In the context of the cited standard the term "where applicable" is not a location-related qualifier. If indeed, the Secretary intended that testing always be performed after blasting, she could have easily provided for this in the cited standard by not adding the qualifying language.

Under the rules of statutory and regulatory construction the phrase "where applicable" must be given meaning and clearly such meaning is to qualify the requirement for testing to only those circumstances where conditions indicate it is warranted. On the facts of this case and based largely on the credible expert testimony of George Karabin, I conclude that such conditions existed in this case from which a "reasonably prudent person" would conclude that testing of the subject roof area was indeed warranted.

In this regard Karabin as well as Haupt, opined that testing was warranted herein because blasting had occurred in two areas adjacent to the fall area, on January 17, 1998, only two days before the fatal roof fall. Karabin also concluded that the slip found in the haulage drift in the 81V20 stope would have provided a warning. While the slip did not proceed into the center drift, Karabin explained that a slip or fracture is a discontinuity in the rock that greatly reduces the

spanning capacity of the roof beam and provides a location for ground movement to occur. Karabin further indicated that while the slip was not observed in the back in the area of the fall, it nevertheless should be considered as a warning sign since it may have risen to a level above the immediate back elevation thereby affecting stability.

Karabin also believed that notice should have been taken from the existence of the transition zone in the 81V20 stope where the rock type changed from laminated to brecciated dolomite. These zones may be faulted, badly fractured and characterized by a feathered structure as one formation rides over or displaces the other and could lead to deteriorating ground. Karabin further opined that the brow areas that existed in the 81V20 stope and in particular, in the vicinity of the accident site, may be indicative of high stress and locally weak rock. According to Karabin these too provided some notice that testing should have been performed in the fall area.

Karabin also explained that the quartz or calcite intrusions present in the 81V20 stope represented a geologic change that could affect local ground conditions, particularly if the crystals formed in fractures and were not well bonded to the surrounding rock mass. According to Karabin these intrusions represented a discontinuity in the rock that could weaken it, concentrate stress or provide planes for rock movement. In particular Karabin cited the presence of quartz/calcite in and around the fatal fall area, in the domed cavity in 3112c, in the slip, and in the two outby high back/fall areas on the 81V20 stope. He associated this quartz/calcite with ground control difficulties in those areas and indicated that these also provided notice that testing was required.

Karabin believed that additional notice of localized bad ground conditions was provided by the cavity observed in the intersection directly east of the accident site. This cavity was growing in size and had been propagating toward the intersection where the accident occurred. According to Karabin, the formation of a cavity suggests locally weak ground and the concentration of stress or excessive ground deformation at that location. He further concluded that continual expansion of the cavity indicated an actively deteriorating area. While acknowledging that water was not a major factor in the cause of the fatal fall, Karabin also opined that the presence of water in the stope nevertheless indicated the existence of fractures in the ground, and those fractures could be expected to affect ground stability.

Under these circumstances it is clear from the existence of any one of the conditions observed by Karabin that testing of the subject area was warranted. Accordingly the violation is proven as charged. In reaching this conclusion I have not disregarded the testimony of a number of Respondent's witnesses, that upon visual examination of the subject roof area they found no apparent evidence of defects in the roof such as cracks, dry spots or noise indicating that the roof was "working," and that therefore they believed further testing was not warranted. However, I conclude, based on the credible expert testimony of Karabin, that those witnesses did not give sufficient consideration to the other warning signs that Karabin described in his testimony.

The violation was also clearly significant and substantial and of high gravity. A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.
>
> *See also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

I do not find however that the violation was the result of the Respondent's unwarrantable failure or significant negligence. In *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987), the Commission held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. This determination was derived, in part, from the plain meaning of "unwarrantable" ("not justifiable" or "inexcusable"), "failure" ("neglect of an assigned, expected or appropriate action"), and "negligence" (the failure to use such care as a reasonably prudent and careful person would use, and is characterized by "inadvertence," "thoughtlessness," and "inattention"). 9 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." 9 FMSHRC at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 189, 193-94 (February 1991).

While it is clear from Karabin's expert testimony that the operator should have known of the need for further testing, the Commission has held that use of a "knew or should have known" test by itself would make unwarrantable failure indistinguishable from ordinary negligence, and accordingly, rejected such an interpretation. Moreover, I give some credit to, and find some mitigation in, the testimony of the experienced miners who closely examined the roof in the area of the subject intersection and who found no evidence of deterioration and therefore found no need to perform testing.

In this regard assistant surveyor Jason Wruck was repairing a spad while elevated to the mine roof in a basket, only inches away from the area of roof that fell. In this location and with his cap lamp he examined and evaluated the roof visually only a short time before the roof fall and found no conditions which he believed would have indicated that testing was necessary. There were no cracks or dry spots, or noise indicating that the roof may have been "working." Wruck is also corroborated by other eyewitnesses. Thad Pettit also examined the same area for loose material. On the Saturday before the accident, Glen Bays, an experienced miner, loaded-out of the heading and examined the area before he began work. Joe Stables, a substitute foreman with years of mining experience, also examined the area that morning from the top of the loader. They observed the roof from a distance of 4 to 5 feet with the aid of the loader lights and their cap lights. Keith Propst who charged the holes for blasting on Saturday morning also examined the roof on Monday and saw no change in the condition of the roof. Alvin McWilliams, who drilled the holes in the crosscut and who assisted Propst, also observed no difference in the roof between Saturday and Monday morning. Tim McFarland, a sub-foreman, also examined the intersection from his tractor with a spotlight that morning. None of these persons who had examined the cited intersection before the roof fall believed that the roof conditions warranted testing.

Order No. 7859811, also issued pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.3200 and charges as follows:

> A fatal accident occurred at this operation on 1/19/98, when a large slab fell on a miner who was setting up a surveying instrument at intersection 3113b in stope 81V20. The slab was approximately 10 feet wide, 20 feet long and was up to 17 inches thick. The ground at this location had been visually examined, but testing for loose ground had not been done. Significant amounts of loose ground had been scaled in the intersections east and west of the fall during the weeks prior to the accident, which was indicative of loose ground conditions in this area of the mine. There was no evidence to indicate that efforts had been made to take down the loose rock or to support the ground in the fall area. This is an unwarrantable failure to comply with a mandatory safety standard.

The cited standard, 30 C.F.R. § 57.3200, provides as follows:

> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travelers permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

In *Asarco Inc.*, 14 FMSHRC 941 (January 1992) the Commission stated, in reference to the proper interpretation of the standard at issue herein, as follows:

> The purpose of Section 57.3200 is to require elimination of hazardous conditions. The fact that there was a ground fall is not by itself sufficient to

sustain a violation. Rather, the Secretary is required to prove that there was a reasonably detectable hazard before the ground fall.

In the instant case I have found the testimony of the Secretary's experts Karabin and Haupt entitled to significant weight in regard to the extent warning signs of a hazard in the vicinity of the subject roof before the accident. The testimony of Karabin has been discussed in detail earlier in this decision. Notice of the potentially hazardous nature of the subject roof was provided by the surrounding conditions described by Karabin. That notice was sufficient to warrant further testing and/or corrective work. Under the circumstances the violation is proven as charged and was clearly "significant and substantial" and of high gravity. For the reasons previously advanced in regard to the prior citation I do not however find that the violation was the result of "unwarrantable failure" or significant negligence.

