JULY 2001

COMMISSION DECISION

ADMINISTRATIVE LAW JUDGE DECISIONS

ADMINISTRATIVE LAW JUDGE ORDERS

JULY 2001

No case was filed in which review was granted during the month of July

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

Lue Wilson v. Sidco Minerals, Docket No. CENT 2000-87-DM. (Chief Judge Barbour, June 7, 2001)

Bryce Dolan v. F & E Erection Company, Docket No. CENT 97-24-DM. (Judge Feldman, June 11, 2001)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 31, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 99-17-M
LOPKE QUARRIES, INC.	:	

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

DECISION

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), the Commission granted cross petitions for discretionary review filed by the Secretary of Labor and Lopke Quarries, Inc. ("Lopke") challenging a decision by Administrative Law Judge T. Todd Hodgdon. 22 FMSHRC 899 (July 2000) (ALJ). Lopke challenges the judge's conclusions that it violated 30 C.F.R. § 56.11001, and that the violations were significant and substantial ("S&S") and due to unwarrantable failure. It also appeals the judge's penalty assessment for its alleged violations of section 56.11001. The Secretary challenges the judge's determination that Lopke did not violate 30 C.F.R. §§ 56.14100(b) and 56.14101(a)(2). For the following reasons, we affirm the judge's decision.

I.

Factual and Procedural Background

Lopke operates portable rock crushing plants at various locations throughout the eastern United States, including the Low Moor Mine near Covington, Virginia, owned by Vulcan Materials. 22 FMSHRC at 899. Lopke began operating at Low Moor in November 1997 and increased the size of its plant in April 1998. *Id.* The plant consists of machines that crush rock, which is then transported by conveyor belts and deposited in discrete piles depending on the size

of rock. *Id.* Front-end loaders move the rock from the piles below the conveyor belts to the area where it is stored for delivery. *Id.*

Joe Spitzer began working for Lopke in January 1998 as a superintendent of its Low Moor plant. *Id.* During Spitzer's tenure at Low Moor, the plant was not able to produce enough crushed stone to meet Lopke's expectations. *Id.* at 899-900. In early May 1998, Lopke sent superintendents Peter Lockwood and Joe McCormack to assist Spitzer in meeting production standards at the plant. *Id.* at 900.

On May 15, 1998, superintendent Lockwood was injured on the site. *Id.* James E. Goodale, an inspector for the Department of Labor's Mine Safety and Health Administration ("MSHA"), was sent to the mine to investigate the accident. *Id.* After the investigation, Inspector Goodale returned to the mine on May 20, 1998, to conduct a regular inspection. *Id.* Based on this inspection, he issued 14 citations or orders to Lopke. *Id.* The company contested nine of the orders and citations at a hearing before Judge Hodgdon, including the five orders and citations under review. *Id.*

II.

Lopke's Petition for Discretionary Review
(Citation No. 7713973 and Order Nos. 7713974 and 7713975)

The Low Moor Mine utilized three conveyor belts, the 57's belt, the Fines Stacker belt, and the 8's belt. 22 FMSHRC at 900-01. The 57's belt was 45 feet long and elevated approximately 4 to 15 feet above ground level. *Id.* The Fines Stacker belt was 80 feet long and elevated approximately 4 to 18 feet above ground level. Gov't Ex. 5. The 8's belt was 50 feet long and elevated approximately 4 to 18 feet above ground level. Gov't Ex. 6. During the May 20 inspection, superintendent Spitzer told Inspector Goodale that, in order to service the conveyor belts, he and other miners walked up the belts without using fall protection equipment. 22 FMSHRC at 901. He also told the inspector that the belts had to be serviced at least once a week. Tr. 121. The inspector issued Citation No. 7713973 and Order Nos. 7713974 and 7713975 alleging violations of section 56.11001 as to each belt. Section 56.11001 provides: "Safe means of access shall be provided and maintained to all working places."

The judge concluded that Lopke violated section 56.11001 by failing to provide safe access to the three conveyor belts. 22 FMSHRC at 903. In making his determination, he credited Spitzer's testimony that Spitzer and other miners walked up the belts to service them without using fall protection equipment. *Id.* at 902. The judge determined that the three violations were S&S and due to the operator's unwarrantable failure. *Id.* at 904-05. He assessed a $7,000 penalty for each violation, in part because they involved a serious level of gravity and were due to the operator's high negligence. *Id.* at 913.

Lopke argues that it did not violate section 56.11001 because it provided a safe means of

access by making a safety harness available to miners for use when servicing the belts. L. Br. at 5-7. It contends that the judge erred in crediting Spitzer's testimony and that substantial evidence does not support the judge's determination that it violated section 56.11001. *Id.* at 9-16. Lopke asserts that the judge failed in his S&S analysis to consider whether there was "a reasonable likelihood that the hazard contributed to will result in an injury." *Id.* at 22. The operator argues that the judge erred in his unwarrantability analysis by focusing solely on Spitzer's involvement as a supervisor in the violations, and by failing to consider that safe means of access were available to miners. *Id.* at 16-20. The operator further asserts that the judge erred in his penalty assessments because he assigned too much weight to the gravity and negligence criteria. *Id.* at 23.

The Secretary responds that the judge correctly determined that Lopke violated section 56.1101 because it failed to ensure that a means of access to the belts was made safe. Sec'y Resp. Br. at 7-11, 13-16. She asserts that Lopke's argument — that the standard only requires operators to provide a means of safe access but does not require them to ensure that a safe means of access is used — is not before the Commission because it was not raised below. *Id.* at 13. The Secretary argues that the judge considered all the relevant factors in his S&S analysis and that his unwarrantable determination is supported by record evidence. *Id.* at 24, 31 & n.14. She further argues that the judge considered the relevant criteria in his penalty assessment, and that his findings are supported by the record. *Id.* at 34-35.

A. Violation of Section 56.11001

While Lopke and the Secretary focus their arguments on the meaning of the term "provided" in section 56.11001, they pay little attention to the standard's requirement that safe means of access must also be "maintained."[1] We conclude that Lopke violated the standard because it failed to maintain safe access to the belts.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). The term "maintained" is not defined in the regulation. However, it is defined in *Webster's Third New International*

[1] We disagree with the Secretary's assertion that Lopke's argument — that the standard only requires an operator to make a safe means of access available but does not require it to ensure it is used — is not before the Commission because it was not raised below. In its post-hearing brief, Lopke argued that it did not violate the standard because it made a safe means of access available to miners servicing the belts. L. Post-Hr'g Br. at 10-11. Thus, the judge had an opportunity to pass on the issue. *Cf. Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992) (declining to consider "theory upon which the judge was not afforded an opportunity to pass.").

Dictionary 1362 (1993) as to "uphold," "keep up," "continue," or "preserve from failure or decline."[2] Based on this plain meaning of "maintained" in section 56.11001, we conclude that the standard requires an operator to uphold, keep up, continue, or preserve the safe means of access it has provided to a working place. The inclusion of the word "maintain" in the standard thus incorporates an on-going responsibility on the part of the operator to ensure that a means of safe access is utilized, as opposed to a purely passive approach in which an operator initially provides safe access and then has absolutely no further obligation.[3]

We turn next to the issue of whether substantial evidence[4] supports the judge's determination that Lopke violated the standard for Citation No. 7713973 and Order Nos. 7713974 and 7713975. We reject Lopke's argument that the judge erred in crediting Spitzer's testimony that he and other miners serviced the belts by walking up them without fall protection equipment.[5] The operator argues that the judge failed to consider evidence that Spitzer overestimated how frequently the belts were serviced. L. Br. at 10-13. Lopke argues that

---

[2] In the absence of an express regulatory definition or an indication that the drafters intended a technical usage, the Commission has relied on the ordinary meaning of the word construed. *Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd*, 111 F.3d 963 (D.C. Cir. 1997) (mem).

[3] This conclusion is consistent with our analysis in a recent decision, *Central Sand and Gravel Co.*, 23 FMSHRC 250 (Mar. 2001), in which the regulation at issue required that "[o]verhead high-potential powerlines shall be installed as specified by the National Electric Code" ("NEC"). 30 C.F.R. § 56.12045. The operator had argued that the word "installed" limited its obligation to comply with the NEC to the act of initially setting up power lines for use. 23 FMSHRC at 253. We refused to adopt this interpretation, holding instead that it was logical to interpret the standard to require that clearances from overhead powerlines be adhered to beyond the time of initial installation, and noted that the National Electric Safety Code ("NESC") requires that applicable clearances be "'maintained.'" *Id.* at 254. We emphasized that the term "installed" (like the word "maintained" in the regulation at issue here) "does not designate a limited, initial period of time during which the NEC applies. Rather, it is short hand for the constant vigilance that the NESC makes clear is appropriate . . . ." *Id.* at 255.

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

[5] As the judge noted, none of the witnesses, apart from Spitzer, were at the mine before early May 1998, so no one but Spitzer could testify directly about what happened at the mine prior to that time. 22 FMSHRC at 902.

Spitzer's testimony that the belts had to be walked up at least once a week is undermined because the 57's belt had a grease line installed which allowed it to be greased from the ground. L. Br. at 12. The judge noted that the 57's belt had a grease line installed, but determined that the belt gearbox and electric motor could not be serviced from the ground. 22 FMSHRC at 903 n.3. Spitzer also testified that, because grease lines often break, management required the 57's belt to be serviced by walking up it. Tr. 208-09. Jason Lewandrowski, the plant operator, testified that no one walked up the 57's belt to grease it, but on cross examination admitted that he had testified in his deposition that the 57's belt had to be walked up to grease it. Tr. 270, 284. In sum, we conclude that ample record evidence supports the judge's decision to credit Spitzer.

Nor are we persuaded by Lopke's assertion that the judge erred in crediting Spitzer's testimony because he failed to consider evidence that Spitzer was biased against the operator. The judge considered evidence that Spitzer was unhappy with his job, that the company was pressing him to increase production, and that Spitzer viewed Lockwood as his replacement. 22 FMSHRC at 902. He determined that the frustrations faced by Spitzer were common to mine superintendents. *Id.* The judge noted that only a month after Spitzer left his job with Lopke, the operator offered him a position as superintendent at another mine which he accepted. *Id.* The judge found it "hard to believe" that Spitzer would accept another position with Lopke if he felt animus toward the company or that the company would offer him another position if it believed he "had intentionally admitted to violations that did not occur." *Id.* The judge concluded that, based on "Spitzer's demeanor and manner while testifying[,] . . . it did not appear that he was dissembling, bore a grudge against Lopke, or was testifying untruthfully." *Id.* at 903. The judge determined that Spitzer was a credible witness and gave "great weight to his testimony." *Id.*

Based on the foregoing, we find that the judge thoroughly analyzed the bias claim and set forth ample reasons for rejecting it and crediting Spitzer. The Commission does not lightly overturn a judge's credibility determinations, which are entitled to great weight. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd on other grounds sub nom Sec'y of Labor v. Keystone Coal Mining Corp.* 151 F.3d 1096 (D.C. Cir. 1998). We find no compelling reason to overturn the judge's decision to credit Spitzer.

Regarding Lopke's argument that it complied with section 56.11001 because it made the safety harness available to miners, we hold that the standard requires something more than simply making a safe means of access "available." At a minimum, the standard's requirement that operators "maintain" safe access to working places mandates that management officials utilize that access, and require other miners to do so. It is clear from Spitzer's credited testimony, however, that Lopke failed to take any measures to ensure that miners actually used the safety harness. Even its own superintendent, the person in charge of safety at the plant, accessed the belts without using the safety harness. He also allowed other miners to access the belts without using the safety harness. Consequently, we conclude that substantial evidence supports in result the judge's determination that Lopke violated section 56.11001. Accordingly, we affirm the judge's determination upholding Citation No. 7713973 and Order Nos. 7713974 and 7713975.

B. S&S

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

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

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria). An evaluation of the reasonable likelihood of injury should be made assuming continued normal mining operations. *See U.S. Steel Mining Co.*, 7 FMSHRC 1125, 1130 (Aug. 1985).

We agree with Lopke that the judge failed in his S&S analysis to apply the third *Mathies* factor concerning whether there was a reasonable likelihood that the hazard contributed to will result in an injury. Nevertheless, we affirm the judge's S&S determination because the record compels the conclusion that there existed a reasonable likelihood of an injury. The judge credited Spitzer's testimony that miners regularly walked up the belts without fall protection equipment. 22 FMSHRC at 901-02; Tr. 195-97, 199-200. It is undisputed that, when the inspector issued the citation and orders, the belts were not equipped with handrails or safety cables and that neither a man-lift nor a ladder was being used to access the heads of the belts. 22 FMSHRC at 901. It is also uncontroverted that the belts rose to a height of 15 to 18 feet above the ground and that the surface of the belts could become slippery because of dust and rain. Tr. 57, 60. Moreover, the operator did not refute the inspector's testimony that the belts swayed when a miner walked up them and material on the belts could cause a miner to fall. Tr. 60. Inspector Goodale also testified that the practice of walking up the belts without fall protection would be likely to result in a fatality. Tr. 56-57. Finally, the judge in his civil penalty assessment also determined that "[w]alking up the conveyor belts without handrails or safety belts was highly risky." 22 FMSHRC at 913.

Lopke did not contest the judge's determinations on the other *Mathies* factors. Accordingly, we find that no remand is necessary and we affirm in result the judge's determination that the operator's violations of section 56.11001 were S&S.