In assessing civil penalties in this case I also note that Respondent is a large operator. It had also been cited for violations of 30 C.F.R. § 57.3401 and § 57.3200 on 26 occasions prior to the roof fall in this case, although some of those citations were issued at the interconnected Buick mine. The Secretary does not question the good faith abatement of the violations and it has been stipulated that even the penalties proposed by the Secretary would not affect Respondent's ability to continue in business.

ORDER

Citation No. 7859810 and Order No. 7859811 are hereby modified to citations under Section 104(a) of the Act and The Doe Run Company is directed to pay civil penalties of $10,000 for each of the violations therein.

Gary Melick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

July 23, 1999

BRIAN K. MOORE	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 99-2-D
	:	
CHELLE ENERGY, INC., and	:	PIKE CD 98-09
CLYDE BOYD,	:	
Respondent	:	
	:	Mine No. 1
	:	Mine ID 15-17881

ORDER OF DISMISSAL

Appearances: Regina Triplett, Esq., Chris Ratliff Law Offices, Pikeville, Kentucky, for Respondent Chelle Energy, Incorporated;
Thomas M. Smith, Esq., Prestonsburg, Kentucky, for Respondent Clyde Boyd.

Before: Judge Weisberger

This case is before me based on a Complaint filed by Brian K. Moore alleging that Chelle Energy, Inc., and Clyde Boyd unlawfully discriminated against him in violation of Section 105(c) of the Federal Mine Safety and Health Act of 1977. On February 1, 1999, an order was issued scheduling this matter for hearing on April 13-15, 1999. Moore subsequently retained counsel, and the hearing was rescheduled, at the request of counsel, for May 12-13, 1999.[1] Respondents subsequently moved to continue the hearing, and after the presentation of arguments by all Parties in a telephone conference call on April 28, 1999, the motion was granted. On April 30, 1999, an order was issued rescheduling the hearing for July 7-8, 1999, to commence at 9:00 a.m, in Louisa, Kentucky.

On July 7, 1999, counsel for Respondents were assembled at 9:00 a.m., at the designated site. Moore did not appear, nor did he contact my office or the courthouse where the case was scheduled to be heard. I contacted my office at 9:10 a.m., and spoke with one of the Commission's secretaries who informed me that at 4:30 p.m., July 6, she received a telephone call from a person who identified himself as Brian K. Moore, who told her that he was having

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[1]/ Moore's counsel subsequently filed a Motion to Withdraw as counsel, and the motion was granted in an order issued April 21, 1999.

problems with his job, that he was not being allowed to take off to attend the hearing, and that he wanted the hearing continued. The secretary said she advised him that I was in transit. She also furnished him with the address of the courthouse in Louisa, Kentucky, and the phone number of the court clerk. The secretary said she advised Moore to go to the hearing. The secretary told me that Moore said that he had no way of getting there. The secretary told me that she informed him to make sure that he shows up at the hearing.

At the hearing, Respondents made a Motion to Dismiss based on Moore's failure to appear at the hearing.

29 C.F.R. § 2700.66(l) provides as follows: "If a party fails to attend a scheduled hearing, the Judge, where appropriate, may find the party in default or dismiss the proceeding without issuing an order to show cause." The order setting this case for hearing was issued on April 30, 1999. Thus, Moore was afforded sufficient time to arrange his affairs so he could attend the hearing. Should this matter be continued, there is no certainty that Moore would be able to arrange transportation and appear at a hearing. Moore had to make the choice between working or attending the hearing and pursuing his case, and chose to work. Further, as a result of his not contacting the Commission until 4:30 p.m., the day prior to the hearing, the Commission incurred the needless expenses of transportation and per diem of the undersigned, as well as costs of a reporter. Also, Respondents incurred loss of time in appearing at the hearing.

Therefore, for all the above reasons, and pursuant to section 2700.66(l), supra, the Motion to Dismiss is granted.

ORDER

It is **ORDERED** that this case be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

Distribution:

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Regena Triplett, Esq., Chris Ratliff Law Offices, P. O. Box 1379, Pikeville, KY 41502 (Certified Mail)

Thomas M. Smith, Esq., P.O. Box 246, 26 Earl Street, Prestonsburg, KY 41653 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

July 23, 1999

SECRETARY OF LABOR,	:	TEMPORARY REINSTATEMENT
MINE SAFETY AND HEALTH	:	PROCEEDING
ADMINISTRATION, (MSHA),	:	
on behalf of **Rodney Smith,**	:	Docket No. KENT 99-243-D
Complainant	:	
v.	:	BARB CD 98-26
	:	BARB CD 98-33
LEECO, INCORPORATED,	:	BARB CD 99-02
Respondent	:	
	:	Maces Creek
	:	Mine ID 15-17911

ORDER GRANTING TEMPORARY REINSTATEMENT

Before: Judge Bulluck

This matter is before me on an application, filed by the Secretary on July 6, 1999, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(2), for an order requiring Leeco, Incorporated ("Leeco") to temporarily reinstatement Rodney Smith to his former position as a roof bolter, third shift belt examiner and assistant foreman at Leeco's Maces Creek Mine, or to a similar position at the same rate of pay. Section 105(c)(2) prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety related protected activity, and authorizes the Secretary to apply to the Commission for temporary reinstatement of miners, pending full resolution of the merits of their complaints. The application is supported by Declaration of Ronnie L. Brock, Mine Safety and Health Administration ("MSHA") supervisory investigator assigned to the Barbourville field office, and a copy of discrimination complaints filed by Smith with MSHA on June 23, 1998, July 23, 1998, and December 3, 1998, respectively.[1] The application alleges that Smith was 1) suspended for three days because of his designation as a miners' representative, 2) subjected to interference and prevented from carrying out his duties pursuant to his miners' representative designation, and 3) constructively discharged from his employment with Leeco by being required

[1]Discrimination Complaint of June 23, 1998, alleges that "[Smith] was given three days off, for following direct orders given by [his] supervisor." Discrimination Complaint of July 23, 1998, alleges that "On July 22, 1998, [Smith] was refused [his] rights as a miners' representative to travel with MSHA inspector. [He] was sent home." Discrimination complaint of December 3, 1998, alleges that "[Smith] was forced to quit for reporting safety violations and management made no attempt to correct them, and [he] was harassed for being a miners' representative."

to work and travel in belt entries under unsafe, hazardous roof conditions.

Leeco elected not to request a hearing and on July 16, 1999, filed its Response, therein denying that the company had prevented Smith, as a miners' representative, from engaging in "walk-around" duties with an MSHA inspector, or suspended him for discriminatory reasons, or that Smith was constructively discharged. Leeco's Response was supported by Affidavit of Leeco's president, Joseph Evans.

Procedural Framework

The scope of this proceeding is governed by the provisions of Commission Rules 45(c), 29 C.F.R. §2700.45(c), which limits the inquiry to a "not frivolously brought" standard by providing that "If no hearing is requested, the Judge assigned the matter shall review immediately the Secretary's application and, if based on the contents thereof the Judge determines that the miner's complaint was not frivolously brought, he shall issue immediately a written order of temporary reinstatement."