C. Unwarrantable Failure

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) ("*R&P*"); *see also Buck Creek*, 52 F.3d at 136 (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353. Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998).

Regarding the duration of the violations, the judge considered in his unwarrantability analysis that the violations lasted several weeks. 22 FMSHRC at 905. Concerning the operator's knowledge of the violations, he noted that management knew that miners were walking up the belts without fall protection and that such actions were unsafe. *Id.* He also considered that Spitzer, Lopke's superintendent in charge of the operation, was directly involved in the violations.[6] *Id.*

---

[6] We reject Lopke's argument that the judge erred by failing to consider that Spitzer's behavior was "aberrational." L. Br. at 17. Several miners, not just Spitzer, walked up the belts without fall protection equipment. 22 FMSHRC at 905; Tr. 195-202, 205. Even if Spitzer had been the only miner to walk up the belts without fall protection equipment, as Lopke's superintendent, his actions would still constitute an aggravating factor. *REB Enters.*, 20 FMSHRC at 225.

In terms of abatement, the judge noted that, although management knew miners were using an unsafe means of access to service the belts, it did nothing to stop them. *Id.* He observed that Spitzer had suggested to higher management that handrails were needed on the belts (as handrails would have been an alternative means of complying with the safe access requirement). *Id.* The judge also considered that Vulcan, the company that hired Lopke to run the operation at the Low Moor Mine, had informed Lopke's management that handrails should be installed on the belts, but Lopke failed to act on that advice. *Id.* It is undisputed that Lopke did not install handrails on the belts until after the citations were issued. *Id.* at 901-02. Moreover, Lopke correctly points out that the judge did not consider whether the harness did, in fact, provide a safe means of access.[7] In his analysis of whether the operator violated section 56.11001, the judge merely determined that it was "questionable" whether using the safety harness was a safe means of access to the belts.[8] *Id.* at 903 n.2. Consequently, even if it had been properly utilized, it is unclear whether this would have constituted compliance with the standard. In any event, the existence of the safety harness would not have been a mitigating factor here because the credited evidence establishes that generally miners did not use the harness and, hence, this means of access was not maintained. Tr. 50-51, 56, 195-98.[9]

Given the record evidence establishing the existence of aggravating factors, we conclude that substantial evidence supports the judge's finding that Lopke's conduct was unwarrantable and, accordingly, affirm his finding.

---

[7] Although Lopke also asserts (L. Br. at 5) that it provided a second safe means of access to the belts because the belts could be lowered to the ground for servicing, there is no evidence that the belts were ever lowered to service them.

[8] Lopke's superintendent Lockwood testified that the harness provided miners servicing the belts with safe access, but Inspector Goodale testified that it was unlikely that the harness provided a safe means of access. Tr. 67-69, 312.

[9] Commissioner Beatty also believes that the judge erred by failing to consider the obviousness or danger posed by the violations. The record indicates that the belts were tall structures (up to 18 feet high) located outside and in clear view of the main area of the operation. *See* photographs at L. Ex. R-5 & R-6. A miner walking up to the top of the belts without fall protection would have been clearly and readily visible to those working nearby at the operation. This evidence compels the conclusion that the violations were obvious. With respect to the danger factor, the inspector testified that the danger posed by walking up the belts without fall protection was "falling off and striking ground level and dying." Tr. 53. Spitzer testified that the danger posed by the violations was "falling off and somebody getting hurt or killed." Tr. 209. The operator did not offer any testimony that servicing the belts without fall protection was safe. Given the testimony of the inspector and Spitzer, the height and conditions in which the miners had to walk to service the tops of the belts, as well as the judge's S&S finding, Commissioner Beatty believes that the evidence compels the conclusion that the violations posed a considerable danger to the miners.

D. Civil Penalties

Commission 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 penalty criteria set forth in section 110(i) and the deterrent purpose of the Act.[10] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The judge must make "[f]indings of fact on each of the statutory criteria [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg,* 5 FMSHRC at 292-93. Assessments "lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

The judge considered the six section 110(i) penalty criteria in his penalty assessment. 22 FMSHRC at 913. He determined that the proposed penalties would not adversely affect Lopke's ability to stay in business, that its operation at the Low Moor site was a small one, and that it was a small- to medium-sized company. *Id.* He found that Lopke's history of violations was relatively good and that it demonstrated good faith in rapidly abating the violations after citation. *Id.* He also determined that the violations involved high negligence because walking up the belts without fall protection equipment was "highly risky" and that the gravity of the violations was serious. *Id.*

Lopke's assertion that the judge erred in his penalty assessments by assigning undue weight to the negligence and gravity criteria is inconsistent with Commission precedent. Judges have discretion to assign different weight to the various factors, according to the circumstances of the case. *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997). The judge did not abuse his discretion by weighing Lopke's high negligence and the high gravity of its violations more heavily than he weighed the other penalty criteria. Accordingly, we affirm the judge's

---

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

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

30 U.S.C. § 820(i).

penalty assessments.

III.

Secretary's Petition for Discretionary Review

A. Order No. 7713976

During the May 20 inspection, Inspector Goodale examined a safety device connected to the driver's seat and seatbelt on a New Holland loader. 22 FMSHRC at 906. The safety device was intended to prevent the driver from being struck by the loader's bucket when he exited the driver's cage. *Id.* It was supposed to lock up the hydraulics of the loader so that its lift arms could not be raised or lowered or the loader moved when the driver stood up. *Id.* It was located out of sight under the driver's seat. *Id.*

The inspector discovered that the safety device was not functional because its wires were broken. *Id.* He testified that such a safety device was not required by MSHA's regulations and that there were signs posted on the arms of the driver's cage warning the driver not to get out of the cage without turning the loader off. *Id.* at 907. Nevertheless, because the safety device was defective, the inspector issued Order No. 7713976 to Lopke for violating section 56.14100(b), which provides: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner . . . ."

The judge determined that the defect affected safety but that no one at the mine was aware that the loader had such a device or that it was defective. 22 FMSHRC at 906-07. He concluded that, to determine whether the operator failed to correct the defect in a timely manner, it is necessary to ascertain when the operator first knew about the defect. *Id.* at 907. Because the operator had no knowledge of the defect, the judge determined that there was no evidence to show that the operator failed to correct it in a timely manner. *Id.* Thus, the judge concluded that the Secretary failed to establish that Lopke violated the standard and he vacated the order. *Id.*

The Secretary argues that section 56.14100(b) is not limited to situations where an operator knows about a defect. Sec'y PDR at 6-7.[11] She maintains that the judge's conclusion that the standard requires the operator to know about the defect discourages operators from being knowledgeable about their equipment. *Id.* at 7. The Secretary asserts that the judge also erred in concluding that the operator did not know about the existence of the safety device. *Id.* at 8. Lopke responds that, because there is no evidence of how long the defect existed, it cannot be determined whether Lopke failed to correct the defect in a timely manner as required by the standard. L. Resp. Br. at 5-6. Lopke argues that it could not have failed to repair the safety device in a timely manner because it did not know the defect existed. *Id.* at 7.

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

Whether the operator failed to correct the defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence.[12] The safety device on the loader may have been defective for only moments before it was discovered by the inspector, or it may have been defective for a considerably longer period. Because there is no evidence in the record indicating when the device became defective, we agree with the judge that the Secretary failed to establish that the defect was not corrected in a timely manner. Accordingly, we affirm his determination that Lopke did not violate section 56.14100(b).

B. Order No. 7713979

During the same inspection, Inspector Goodale tested the parking brake on a Dresser 555b front-end loader. 22 FMSHRC at 908. He tested it by instructing the driver to let the loader coast down an incline of approximately 12 to 14 percent from a stop. *Id.* When the loader was traveling at approximately three to five miles an hour, he told the driver to apply the parking brake but to not use the foot brake. *Id.* The inspector determined that the loader continued to travel down the incline at a slower rate after the parking brake was applied. *Id.* He then asked the driver to stop the loader by applying the foot brake, which the driver did. *Id.* The inspector repeated the test a second time with the same results. *Id.* Spitzer testified that he knew about a parking brake problem on the loader for about a week or a week and a half before the inspection. Tr. 99-100, 218.

The inspector issued Order No. 7713979 to the operator for violating section 56.14101(a)(2), which provides: "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." He determined that the violation was not S&S because the foot brake worked, but that it was due to unwarrantable failure because management, through superintendent Spitzer, knew about the defective brake but failed to correct it. Gov't Ex. 9; Tr. 98-100.

The judge determined that, instead of testing whether the loader's parking brake would "hold" the stationary loader on an incline as required under section 56.14101(a)(2), the inspector inappropriately tested whether the brake would "stop" the already moving loader on an incline. 22 FMSHRC at 908. He vacated the order against Lopke because the Secretary failed to establish that the parking brake would not hold the loader on an incline. *Id.* at 909.

The Secretary argues that the plain language of the standard does not require testing to show a violation. Sec'y PDR at 9. She asserts that, even if the inspector did not test the parking brake properly, management's admission that the parking brake was defective was sufficient to

---

[12] Lest an operator be tempted to remain ignorant of defective conditions, we note that Lopke was also cited for failing to inspect the loader before putting it into operation. 22 FMSHRC at 907.

support a finding that Lopke violated the standard. *Id.* at 9-12. Lopke responds that the judge properly determined that it did not violate section 56.14101(a)(2) because the Secretary failed to establish that the parking brake could not hold the loader on an incline. L. Resp. Br. at 15. Lopke asserts that, even if management knew beforehand that the parking brake needed "adjustment," this does not prove that it could not hold the loader on an incline. *Id.* at 16.

We reject the Secretary's argument that, regardless of the way the inspector tested the parking brake,[13] Lopke violated the standard because management knew beforehand that the parking brake was malfunctioning. The Secretary points out that superintendent Spitzer testified that he knew the parking brake was a problem a week to a week and a half before the inspection. In reference to the parking brake, Spitzer testified that "[s]ometimes it would work, sometimes it wouldn't. . . . Sometimes it would hold partially, sometimes it wouldn't. I don't believe it ever completely let loose and wouldn't hold at all." Tr. 218-19. The Secretary also cites to superintendent Lockwood's testimony to support her argument. He testified that two days before the inspection the parking brake required adjustments and that it was adjusted and cleaned before the inspection. Tr. 320-21. When asked if it worked after the adjustment "for some period of time," Lockwood testified that "[s]ometimes it did, sometimes it didn't." Tr. 321.

The testimony of Spitzer and Lockwood is simply unclear on the degree to which the parking brake was not functioning. For example, it is not clear from Lockwood's answer whether the parking brake worked but needed further minor adjustments or whether it sometimes did not work at all. It is also not clear from his testimony whether the subsequent problems with the parking brake after it was adjusted occurred before or after the inspection because Lockwood also testified that Lopke had problems with the parking brake after the inspection. Tr. 322. Certainly, neither Spitzer nor Lockwood testified that the parking brake would have failed to hold the loader "with its typical load on the maximum grade it travel[ed]." *See* 30 C.F.R. § 56.14101(a)(2). Accordingly, we conclude that substantial evidence supports the judge's finding that the Secretary did not prove the violation, and we affirm his decision to vacate the order.

[13] On review, the Secretary does not claim that the inspector's test showed that the parking brake violated the standard.

IV.

Conclusion

For the foregoing reasons, with respect to Citation No. 7713973 and Order Nos. 7713974 and 7713975, we affirm the judge's decision that Lopke violated section 56.11001 and that the violations were S&S and unwarrantable. We also affirm the judge's penalty assessments for these violations. In addition, we affirm the judge's decision vacating Order Nos. 7713976 and 7713979 on the ground that the Secretary did not prove that Lopke violated sections 56.14100(b) or 56.14101(a)(2), respectively.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Distribution

Jack Powasnik, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

R. Henry Moore, Esq.
Buchanan Ingersoll
One Oxford Centre
301 Grant St., 20th Floor
Pittsburgh, PA 15219-1410

Administrative Law Judge T. Todd Hodgdon
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 9, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-268-M
Petitioner	:	A.C. No. 23-01892-05543
v.	:	
	:	Docket No. CENT 2000-387-M
TABLE ROCK ASPHALT	:	A.C. No. 23-01892-05544
CONSTRUCTION, CO., INC.,	:	
Respondent	:	Docket No. CENT 2001-2-M
	:	A.C. No. 23-01892-05545
	:	
	:	Table Rock Quarry #3
	:	
	:	Docket No. CENT 2000-306-M
	:	A.C. No. 23-01836-05568
	:	
	:	Table Rock Quarry #1

DECISION

Appearances: Jennifer A. Casey, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Bradley S. Hiles, Esq., R. Lance Witcher, Esq., Blackwell Sanders Peper Martin, LLP, St. Louis, Missouri, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for assessment of civil penalties filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Table Rock Asphalt Construction Company, Inc. (Table Rock). The petitions sought to impose a total civil penalty of $2,055.00 for eleven alleged violations of the mandatory safety standards in 30 C.F.R. Part 57 of the Secretary's regulations governing underground mines. One of the cited S&S violations was attributed to Table Rock's alleged unwarrantable failure, six additional alleged violations were also designated as significant and substantial (S&S) in nature, and the remaining four cited conditions were characterized as non-S&S. These matters were heard from April 24 through April 26, 2001, in Branson, Missouri. The parties have filed thorough Proposed Findings of Fact and Conclusions of Law that have been considered in the disposition of these matters.