It is well settled that the "not frivolously brought" standard is entirely different from the scrutiny applicable to a trial on the merits of the underlying discrimination complaint. In *Jim Walter Resources v. FMSHRC*, 920 F.2d 738, the Court explained the standard as follows:

> The legislative history of the Act defines the 'not frivolously brought standard' as indicating whether a miner's 'complaint appears to have merit'-- an interpretation that is strikingly similar to a reasonable cause standard. [*Citation omitted*]. In a similar context involving the propriety of agency actions seeking temporary relief, the former 5th Circuit construed the 'reasonable cause to believe' standard as meaning whether an agency's 'theories of law and fact are *not insubstantial or frivolous*.' 920 F.2d at 747 (*emphasis in original*) (*citations omitted).*
>
> Congress, in enacting the 'not frivolously brought' standard, clearly intended that employers should bear a proportionately greater burden of the risk of an erroneous decision in a temporary reinstatement proceeding. Any material loss from a mistaken decision to temporarily reinstate a worker is slight; the employer continues to retain the services of the miner pending a final decision on the merits. Also, the erroneous deprivation of the employer's right to control the makeup of his work force under section 105(c) is only a *temporary* one that can be rectified by the Secretary's decision not to bring a formal complaint or a decision on the merits in the employer's favor. *Id.* at 748, n. 11 (*emphasis in original*).

Ruling

The Mine Act accords to miners and miners' representatives protection from discharge or other discriminatory acts, based on their exercise of any statutory right under the Act. 30 U.S.C. §815(c). The Commission has consistently held a miner seeking to establish a *prima facie* case of discrimination to proving that he engaged in activity protected by the Act and, that he suffered adverse action as a result of the protected activity. *Secretary on behalf of Pasula v. Consolidation Coal Company.*, 2 FMSHRC 2786, 2797-2800 (October 1980), *rev'd on other grounds, sub nom. Consolidation Coal Company v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Coal Company,* 3 FMSHRC 803, 817-18 (April 1981).

The Secretary's allegations are based, in part, on Inspector Brock's review of the investigative reports, respecting Smith's discrimination claims. Brock found that on June 23, 1998, Smith, the sole non-supervisory miners' representative who traveled with MSHA inspectors, was suspended for three days for working inby unsupported roof, a common practice at the mine, for which no other employee had been similarly disciplined. Brock further found that on July 22, 1998, mine superintendent Arnold Lowe prevented Smith from accompanying MSHA inspector Buford Conley on a Triple A inspection of the mine, by sending Smith home and permitting a shift foreman, not yet officially confirmed as a miners' representative, to travel with Conley. Brock's review also found support for Smith's claim that he was constructively discharged on December 1, 1998, due to Leeco's failure to address hazardous roof conditions reported by Smith in the pre-shift and belt examination books. In this regard, Brock found that other employees had been making notations of corrective actions in the examination books, which actions were not, in fact, being taken, and that on November 30, 1998, Smith refused to sign the pre-shift book that falsely reported corrective roof support measures. Finally, Brock concluded that Smith's allegations of constructive discharge due to Leeco's failure to correct hazardous conditions in the belt entries where Smith traveled and worked, and harassment due to his designation as a miners' representative, were not frivolous.

Leeco's Response, supported by president Evans' Affidavit, seeks to establish that the complaints were frivolously brought by, rebutting each allegation made by the Secretary. Leeco asserts that Smith and two other employees intentionally, deliberately and repeatedly traveled under unsupported roof, and that all three were suspended for three days. Respecting the July 22, 1998, inspection, Leeco states that Smith had completed his shift prior to the inspection and was not sent home, suffered no loss of pay, and was among several miners' representatives at the mine, one of whom traveled with Inspector Conley during his inspection. In response to the constructive discharge allegation, Leeco asserts that Smith certified that corrective action had, in fact, been taken, respecting conditions found by him, to the degree that he consecutively signed several pre-shift and belt examination book entries. Moreover, Leeco states that Smith voiced no specific health, safety or other concerns to mine management, respecting his general job dissatisfaction, and that he voluntarily resigned on December 1, 1998.

It is clear that the Mine Act protects miners' representatives from harassment or intimidation in the exercise of their duties. Moreover, since Leeco has waived its right to a hearing on the Secretary's application, while I have considered Leeco's Response, my review must accept as true the events, as alleged. At best, Leeco has shown an intent to defend its actions at hearing, on the basis of legitimate business-related, non-discriminatory motivations. The Secretary has set forth allegations of discipline of Smith and interference in the exercise of his duties as a miners' representative, sufficient to raise an inference of discrimination. Likewise, respecting constructive discharge, the Secretary's allegation sets forth protected activity and refusal to work under unsafe roof conditions, under circumstances that are protected under the Mine Act, if proven. While the Secretary ultimately bears the burden at hearing of proving these allegations by a preponderance of the evidence, in order to sustain a violation of section 105(c), they are not, as set forth in the Secretary's application, clearly lacking in merit and, therefore, satisfy the lesser threshold in this proceeding, of not being frivolously brought.

ORDER

For the reasons set forth above, it is **ORDERED** that Leeco, Incorporated, immediately reinstate Rodney Smith to the position that he held immediately prior to his resignation from employment on December 1, 1998, at the same rate of pay and benefits, or to a similar position at the same rate of pay and benefits, with the same or equivalent duties.

Jacqueline R. Bulluck
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 26, 1999

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 99-158-D
on behalf of	:	
LEONARD M. BERNARDYN,	:	WILK CD 99-01
Complainant	:	
v.	:	Wadesville Pit
	:	Mine ID 36-01977
READING ANTHRACITE COMPANY,	:	
Respondent	:	

DECISION

Appearances: Troy E. Leitzel, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for the Complainant;
Martin J. Cerullo, Esq., Cerullo, Datte & Wallbillich, P.C., Pottsville, Pennsylvania, for the Respondent.

Before: Judge Weisberger

1. Introduction

This case is before me based upon a Complaint of Discrimination filed by the Secretary of Labor ("Secretary") on behalf of Leonard M. Bernardyn alleging that Bernardyn was discharged by Reading Anthracite Company ("Reading") in violation of section 105(c) of the Federal Mine Safety and Health Act of 1997 ("the Act").[1] Pursuant to notice, the case was heard on May 18, 1999, in Harrisburg, Pennsylvania.[2] On July 15, 1999, the Parties filed Proposed Findings of Fact, and Briefs.

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[1]/ On March 4, 1999, the Secretary, on behalf of Bernardyn, filed an Application for Temporary Reinstatement. Subsequent to an evidentiary hearing on this application held on March 16, 1999, an order was issued directing Reading to reinstate Bernardyn (*Secretary of Labor on behalf of Leonard M. Bernardyn* v. *Reading Anthracite Company*, 21 FMSHRC 339 (March 19,1999)).

[2]/ At the March 18, 1999 hearing, the transcript of the temporary reinstatement proceeding, 21 FMSHRC, supra, and the exhibits admitted at that proceeding, were ordered incorporated into the record of the instant proceeding.