During the course of the hearing, the parties reached a settlement agreement with respect to Citation No. 7891486 in Docket No. CENT 2001-2-M wherein the citation was modified to delete the S&S designation. Consequently, Table Rock agreed to pay a reduced civil penalty of $55.00 rather than the $161.00 penalty initially proposed by the Secretary. (Tr. 97-98). The parties' settlement agreement was approved on the record. (Tr. 98). In addition, the Secretary moved to vacate non-S&S Citation No. 7891420 and S&S Citation No. 7891424 in Docket No. CENT 2000-268-M, and S&S 104(d)(1) Citation No. 7891409 alleging Table Rock's unwarrantable failure in Docket No. CENT 2000-387-M. (Tr. 303, 334). The Secretary's motion to vacate was also granted on the record. (Tr. 305, 335).

Thus, four alleged violative conditions designated as S&S and three alleged non-S&S violations remain in dispute. The Secretary seeks to impose a total civil penalty of $795.00 for these remaining seven citations.

I. Pertinent Case Law and Penalty Criteria

This decision applies the Commission's standards with respect to what constitutes a significant and substantial (S&S) violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (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 of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission explained its *Mathies* criteria as follows:

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

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

With respect to the imposition of penalties, this decision applies the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. In this regard, section 110(i) provides, in pertinent part:

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

Applying the statutory penalty criteria, Table Rock is a small mine operator that is subject to the jurisdiction of the Mine Act. Table Rock has a good compliance history in that the majority of violative conditions cited during the two year period preceding the issuance of the citations in issue were designated as non-S&S violations. It is not contended that the $2,055.00 civil penalty initially proposed by the Secretary will negatively impact Table Rock's ability to continue in business. Finally, Table Rock abated the cited conditions in a timely manner.

II. Findings and Conclusions

Table Rock operates two underground limestone facilities known as the Table Rock Quarry #1 located in Branson, Missouri, and the Table Rock Quarry #3 located in Kimberling, Missouri. Both quarries are considered small operations in that Table Rock employs less than ten employees at each location. Quarry operations are conducted on a single shift basis, each shift operating five days per week. Each mine uses a room and pillar mining method in which limestone is drilled and blasted in underground operations. The product is then brought to the surface by haul trucks where the material is crushed, sized and stockpiled for sale to customers. As underground mine facilities, each quarry is inspected by the Mine Safety and Health Administration (MSHA) four times per year.

Six of the outstanding citations in these proceedings were issued by MSHA Inspector Robert Capps as a consequence of inspections conducted in March and June 2000 Table Rock's #3 quarry. The remaining citation for disposition was issued by MSHA Inspector Jerry Hoskins at Table Rock's #1 quarry in April 2000. At the time these citations were issued, both inspectors were assigned to MSHA's Little Rock, Arkansas Field Office.

a. Citation Nos. 7891421 and 7891422 (Berms)
(Docket No. CENT 2000-268-M)

Capps arrived at Table Rock's #3 quarry on the morning of March 1, 2000, whereupon Capps conducted a pre-inspection conference with foreman Wyndell Carey. Capps proceeded on foot to inspect the underground operation where active mining was occurring. Capps was accompanied underground at various times by Carey, Jim David, who is Table Rock's assistant operations manager and safety director, and laborer Terry Bayliff.

Section 57.9300(b), 30 C.F.R. § 57.9300(b), requires, in pertinent part, where a risk of overturn exists, berms on haul roads ". . . shall be at least mid-axle height of the largest [vehicle] that *usually travels* the roadway (emphasis added)." As a preliminary matter, we must address the minimum mid-axle height required under the cited regulatory standard. Capps testified that haul trucks were the largest vehicle and the "primary vehicle" that "usually traveled" the haul roads. (Tr. 526, 566-67, 569, 580). In fact, Citation No. 7891421, one of the subject berm citations issued by Capps, notes that safe use of haul trucks are the focus of concern. (Gov. Ex. 14). The mid-axle height of Table Rock's haulage trucks is 18 inches. (Tr. 497, 580).

At the hearing, the Secretary suggested larger graders that occasionally are used to maintain the haul road, that have mid-axle heights of 24 to 30 inches, should govern the minimum berm height required by section 57.9300(b). (Tr. 480-81). The Secretary's attempt to raise the berm bar is contrary to well established law that, where a regulatory provision is clear, the terms of the provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning, or, unless such meaning would lead to an absurd result. *Rawl Sales & Processing Co.*, 23 FMSHRC 463, 466 (May 2001) (citations omitted). The plain meaning of the term "usually travels" in section 57.9300(b) dictates that the minimum berm height required by the standard. In this case the largest vehicle usually traveling the haul road is a haulage truck. Thus, the 18 inch mid-axle height of the haulage trucks governs the minimum berm height required by the safety standard.

After inspecting the underground areas, Capps, traveled the haul road alone in his own vehicle to inspect Table Rock's stockpiles. Capps noted the berm along the haul road was in "excellent shape" measuring ". . . [b]etween 36 to 48 inches. Three to four feet." (Tr. 473, 498, 586). Upon returning from the stockpiles in his vehicle via the haul road, Capps noted an area on the left side approximately half way up the mine exit roadway from the explosives magazines that was approximately 50 feet in length that was not provided with a berm of mid-axle height. Capps reportedly observed that part of the inadequate 50 feet berm area was approximately 10 inches in height and part of the area had no berm at all.

Capps testimony regarding whether he got out of his car and took actual measurements of the subject berm area was equivocal. (Tr. 503-04). Capps testified that, "I must have gotten out of my car and measured the height because I [was] specific [in the citation] about ten inches." (Tr. 503). Capps later testified that "[he] walked right up on [the berm]." (Tr. 516). At another

point in his testimony, Capps stated, "I didn't measure [the distance that was not adequately bermed], but I estimated it to be 50 feet in length." (Tr. 474). Significantly, Capps admitted he did not get out of his vehicle when he "eyeballed" the other 25 feet of allegedly inadequate berm he also cited that is discussed below. (Tr. 558). Capps did not take any photographs of the cited berm conditions. (Tr. 558). Since the berm area in issue was on the right side of Capps' car, if Capps had not left his vehicle, Capps would have had to look through the windshield and passenger window to observe the area from his vehicle. (Tr. 515-16).

As Capps continued driving the haul road from the stockpiles, Capps noted "a partial berm . . . not sufficient height to protect the operators of vehicles . . ." that was approximately 25 feet in length located at the final down hill section of the mine entrance elevated roadway. (Gov. Ex 15). Capps testified that he "eyeballed" the condition from his vehicle. (Tr. 558). He did not stop to take measurements of the height or length of the subject berm condition. (Tr. 515-16).