II. Applicable Law

The Commission, in *Braithwaite* v. *Tri-Star Mining*, 15 FMSHRC 2460 (December 1993), reiterated the legal standards to be applied in a case where a miner has alleged that he was subject to acts of discrimination. The Commission, *Tri-Star*, at 2463-2464, stated as follows:

> The principles governing analysis of a discrimination case under the Mine Act are well settled. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula* v. *Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds, sub nom. *Consolidation Coal Co.*, v. *Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette* v. *United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. Pasula, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. *Pasula*, 2 FMSHRC at 2800; *Robinette*, 3 FMSHRC at 817-18; see also *Eastern Assoc. Coal Corporation*, v. *United Castle Coal Co.*, 813 F.2d 639, 642 (4th Cir. 1987).

III. The Secretary's Prima Facie Case

A. The Secretary's Witnesses

Leonard Bernardyn, a truck driver at the pit in question, testified that at the start of the shift on November 10, 1998, the weather was misty, and the road was starting to get slick.[3] Bernardyn indicated that on the morning of November 10, he felt that if he were to go at his normal speed he would go in circles.[4] He indicated that he was stopped by Stanley Wapinski, the general superintendent at Reading, who told him that he was going too slow. Bernardyn told Wapinski that it was getting slippery, and Wapinski informed him to get moving.

Bernardyn utilized a CB radio that was in his truck to attempt to contact Thomas Dodds, another truck driver, who was a union representative. Bernardyn broadcasted over the CB radio

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[3]/ Bernardyn testified at the March 16, 1999 hearing.

[4]/ In general, the truck drivers are not informed by the company as to the maximum speed at which the trucks are to be driven.

that he was being harassed, and was asked to drive faster than warranted by the road conditions. Bernardyn conceded that he did use curse words at the time.

Shortly thereafter, Bernardyn was stopped again by Wapinski who told him that he was holding everything up, and directed him to park. After Bernardyn stopped the truck, Frank Derrick, Readings general manager, informed him that he was fired. According to Bernardyn, Derrick did not tell him that he was being fired for cursing, or for using threatening language.

Dodds[5] confirmed that on the morning at issue the roads were slick. He also confirmed Bernardyn's testimony with regard to what Bernardyn communicated over the CB radio. Dodds indicated that generally miners on the site at issue do not use curse words on the CB radio.

Thomas Goodman,[6] a retired Reading employee and former truck driver, confirmed that the roads were slick on the morning at issue. Goodman testified that at approximately 8:00 a.m., the truck that he was driving began to slide. He also essentially confirmed Bernardyn's testimony as to what Bernardyn had said over the CB radio.

Dale Coombe, a truck driver employed by Reading, who worked at the site on the date in question, confirmed that it was raining. He indicated that generally when it rained the roadways become slick, and that Titan trucks easily spin around in such conditions. He confirmed that he heard Derrick ask Wapinski, over the CB radio, what was holding up the Titan trucks, and Wapinski stated that the drivers were driving cautiously as the conditions were slippery. He also confirmed that during his second trip of the day, he heard Derrick tell Wapinski over the CB ". . . to tell the driver to park the truck and send him out of the pit" (Tr. 16, May 18, 1999).

Coombe indicated that one time a Titan truck that he was driving had spun around in the mud, and the foreman, Robert Shellhammer, called him a "f---ing liar" and that "I was f---ing dangerous, and that he would get me fired if it was the last thing he would do (Tr. 19, May 18, 1999). Coombe was asked at what speed he was, "on a general basis," told to drive, and he answered as follows: "[t]hey want you to drive as fastly as you can as long as you do it safely . . ." (sic) (Tr. 19, May 18, 1999).

John Downey, the President of the local union, who had worked for Reading for approximately 20 years until June 1998, indicated that in September 1998, at a grievance hearing that he attended it "c[a]me out" (Tr. 28, May 18, 1999) that Edward Mitchell, a truck driver employed by Reading, who alleged he was "forced" to drive a truck not in his classification, directed the following towards his supervisor: "you can s--- my d--- if you think I will drive that truck" (Tr. 29, May 18, 1999). According to Downey, Mitchell was not discharged by Reading

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[5]/ Dodds testified at the March 16, 1999 hearing.

[6]/ Goodman testified at the March 16, 1999 hearing.

for the use of this profanity, but instead was fired for refusing to perform a job task that was not in his classification. Downey stated that Mitchell was rehired the following day.

Downey testified that he was cursed at by Wapinski who used the following language: "you're a f----n committee man" (Tr. 30, May 18, 1999). According to Downey, on another occasion, Wapinski said to him as follows: "why don't [you] go get an f----ing job at the mall" (sic) (Tr. 31, May 18, 1999). Downey indicated that a meeting had been arranged between the Union and Reading to resolve the issue of cursing at the site.

Jay Berger testified that in his capacity as a UMW Executive Board Member, he has attended grievance hearings at the mine, and that it is "common" for profanity to be used at these hearings (Tr. 47, May 18, 1999).

B. Reading's Witnesses

Derrick, Shellhammer,[7] and Wapinski,[8] testified on behalf of Reading, that on the date at issue, the roads were slippery, that Bernardyn was going slower than the normal speed due to the road conditions, that Wapinski told him to get moving, that Wapinski stopped him a second time and told him that he was holding everything up, and that shortly thereafter Derrick informed him that he was being fired.

C. Discussion

Based on the essentially uncontroverted evidence I find that Bernardyn engaged in protected activities by driving at a speed consistent with the road conditions, and that Reading took action adverse to him by firing him. Moreover, due to the coincidence in time between Derrick's ordering Wapinski to stop Bernardyn twice for holding things up, and his (Derrick's) firing Bernardyn, I find that the Secretary has established that Bernardyn's termination by Reading was motivated, in some part, by his protected activities.

IV. Reading's Affirmative Defense

Reading presents an affirmative defense that, in essence, Bernardyn would have been fired in any event based on his unprotected activities, i.e., the use profanity over a CB radio, and the use of threatening language he directed at Wapinski.

It is the Secretary position, in contrast, that Reading has not established its affirmative defense. In support of its position, the Secretary cites the fact that there was no evidence

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[7]/ Shellhammer testified at the March 16, 1999 hearing.

[8]/ Wapinski testified at the March 16, 1999 hearing.

adduced that Bernardyn was warned concerning the use of profanity, that there was no evidence adduced that Reading had any company policy prohibiting swearing, that, according to the testimony of Coombes, Downey, and Berger, profanity was used at the mine by miners and management, and that, according to the testimony of Downey, on one occasion, a miner had directed profanity against a supervisor, but was not discharged by Reading.

On the other hand, Derrick testified that after he had directed Wapinski to stop Bernardyn a second time for driving too slow, and to meet him at the dump area, he (Derrick) had intended to transfer Bernardyn from his usual run, and put him instead on the coal run using a different truck. Derrick indicated that such a reassignment is not considered to be disciplinary, and he related four instances wherein he had reassigned individuals to other jobs after it had become apparent that they were not performing their original jobs satisfactorily.