At approximately at 11:00 a.m., after traveling the haul road, Capps returned to talk to Carey and David. Capps told Carey there were two areas of berm that needed to be "brushed up." (Tr. 622-23). Capps told Carey the areas were located "halfway up the big hill on the right and at the bottom of the hill right where it turns and goes up." (Tr. 623). Capps also informed David that "a couple of berms needed freshened (sic) up." (Tr. 585). Both Carey and David concluded that Capps was not going to issue citations for the two berm areas discussed by Capps. Capps told Carey and David that he would complete his inspection of other mine areas and meet Carey and David at 1:00 p.m. for a close-out conference.

At the 1:00 p.m. meeting, Capps did not issue any citations or mention any violations. Capps testified that he "assumed" Carey and David understood the berm conditions were violations although he did not explicitly tell them they were violations, or, that he intended to issue citations. (Tr. 665-66).

After Capps left the mine on the afternoon of March 1, 2000, David drove up the haul road to observe the areas noted by Capps. David determined the berms were between 36 and 48 inches with the exception of the two areas that were between 20 and 24 inches. David explained that when you have 20 to 24 inches next to a four foot berm it may look deceivingly low. (Tr. 587-88). David testified he would have taken photographs and measured the berms if he knew Capps intended to cite the conditions as violations. (Tr. 589). Upon returning from the haul road, David instructed Carey to add material to the subject areas. Carey used a front-end loader to add material to two areas of the berms. Carey estimated these low areas were approximately 18 to 20 inches high. (Tr. 625-26). Bayliff also testified he did not observe any unusually low berm areas during his several trips on the haul road on March 1, 2000. (Tr. 654-56).

Capps returned to his hotel and wrote Citation Nos. 7891421 and 7891422 on the evening of March 1, 2000, citing alleged S&S violations of section 57.9300(b) of the mandatory safety standards for inadequate berms at the two locations discussed above. (Gov. Exs. 14, 15). Capps

returned to Table Rock's #3 quarry the following morning on March 2, 2000, whereupon Capps served the citations on Carey. Carey testified he was surprised to receive the citations because he thought Capps had determined that there had been a "clean inspection." (Tr. 634).

As a threshold matter, I note the Secretary has the burden of proving, by a preponderance of the evidence, that a violation of the cited mandatory safety standard has occurred. *Southern Ohio Coal Co.*, 14 FMSHRC 1781, 1785 (November 1992) (citations omitted). Viewing the testimony most favorably for the Secretary, at best, it is clear that Capps does not remember whether or not he took actual height measurements of the approximate 50 foot area of the berm cited in Citation No. 7891421. Applying the preponderance evidentiary standard, Capps' failure to recall casts doubt on the reliability of his testimony. Without Capps' representation that he measured the berm, the Secretary cannot establish that the berm was 10 inches in height or less. In this regard, absent actual measurements, I credit David's testimony that Capps may be mistaken because an 18 inch high berm area may look lower than it actually is when compared to adjacent 48 inch berm areas. Moreover, absent clear evidence of objective measurements, the Secretary has failed to rebut the testimony of David and Carey that the cited berm areas were at least 18 inches high. **Accordingly, Citation No. 7891421 shall be vacated.**

With respect to the 25 foot berm area cited in Citation No. 7891422, Capps admitted he did not measure this area and that he only observed this area from his vehicle. Consequently, consistent with the above discussion, **Citation No. 7891422 shall also be vacated.**

Having vacated these berm citations, I note, parenthetically, that it is regrettable that Capps did not clearly inform Table Rock of the alleged violative berm conditions during his March 1, 2000, inspection. Had he done so, if Table Rock had contested the alleged violative conditions, actual measurements and photographs undoubtedly would have been taken.

b. Citation No. 7891423 (Serviceable Fire Extinguishers)
(Docket No. CENT 2000-268-M)

As a result of his March 1, 2000, inspection of the underground areas of Table Rock's #3 quarry, Capps also issued Citation No. 7891423 for a significant and substantial violation of the mandatory safety standard in section 57.4200(b)(2), 30 C.F.R. § 57.4200(b)(2). The citation was issued because Table Rock "failed to provide a serviceable fire extinguisher at the ANFO blasting agent storage trailer located in the mined out underground area." (Gov. Ex. 16). It is undisputed that, although fire extinguishers were kept on the powder truck that was used to transport ANFO blasting material from the storage trailer to active mine areas, the nearest stationary fire extinguisher to the Ammonia Nitrate Fuel Oil (ANFO) blasting agent trailer was located approximately 200 feet away at the underground maintenance shop. Section 57.4200(b)(2) provides that on-site fire fighting equipment shall be "strategically located" and "readily accessible" although these terms are not defined in the Secretary's regulations.

In defending against the citation, Table Rock argues that the ANFO trailer is normally not accessed on foot. Rather, it is normally used by the blaster and his helper when they are loading ANFO from the trailer into the powder truck for transport to active areas of the mine. The powder truck is equipped with four fire extinguishers. In apparent recognition that the closest fire extinguisher to the ANFO trailer located 200 feet away does not satisfy the cited safety standard, Table Rock asserts the mobile fire extinguishers located on the powder truck constitute strategically located and readily accessible fire fighting equipment satisfying the standard.

The presence of mobile fire extinguishers may be a mitigating factor material to the reasonable likelihood of injury issue central to the S&S question. However, with respect to the fact of the violation, mobile fire extinguishers cannot satisfy the provisions of section 57.4200(b)(2) in circumstances, however infrequent, when individuals are in or around the blasting trailer when the powder truck is not present. In this regard, I do not find convincing Table Rock's contention that it intentionally does not provide fire extinguishers in close proximity to the blasting trailer in order to encourage personnel to evacuate rather than fight a fire in the vicinity of the trailer. Such a policy ignores the safety of maintenance shop personnel who may continue to go about their duties 200 feet away from the trailer while persons at the trailer high-tail-it out of the mine because they do not have the option of extinguishing a potentially explosive fire in its early stages. Accordingly, the Secretary's interpretation and application of the "strategically located" and "readily accessible" terms in section 57.4200(b)(2) to require fire extinguishers in the immediate vicinity of the blasting trailer are reasonable. Consequently, the undisputed facts support the conclusion that a violation of section 57.4200(b)(2) has occurred.

Turning to the significant and substantial issue, applying the *Mathies* criteria, it is apparent that the cited violation, *i.e.*, the failure to provide readily accessible stationary fire extinguishers, contributes to the discrete safety hazard of an inability to extinguish a fire. It is also obvious, given the ANFO trailer as the site of the potential hazard, that if a fire were to occur, serious, if not fatal injuries, will occur.

However, an S&S finding also requires a finding that it is reasonably likely that the hazard contributed to will result in an event, *i.e.*, a fire and explosion, in which there is a serious injury. *U.S. Steel*, 6 FMSHRC at 1836. The Secretary has failed to demonstrate ignition sources in the vicinity of the ANFO trailer that is located in an inactive area of the mine. Moreover, the presence of fire extinguishers on the powder truck is an additional factor that mitigates the likelihood of fire. Consequently, the Secretary has failed to demonstrate that serious injury was reasonably likely to occur.