Derrick asserted that his decision to terminate Bernardyn was based upon the fact that he heard Bernardyn use the following threatening language over the CB directed against Wapinski "I'll get the little f----r" (Tr. 90, March 16, 1999). He also indicated that there was no disparity between his decision to terminate Bernardyn for the use of profanity, and his decision to only give warnings to three other individuals who had used profanity directed against their foreman. He explained that Bernardyn, in contrast to these individuals, used language threatening a foreman over the CB radio, whereas the other three individuals did not use threatening language, and did not broadcast their profanity over the CB radio. Also, he noted that whereas these three individuals made a profane remark only once, Bernardyn used profanity "nonstop" (Tr. 71, May 18, 1999) for approximately 8-10 minutes.

In evaluating the evidence regarding the events at issue, I note that Bernardyn conceded that he did curse over the CB. Also, the Secretary did not impeach or call any witnesses to contradict or rebut Derrick's testimony that Bernardyn cursed "nonstop" over the CB radio for approximately 10 minutes, and used threatening language directed against Wapinsky, his supervisor.[9] I thus accept Derrick's testimony in these regards. Accordingly, I find credible Derrick's testimony that his decision to immediately terminate Bernardyn was made when Bernardyn cursed and threatened his supervisor over the CB. Hence, I thus find that Reading has established that its decision to immediately terminate Bernardyn would have been taken in either event based upon Bernardyn's unprotected activities, i.e., excessive profanity, and threatening profane language directed over the CB radio against his supervisor. I find that this decision by Derrick not to have been an unsound business decision of such a degree as to lead to an inference that it was pretextual.

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[9]/ Barnardyn was asked whether he threatened anybody on the CB and he answered as follows: "No. I never threatened anybody in my life." (Tr. 32, March 16, 1999). However, he did not testify on rebuttal to rebut Derrick's testimony regarding the specific words he used directed against Wapinski. It thus is reasonable to draw an inference that he used these words, but did not consider them to constitute a threat.

Therefore, for all the above reasons, I find that although the Secretary has established a prima facie case, Reading has prevailed in establishing its affirmative defense. I thus conclude that the Secretary has not prevailed in establishing that Barnardyn was discharged in violation of section 105(c) of the Act. Therefore, the Complaint shall be dismissed.

ORDER

It is **ORDERED** that the Order of Temporary Reinstatement, issued on March 19, 1999, (21 FMSHRC, supra) is hereby **DISSOLVED**. It is further **ORDERED** that the Complaint filed in this case shall be **DISMISSED,** and that this case shall be **DISMISSED**.

Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 28, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 98-109
Petitioner	:	A. C. No. 46-01318-04347
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	
Respondent	:	Robinson Run No. 95 Mine

DECISION

Appearances: Melonie J. McCall, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, on behalf of Petitioner;
Elizabeth S. Chamberlin, Esq., Consol Inc., Pittsburgh, Pennsylvania, on behalf of Respondent.

Before: Judge Melick

This case is before me upon a petition for civil penalty filed by the Secretary of Labor against the Consolidation Coal Company (Consol) pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, the "Act" alleging three violations of mandatory standards and seeking a civil penalty of $4,350.00 for those violations. The general issue before me is whether Consol committed the violations as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

At hearing the parties agreed to settle Citations No. 3322514 and 3495715 by reducing the civil penalty to $1,588.00. The proposed settlement was supplemented post-hearing and is acceptable under the criteria set forth in Section 110(i) of the Act. An order directing payment of the agreed penalty will be incorporated in this decision.

The citation remaining at issue, No. 3322516, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 360(a)(1) and charges as follows:

> An adequate preshift examination was not conducted on the Nos. 13 and 14 belt conveyers, in that two violations were issued on loose coal and float coal dust on these two belt conveyors. These conditions were very obvious and should have been reported or corrected. Citations No. 3322514 and 3322515 were issued for the loose coal and float coal dust. The mine examiner shall be instructed on the proper way to preshift the belt conveyors.

The cited standard, 30 C.F.R. § 75.360(a)(1), provides as follows:

> Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator shall make a preshift examination within 3 hours preceding the beginning of any shift during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the shift.

Inspector Walter Daniel of the Department of Labor's Mine Safety and Health Administration (MSHA) cited the underlying violative accumulations at the Robinson Run No. 95 Mine on April 14, 1998. The citations corresponding to those violations and the conditions cited therein are not disputed (Gov't Exhs. No. 2 and 3). The first of these underlying citations, No. 3322514, was issued at 6:10 p.m., on April 14, 1998 and alleges as follows:

> Loose coal and rock was allowed to accumulate under and in contact with the bottom belt under the tail piece in the 13D (O81) Section. Float coal dust had accumulated on the tail piece and structure of the tail piece. This was in an area of approximately 20 feet in length and 10 feet wide. The company's clean up plan was not being followed on this section.

The second citation, No. 3322515, was issued at 7:45 p.m., on the same date and alleges as follows:

> Loose coal was allowed to accumulate under, around and in contact with the bottom belt and bottom belt rollers at the 5 north No. 3 belt drive. The loose coal was in an area of approximately 45 feet in length, and 10 feet wide. The loose coal ranged from 1 inch to 12 inches in depth. The company's clean up plan was not being followed on this belt line.

It is not disputed that the failure to report hazardous conditions in the preshift examination report may constitute a violation of the cited standard. While acknowledging that the violative conditions existed at the time they were cited, i.e., at 6:10 p.m. at the 5 North No. 3 belt drive and at 7:45 p.m., near the 9D belt transfer and box check, Consol maintains that these violative conditions did not exist at the time of the preshift examination for the corresponding shift. In this regard, it is significant that the issuing inspector candidly acknowledged at hearing that he did not know how long the coal accumulations he cited at 6:10 p.m. and at 7:45 p.m. had been present nor how bad the conditions were when the preshift examiner conducted his examination.

The only direct evidence of conditions extant at the time of the relevant preshift examination is the first-hand observation of the examiner himself, Ray Oldaker. Oldaker has significant mining experience and has worked at the Robinson Run Mine for 27 years. On April 14, 1998, he was foreman in charge of all the mine's belts. He has been performing

preshift examinations since 1975 and has never been charged with performing an inadequate examination. Oldaker's reputation as an extremely conscientious mine examiner is also unchallenged. His reports of preshift examinations also appear to be clear, detailed and meticulous (See Oldaker's reports in Resp.'s Exh. No. 2). In particular, his report of the preshift examination at issue in this case conducted between 1:00 p.m. and 3:30 p.m., on April 19, 1998, cites a number of hazardous conditions including apparent accumulations in areas other than those subsequently cited by Inspector Daniel in this case. These factors serve to underscore Oldaker's credibility.

Oldaker began the preshift examination for the oncoming shift on April 14, 1998, at 1:30 p.m. At the transfer point at the 100 crosscut, he stopped to talk with belt cleaner Jody Dodd. Dodd had then finished cleaning this area which was the same area as cited in Citation No. 3322514 and referenced by inspector Daniel in the citation at bar. (See Gov't Exh. No. 2). Oldaker testified credibly that the area was then clean. There was no accumulation of coal spillage or coal dust. As he proceeded with his examination he found an area of unrelated coal spillage. He reported this in the preshift examiner's report as located between the No. 87 and No. 92 blocks (See Resp.'s Exh. No. 2).