Accordingly, **Citation No. 7891423 shall be modified to delete the significant and substantial designation**. In addition, given Table Rock's reasonable reliance on the mobile fire extinguishers that are normally present when the ANFO trailer is accessed, **the degree of negligence attributable to Table Rock shall be reduced from moderate to low**.

As previously noted, applying the statutory penalty criteria, Table Rock is a small mine operator without an extraordinary violation history. Table Rock abated the violation in a timely manner and the $184.00 initially proposed by the Secretary for Citation No. 7891423 will not impair its ability to continue in business. Given the reduction in Table Rock's degree of negligence and the reduction in the gravity of the cited non-S&S violation, **a civil penalty of $55.00 shall be imposed for Citation No. 7891423**.

c. Citation No. 7893052 (Magazine Ground Strap)
(Docket No. CENT 2000-306-M)

MSHA Inspector Jerry Hoskins conducted a routine inspection of Table Rock's Quarry #1 on April 11 and April 12, 2000. On April 12, 2000, Hoskins issued Citation No. 7893052 alleging a significant and substantial violation of section 57.6132(b), 30 C.F.R. § 57.6132(b). This mandatory safety standard requires that ". . . [m]etal magazines shall be equipped with electrical bonding connections between all conductive portions so the entire structure is at the same electrical potential . . . ." (Gov. Ex. 22). Citation No. 7893052 was issued after Hoskins observed a broken grounding strap on the door of the steel magazine housing detonator explosives, causing the door to be at different electrical potential than the magazine. The Secretary proffered a photograph of the broken grounding strap observed by Hoskins to support the alleged section 57.6132(b) violation. (Gov. Ex 23). Hoskins characterized the cited violation as significant and substantial because he believed the differing electrical potential caused by the broken strap could cause sparks when the magazine door was opened risking a possibility of ignition and explosion.

In its defense, Table Rock contends the citation should be vacated because Hoskins did not test the electrical potential with an Ohmmeter to verify the alleged differing electrical potential. In this regard, Table Rock speculates that the two four inch steel hinges that joined the magazine structure with its door was an alternative to the grounding strap that was an equally effective method of electrical bonding to ensure that equal electrical potential was maintained to prevent a source of ignition.

I am not persuaded by Table Rock's conjecture that the steel hinges provided adequate and effective electrical bonding. Such a theory is belied by the magazine manufacturer's design of a heavy duty grounding strap welded into the body of the magazine structure. (See photo in Gov. Ex. 23). Hoskins failure to take Ohmmeter readings does not constitute a flawed citation. If a grounding strap on a steel structure is severed, and no alternative methods of grounding have been installed to address the defective strap, it is reasonable to conclude, without further electrical testing, that the structure is not properly grounded. Consequently, the evidence supports the fact of occurrence of the cited violation in Citation No. 7893052.

With respect to the issue of S&S, Hoskins testified that sparks (heat) occurring as the magazine door was opened created by the unequal electrical potential could ignite the detonators. However, David testified, without contradiction, that the detonators stored in the cited magazine were electrical detonators requiring electricity to pass through the detonators completing a circuit. (tr. 769-72). In accordance with the shunting provisions in section 57.6401(a), 30 C.F.R. § 57.6401(a), the electric detonators were kept shunted until they were connected to an electrical blasting line. A shunt is a plastic fitting placed on the ends of the two detonating wires of each detonator to ensure that the wires remain separated and that they can not be activated. Hoskins could not recall whether the subject detonators were shunted. (Tr. 758).

Addressing the significant and substantial issue, applying the *Mathies* criteria, it is apparent that the cited violation, *i.e.*, the defective guarding strap creating the potential for disparate electrical potential, contributes to the discrete safety hazard of a magazine explosion. In such event, it is reasonably likely that serious injury will occur.

However, as previously discussed, an S&S finding also requires a finding that it is reasonably likely that the hazard contributed to will result in an event, *i.e.*, an explosion, in which there is a serious injury. The Secretary does not assert that explosives other than electric detonating caps were, or will be, stored in the subject magazine. Given the unrebutted testimony that the subject detonators were electrical and shunted, the Secretary's assertion that it is reasonably likely that a potential heat generating spark caused by unequal electrical potential will cause an explosion is unpersuasive. Significantly, the Secretary has not shown that heat caused by a spark poses a risk of igniting electrical detonators. The fact that the detonators are shunted makes such heat related ignition even more remote. Although the transmission of electricity from lightening striking the ungrounded metal structure may provide a significant source ignition, it can not be said that it is reasonably likely that lightening will strike the cited magazine. Given the remoteness of lightening striking, and the absence of evidence of any other significant sources of ignition, **Citation No. 7893052 shall be modified to delete the significant and substantial designation**.

Hoskins attributed this grounding violation to a moderate degree of negligence. The defect in the grounding strap prominently located on the front of an explosives magazine was readily apparent and should not have been ignored. Reliance on the door hinges as a means of grounding, as Table Rock appears to suggest, accentuates rather than mitigates its negligence. While grounding is an important safety precaution on any piece of equipment, its importance on an explosives magazine is self evident. Accordingly, in addition to deleting the S&S designation in **Citation No. 7893052**, the citation **shall be modified to reflect the cited violation was attributable to a high degree of negligence**. I have previously discussed the statutory penalty criteria as it applies to Table Rock. Given the increase in the degree of Table Rock's negligence, **a civil penalty of $100.00 shall be imposed for Citation No. 7893052**.

d. Citation Nos. 7891488, 7891489 and 7891490 (Return Roller Guarding) (Docket No. CENT 2001-2-M)

On June 19, 2000, Capps returned to Table Rock's #3 quarry to conduct another routine inspection. On the following day Capps issued Citation Nos. 7891488, 7891489 and 7891490 citing non-significant and substantial violations of the mandatory safety standard in section 57.14109, 30 C.F.R. § 57.14109. The cited conditions concerned three unguarded return rollers (idlers) on two different conveyors located in an area of the mine that was not frequently traveled. Specifically, Citation No. 7891488 cited a return roller under the jaw crusher that was located under the conveyor belt, 37 inches from the ground and five inches in from the outer perimeter of the conveyor's frame. The other two return rollers cited in Citation Nos. 7891489 and 7891490 were located under the impactor conveyor belts, 37 inches and 34 inches from the ground, respectively. Both impactor return rollers were located four inches from the outside of the conveyor frames. Section 57.14109, the mandatory safety standard initially cited, provides, in pertinent part, that "unguarded conveyors *next to travelways*" shall be equipped with railings to prevent persons from falling on or against the conveyor (emphasis added).