Oldaker testified that he then proceeded to the box check at the 9D location where he saw no hazardous conditions. He did observe at that time, however, two garbage bags containing used rock dust bags nearby. The practice at the mine was to fill the garbage bags with the rock dust bags before removing them from the mine. He did not report these two bags as he did not find them to be hazardous. The Secretary likewise does not consider these bags to have been hazardous. Oldaker saw no rollers in coal spillage nor rock dust bags in contact with rollers at this location. The rollers at that location also are situated three feet off the floor. I find Oldaker's testimony credible and conclude that, indeed, the hazardous conditions found and later cited by Inspector Daniel were not present at the time of Oldaker's pre-shift exam.

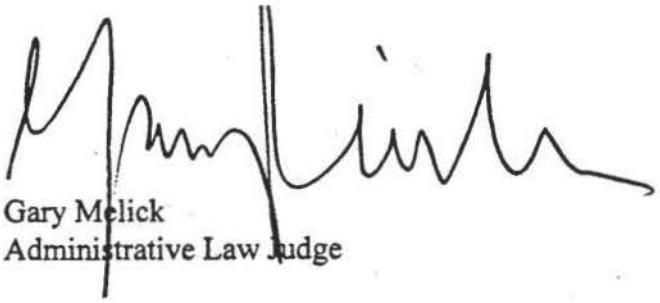
As Consol notes the most likely source of the cited accumulations was the coal spill at the 5 North, No. 3 belt drive which occurred at about 2:30 p.m. - - well after Oldaker's examination of the area. In addition, the area of the accumulation at the 9D box check was an area of high turbulence where float coal dust, fine coal and rock dust bags were continually blown off of the belt. Finally, it is undisputed that coal had been transported from four continuous miner sections and a longwall section by the conveyor belt through this area between the time of the preshift exam and the inspector's observations. I find that, indeed, these factors most likely account for the buildup of accumulations after the preshift exam.

Under all the circumstances, I find that the conditions cited by Inspector Daniel at 6:10 p.m. and at 7:45 p.m. on April 14, 1998, did not exist at the time of Oldaker's preshift examination. Citation No. 3322516 must accordingly be vacated. In reaching this conclusion I have not disregarded the testimony of union walkaround Joseph Spadafore. Spadafore accompanied Inspector Daniel during the subject inspection. While recognizing his long underground mining experience, his conclusion that it had taken several days or eight or nine shifts for the cited coal dust, etc. to accumulate, is without adequate foundation. Indeed, his

conclusion appears to be based on nothing more than conjecture and speculation and therefore is entitled to but little weight.

ORDER

Citation Nos. 3395715 and 3322516 are affirmed as modified and Consolidation Coal Company Inc. is directed to pay civil penalties of $794.00 for each of the violations charged therein within 40 days of the date of this decision. Citation No. 3322516 is hereby vacated.



Gary Melick
Administrative Law Judge

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ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

July 2, 1999

DISCIPLINARY PROCEEDING : Docket No. D 99-1

APPLICATION FOR APPOINTMENT OF PROSECUTOR

This disciplinary matter was assigned to me on June 10, 1999, for hearing and decision, pursuant to the June 9, 1999, order of the Commission. It arose out of a referral for disciplinary proceedings by the Secretary of Labor.

On June 16, 1999, a Prehearing Order was issued to the parties receiving the Commission's order. On June 24, 1999, a response was received from counsel for the Secretary stating that: "[T]he role of the Department of Labor in this matter was limited to forwarding to the Commission information that may warrant disciplinary proceedings against Ms. Prater so that the Commission can [*sic*] take appropriate action. . . . The Department is not a party to these proceedings and does not expect to participate at the hearing in this matter." A copy of the response is attached to this application.

With the withdrawal of the Secretary, there is no one to represent the interests of the Commission in insuring that individuals practicing before it "conform to the standards of ethical conduct required of practitioners in the courts of the United States." 29 C.F.R. § 2700.80(a). Commission Rule 80(c), 29 C.F.R. § 2700,80(c), provides that the Commission "may designate counsel to prosecute the matter before the Judge."

Accordingly, application is made to the Commission for the appointment of counsel to prosecute this matter at the hearing.

T. Todd Hodgdon
Administrative Law Judge

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

DISCIPLINARY PROCEEDING	)	**Docket No. D99-1**

RESPONSE TO PREHEARING ORDER

On April 13, 1999, on behalf of the Mine Safety and Health Administration, the U.S. Department of Labor, Office of the Solicitor, referred Connie Prater for disciplinary proceedings pursuant to 29 CFR § 2700.80(c)(1). That provision states

> ... [A] Judge or other person having knowledge of circumstances that may warrant disciplinary proceedings against an individual who is practicing or has practiced before the Commission shall forward to the Commission for action such information in the form of a written disciplinary referral. . .

Thus, the role of the Department of Labor in this matter was limited to forwarding to the Commission information that may warrant disciplinary proceedings against Ms. Prater so that the Commission can take appropriate action. Attached to the referral was all of the information the Department has regarding this matter. The Department is not a party to these proceedings and does not expect to participate at the hearing in this matter.

Respectfully submitted,

HENRY L. SOLANO
Solicitor of Labor

Edward P. Clair
Associate Solicitor

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SHEILA K. CRONAN
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **RESPONSE TO PREHEARING ORDER** was mailed this 23rd day of June, 1999, to:

David J. Farber, Esq.
Patton Boggs, L.L.P.
2550 M Street, N.W.
Washington, D.C. 20037

Sheila K. Cronan

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868

July 15, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-263-M
Petitioner	:	A. C. No. 45-03086-05511
	:	
v.	:	
GOOD CONSTRUCTION,	:	Good Portable Crusher
Respondent	:	

ORDER TO REOPEN
ORDER TO SUBMIT PENALTY PETITION

This case is before me pursuant to order of the Commission dated June 21, 1999.

The instant matter involves one alleged violation. In a letter received on May 4, 1999, the operator seeks to reopen this case on the ground that it did not receive notice of the proposed penalty assessment.

On October 21, 1997, MSHA issued five citations to the operator. MSHA proposed penalties for four of the violations, which the operator timely contested and which are contained in Docket Nos. WEST 98-139-M and WEST 98-178-M. These dockets were assigned to Administrative Law Judge Richard Manning, who held a hearing on January 6, 1999, and issued a decision on February 17, 1999.

On December 7, 1998, MSHA proposed a penalty for the violation in this case and mailed the proposal by certified mail to the operator on that date. The proposed assessment was returned to MSHA with the envelope marked "unclaimed". The operator has provided a copy of the envelope which shows that the operator was notified of the certified mail on December 16 and 21, 1998, and that on December 26, 1998, the notification was returned marked unclaimed. The operator states that it was not until February 24, 1999, that it realized a penalty had been assessed when it received a demand letter from MSHA. The address on the demand letter and returned envelope are the same.

On June 29, 1999, I issued an order directing the operator to explain why it failed to accept the certified mail notifications from the post office. In that order I held that service in this case by certified mail with at least two attempted deliveries was adequate.

On July 12, 1999, the operator filed its response to the June 29 order. The operator states that its office is located in a rural area 8 miles from the nearest post office. The operator states that it received the first notice but due to a heavy snow storm was unable to reach the post office

for several days. By the time the operator was able to get to the post office the assessment package had been returned.

I accept the operator's representations and find that the operator has satisfied the requirements of Rule 60(b)(1). I further note that as stated in the Commission's June 21 order, the Secretary does not object to operator's motion for relief. Therefore, this case should be reopened.

In light of the foregoing, it is **ORDERED** that this case is hereby **REOPENED**.

It is further **ORDERED** that the Solicitor file a penalty petition within 45 days of the date of this order.

Paul Merlin
Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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July 28, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 99-24-M
Petitioner	:	A. C. No. 30-02863-05501 8UQ
v.	:	
	:	West Bloomfield Mine
ROOT NEAL & COMPANY,	:	
Respondent	:	

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION TO COMPEL

I. Background

This civil penalty proceeding is being brought by the Secretary against Root Neal & Company (Root Neal), a contractor of Elam Sand & Gravel Corporation (Elam). This matter is scheduled for hearing on August 3, 1999, in Rochester, New York.

The case concerns an accident that occurred on May 9, 1998, wherein Michael Corbin, an Elam employee, sustained serious injuries to his arms and back. The accident occurred when Corbin was struck by a descending loader bucket of a Caterpillar 966F. At the time of the accident, Corbin was engaged in mounting a bucket scale on the Caterpillar loader with Root Neal employees Frank Pluta and John Wall. The May 26, 1998, accident report prepared by Mine Safety and Health (MSHA) Inspector William L. Korben, Jr., reflects that Elam's superintendent Alan "Jody" Randolph assigned Corbin to assist Pluta and Wall because of Corbin's welding experience. A copy of the May 26, 1998, accident report was provided to the respondent by the Secretary on July 23, 1999.

On July 26, 1999, the Secretary filed her Response and Objections to Interrogatories posed by the respondent. In response to Interrogatory No. 4 requesting the identity of all persons who had personal knowledge of the circumstances surrounding the accident, the Secretary identified David Spallina, Elam's President, Corbin, Randolph, Wall and Pluta as individuals having first hand knowledge. On July 26, 1999, the Secretary also filed her witness exchange list reflecting that she had advised the respondent that her intended witnesses included Spallina, Randolph, and Corbin.

Under Rule 56(b), 29 C.F.R. § 2700.56(b), and Rule 26(b)(1) of the Federal Rules of Civil Procedure, all relevant material not privileged is subject to discovery. The Commission and the Federal Courts have broadly construed the discovery rule with respect to what is relevant material, and have, conversely, narrowly construed the claim of privilege. *Hickman v. Taylor*, 329 U.S. 495 (1947); *Secretary/Logan v. Bright Coal Co., Inc.*, 6 FMSHRC 2520 (1984). The burden of persuasion rests with the party asserting the privilege. Even if a privilege is properly asserted, it remains qualified. Thus, the material may be subject to discovery upon a showing by the party seeking disclosure that there is a "substantial need" for the material and that a failure to disclose would impose an "undue hardship." *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957); *Consolidation Coal Company*, 19 FMSHRC 1239, 1243 (July 1997) (Citations omitted); Fed R. Civ. P. 26(b)(3)..

II. The Asserted Privileges

The Secretary seeks to protect from disclosure fourteen documents based on assertions that these documents are protected by the informant's privilege, the work product privilege and the deliberative process privilege.

A. The Informant's Privilege

The Commission discussed the history and substance of the informant's privilege in *Secretary of Labor o/b/o Donald L. Gregory, et al v. Thunder Basin Coal Company,* 15 FMSHRC 2228, 2234 (November 1993). The Commission stated:

> Commission Procedural Rule 61, . . . 29 C.F.R. § 2700.61, provides that, "except in extraordinary circumstances," a judge "shall not . . . disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner." The informant's privilege is based on the Supreme Court's discussion in *Roviaro v. United States*, 353 U.S. 53 (1957). The informant's privilege is the right of the government to withdraw from disclosure the identity of persons furnishing information on violations of the law to law enforcement officials. *Bright,* 6 FMSHRC at 2522-23. In general, the privilege protects against the disclosure of an informant's identity and against the release of those portions of written statements that could reveal an informant's identity. The Commission has emphasized — and all parties to the present proceeding agree — that the privilege is qualified. Where disclosure is essential to the fair determination of a case, the privilege must yield or the case may be dismissed. *Bright,* 6 FMSHRC at 2523. (Emphasis added).

Thus, the informant's privilege protects the identity of an anonymous informant. Although the Secretary is not seeking to protect information provided to MSHA by Root Neal employees Wall and Pluta, the Secretary seeks to protect, based on the informant's privilege, any statements that may have been provided to MSHA by Corbin, the victim of the accident, as well

as any statement by Randolph and Spallina. Thus, in essence, the Secretary argues she may invoke the informant's privilege to protect from disclosure any written statement provided to MSHA investigators even if the operator knows an individual has provided information to MSHA and the individual has no expectation of anonymity.

However, the informant's privilege is not intended to protect the content of statements given to government officials unless that content discloses a confidential informant's identity. Here, the respondent knows that Corbin, Randolph and Spallina have first hand knowledge of the facts surrounding the accident. Surely the Secretary does not claim that the respondent is unaware that the accident victim has been a source of MSHA's information. Rather, Corbin, Randolph and Spallina are well known to the respondent as individuals that have provided MSHA with important information. In fact, they have been identified by the Secretary in her answers to interrogatories and in her list of intended witnesses. In this regard, the Commission has concluded a claim of informant's privilege does not lie where there is an express identification of the individual alleged to be an informant. *Thunder Basin,* 15 FMSHRC at 2236. Accordingly, as noted below, statements by Corbin, Randolph and Spallina, or, summaries of information provided by Corbin, Randolph and Spallina in MSHA investigative reports, are not protected by the informant's privilege.

B. The Work Product Privilege

The work-product privilege has been codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure. In *ASARCO, Inc.,* 12 FMSHRC 2548 (December 1990), the Commission discussed the work-product privilege, stating:

> In order to be protected by this immunity under [Rule] 26(b)(3), the material sought in discovery must be:
>
> 1. documents and tangible things;
>
> 2. prepared in anticipation of litigation or for trial; and
>
> 3. by or for another party or by or for that party's representative.
>
> It is not required that the document be prepared by or for an attorney. If materials meet the tests set forth above, they are subject to discovery 'only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.' If the court orders that the materials be produced because the required showing has been made, the court is then required to 'protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.' *Id.* at 2558 (citations omitted).

> The burden of satisfying the three-part test is on the party seeking to invoke the work-product privilege, but once that party has met its burden, the burden shifts to the party seeking disclosure to make a requisite showing that there is substantial need and undue hardship to overcome the privilege. *P. & B Marina, Ltd. Partnership v. Logrande,* 136. F.R.D. 50, 57 (E.D.N.Y. 1991), aff'd, 983 F.2d 1047 (2d Cir. 1992).

It is clear that the investigative report and other documents sought to be protected under the work product privilege are "tangible documents" prepared "by or for the Secretary." The dispositive question concerning the applicability of the work product privilege is whether these documents were "prepared in anticipation of litigation or for trial." Whether these documents are privileged because they were prepared with litigation in mind must be based on the nature of the documents and the factual situation in each particular case. *ASARCO,* 12 FMSHRC at 2558.

> If the documents can fairly be said to have been prepared because of the prospect of litigation, then the documents are covered by the privilege. *Id. [citing* Wright & Miller, *Federal Practice and Procedure §* 2024 p.198-99 (1970)]. If, on the other hand, litigation is contemplated but the document was prepared in the ordinary course of business rather than for the purposes of litigation, it is not protected. *Id.* In addition, particular litigation must be contemplated at the time the document is prepared in order for the document to be protected. *Id. (*Emphasis added*).*

The Secretary seeks to protect substantial portions of MSHA November 17, 1998, 110(c) investigative report prepared by Special Investigator John S. Patterson. Although the 110(c) investigation did not result in any 110(c) charges being brought by the Secretary, the 110(c) investigation was conducted after the citations in issue had been issued in May 1998.

In *ASARCO* the Commission concluded that a portion of a 110(c) investigation was entitled to work product protection. However, the portion of the investigative report protected in *ASARCO* concerned notes made by an MSHA Special Investigator while interviewing an MSHA supervisory inspector in the presence of an attorney assigned to the Secretary's Solicitor's office. 12 FMSHRC at 2257. In contrast, here, the Secretary seeks to protect from disclosure investigative report summaries of information provided by individuals, who have now been identified by the Secretary as individuals with first hand knowledge, and who the Secretary intends to call as witnesses. The facts in this case are therefore distinguishable from *ASARCO.*

Moreover, even if the report was protected by the work product privilege, the respondent has a substantial need for statements made to investigators shortly after the subject accident occurred by individuals with first hand knowledge. *See Consolidation Coal*, 19 FMSHRC at 1244, n.4. To deprive the respondent of such statements made following the accident by victim Corbin and his supervisor Randolph creates an undue hardship in the preparation of the respondent's case. Consequently, as noted below, with the exception of the MSHA investigator's conclusions that are entitled to protection under the deliberative process privilege, the portions of the 110(c) investigative report that have been redacted must be provided to the respondent in discovery.

C. The Deliberative Process Privilege

The Commission has defined the deliberative process privilege as one which "attaches to inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy." *In re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992 (June 1992) [*quoting Jordan v. United States Dep't of Justice*, 591 F.2d 753, 774 (D.C. Cir. 1978)]. "Protected by the privilege are 'pre-decisional' communications that are 'deliberative,' meaning that the communication 'must actually be related to the process by which policies are formulated.'" *Id.* (quoting 591 F.2d at 774) (emphasis omitted). Thus, the conclusions of the investigator in the 110(c) investigation report are "pre-decisional" in nature and protected by the deliberative process privilege.

D. The Miner Witness Privilege

Commission Rule 62, 29 C.F.R. § 2700.62, provides:

> A judge shall not, until two days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the judge to testify or whom a party expects to summon or call as a witness.

Application of this privilege is consistent with Congressional concern regarding the possibility of retaliation against miners who participate in enforcement proceedings brought by the Secretary pursuant to the Mine Act. *Bright,* 6 FMSHRC at 2524. However, the Secretary has waived this privilege with respect to Corbin and Randolph since they have been identified as intended witnesses. The miner witness privilege does not apply to David Spallina who is Elam's President.

III. Disposition of the Secretary's Privilege Claims

Document 1: Health and Safety Conference worksheet prepared by MSHA personnel. This document was prepared after the respondent notified MSHA that it was contesting the citations. Consequently, it is protected by the work product privilege.

Document 2: MSHA Special Assessment Recommendation Form. This document provides the basis, or lack thereof, for a special assessment. A respondent is then notified whether a special assessment is assessed. The document is prepared in the normal course of business whether or not a citation is contested. Moreover, this form provides for notification of the operator that a special assessment has been made. This form has previously not been accorded work product or deliberative process protection. *See ASARCO, Inc.*, 14 FMSHRC 1323, 1328-30 (August 1992). Accordingly, it is not privileged and must be disclosed.

Documents 3 through 8: These documents are redacted portions of the 110(c) investigation prepared by MSHA Special Investigator John S. Patterson on November 17. 1998, that contain factual material including information provided by Corbin and Randolph. These individuals have been identified by the Secretary as intended witnesses who have first hand knowledge of the accident. Thus, these witnesses lack the anonymous informant status that is a condition precedent to the informant's privilege. The nature of the investigative report is not entitled to work product protection as there is no evidence that it had been prepared after consultation with the Solicitor's office in contemplation of litigation. Even if these redacted portions were protected under the work product privilege, the need for the victim's statements and his supervisor's statements provided shortly after the accident outweighs the privileged nature of the investigator's summary of the information provide to him by these individuals. Depriving the respondent of the victim's recollection of the accident as reported to MSHA places an undue hardship with regard to the respondent's ability to prepare its case.

Document 9: This document is a redacted portion of MSHA's 110(c) investigation. The second paragraph which had been redacted concerns factual information and must be disclosed. The remaining portion of Document 9 deals with the conclusion and recommendation of the investigative inspector. Conclusions and recommendations are protected by the deliberative process privilege. Thus, the Secretary's privilege claim in Document 9 is granted in part and denied in part.

Document 10: This document is a redacted portion of the 110(c) investigation that identifies the individuals interviewed by the 110(c) investigator. The identity of all of these individuals has been provided by the Secretary in her witness exchange list and answers to interrogatories. Consequently, there is no informant's privilege. Thus, Document 10 must be disclosed.

Document 11: Document 11 contains portions of notes of the 110(c) investigator. They are deliberative in nature as they served as the basis for the 110(c) investigative report and conclusions. As such, they are entitled to deliberative process privilege protection.

Document 12: This document is an MSHA form entitled Possible Knowing/Willful Violation Review Form. It contains the opinions, conclusions and recommendations regarding whether 110(c) charges should be brought. It is deliberative in nature and entitled to deliberative process privilege protection.

Document 13 and 14: These documents are statements provided to MSHA by individuals who have been named as intended witnesses. Their identity has been provided to the respondent by the Secretary. Therefore, these statements are not entitled to protection under the informant's or miner witness privileges. Accordingly, copies of these statements must be provided to the respondent.

ORDER

Consistent with the above discussion, **IT IS ORDERED** that the respondent's motion to compel with respect to Document Nos. 2 through Document 8, Document No. 10, Document No. 13 and Document No. 14 **IS GRANTED**. The respondent's motion to compel with respect to Document No. 9 **IS GRANTED IN PART AND DENIED IN PART**.

IT IS FURTHER ORDERED, having provided the parties with a facsimile of this Order, and having advised the parties of the substance of this Order partially compelling disclosure during a conference call on the morning of July 27, 1999, that the Secretary provide copies of the above documents to the respondent no later than the close of business (5:00 p.m.) on July 28, 1999.

IT IS FURTHER ORDERED That the Secretary's request for a protective order with respect to Document No. 1, the conclusion and recommendation portion of Document No. 9, Document 11 and Document 12 **IS GRANTED**.

Jerold Feldman
Administrative Law Judge

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