Citation Nos. 7891488, 7891489 and 7891490 were modified on December 12, 2000, to reflect the mandatory safety standard violated was section 57.14107(a), 30 C.F.R. § 57.14107(a), rather than section 57.14109. Capps testified that the citations were modified because the areas immediately surrounding the cited conveyor systems were not "travelways" as defined by the regulations.[1] (Tr. 134-35, 156). In fact, as previously noted, the subject areas are traveled infrequently.

Section 57.14107, the revised safety standard cited, provides:

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

(Emphasis added).

[1] Section 57.2, 30 C.F.R. § 57.2, defines "travelway" as ". . . a walk or way regularly used and designated for persons to go from one place to another."

Before addressing the validity of the subject guarding citations, it is instructive to examine the Commission's decision in *Thomas Brothers Coal Company*, 6 FMSHRC 2094 (September 1984) that addressed the purpose of section 77.400(a), a similar mandatory guarding standard governing coal mining. The Commission stated:

> We find the most logical construction of the standard is that it imports the concepts of *reasonable possibility of contact and injury*, including contact stemming from inadvertent stumbling or falling, momentary inattention or ordinary carelessness. Applying this test requires *taking into consideration all relevant exposure and injury variables*. For example, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis.

6 FMSHRC at 2097 (emphasis added).

Thus, as a general proposition, stumbling and inadvertent contact are the concerns that the guarding standard addresses. That is why 57.14107(b) exempts "moving parts [that] are at least seven feet away from walking or working surfaces," although such areas may be accessed by ladders. The standard is not intended to require moving parts to be guarded in order to prevent contact by personnel who may climb up to inaccessible areas, or, intentionally crawl, or reach, under inaccessible areas near ground level to perform maintenance. Under such circumstances, section 57.14105, 30 C.F.R. § 57.14105, requires maintenance of equipment to be performed only after the power is turned off and the equipment is blocked against motion. Moreover, guarding such inaccessible areas may require removing the guard to accomplish cleaning.

Turning to the facts of this case, Secretary's purported reliance on the inadvertent contact hazard caused by a trip and fall as the basis for applying the guarding standard is undermined by Capps' testimony. Capps conceded that moving parts can be functionally guarded solely by location if the moving part was covered by a belt and near ground level. (Tr. 112). Capps further admitted that the possibility of inadvertent contact with the cited rollers as a consequence of stumbling was "unlikely" ". . . partially because of the height and because of the fact of the location that [the rollers are] in, because it's normally a low-traffic area." (Tr. 113).

The remoteness of inadvertent exposure to the cited rollers is further demonstrated by Capps' testimony concerning the hazards created by contact with moving conveyors. Capps testified that there are pins in a conveyor belt's coupling system that could catch onto the clothing of an individual walking next to a conveyor belt. In such an event, the individual could become entangled in the moving belt and sustain serious injury. However, Capps conceded the protections contemplated by the provisions of section 57.14109, that require railings to prevent

persons from falling on or against a conveyor, do not apply to the cited conveyors because the possibility of contact is remote because the cited areas are not where people normally travel. (Tr. 157-58). Capps further admitted that inadvertent contact with the cited rollers, located 34 to 37 inches from the ground and covered by the conveyors, is even more remote than inadvertent contact with the belt. (Tr. 296-99).

Rather, it is clear that the Secretary's primary basis for seeking to apply section 57.14107(a) is the alleged hazard posed to clean-up personnel. In this regard Capps testified about people who could be drawn into the rollers while cleaning spillage around the cited rollers with shovels. (Tr. 115, 174). However, Capps stated he never observed any employees cleaning the cited areas with shovels, and he did not know if the roller areas were cleaned with shovels. (Tr. 136, 174, 177-78). Table Rock maintains that spillage in the vicinity of the cited areas is removed by using a scoop attached to a bobcat vehicle. The operator of the bobcat sits in a steel caged operator's cabin and is not exposed to the return rollers. (Tr. 207, 225, 228, 281-82, 286, 287).

The Secretary's concern for the safety of clean-up personnel as a basis for imposing the guarding requirements of section 57.14107(a) assumes that the subject areas under the conveyor will be cleaned manually without de-energizing the belt as required by section 57.14105. Such an assumption is a not an adequate basis for application of section 57.14107(a) in the current case.

While almost anything is possible, regardless of how remote, application of the guarding standard in this case is tantamount to requiring all moving parts, regardless of their lack of accessibility and their location in untraveled areas of the mine, to be guarded. If the Secretary wishes to pursue such a regulatory approach, she should do so through the notice and comment rulemaking process. However, the plain language of the regulatory standard currently only requires guarding of moving parts that, through inadvertence, "can cause injury." Here, the Secretary has failed to demonstrate that there is a *reasonable possibility* of inadvertent contact. *Thomas Brothers*, 6 FMSHRC at 2097. This conclusion is consistent with the Secretary's characterization of the alleged violations as not reasonably likely to cause injury (non S&S). While designating these alleged violations as non-S&S is not fatal to the Secretary's case, nevertheless, it is an implicit recognition of the degree of remoteness of the possibility of injury.

Finally, Table Rock had partially guarded the cited rollers with chain link material that hung approximately 18 inches from the conveyor frame, leaving approximately 18 inches of clearance from the ground. This 18 inch clearance allowed the bobcat scoop to clean under the cited conveyors. This chain link material further protected individuals from inadvertent contact. The Secretary suggests this partial guarding is an admission by Table Rock that guarding was required. (Tr. 122). Just as the Secretary is not estopped from citing the alleged violative conditions in these matters because they had not been cited by MSHA inspectors during prior inspections, so too, Table Rock is not estopped from denying liability because, in an abundance of caution, it elected to install partial guarding. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421 (June 1981); *accord Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416-17 (10th Cir. 1984). **Accordingly, Citation Nos. 7891488, 7891489 and 7891490 shall be vacated.**

ORDER

1. In view of the above, **IT IS ORDERED THAT** Citation Nos. 7891421, 7891422, 7891488, 7891489 AND 7891490 **ARE VACATED**.

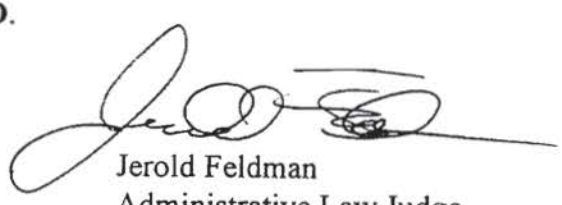
2. **IT IS FURTHER ORDERED THAT** Citation Nos. 7891423 and 7893052 **ARE MODIFIED** to delete the significant and substantial (S&S) designation. In addition, Citation No. 7891421 **IS MODIFIED** to reflect the cited violation is attributable to the respondent's low degree of negligence, and, Citation No. 7893052 **IS MODIFIED** to reflect the cited violation is attributable to the respondent's high degree of negligence.

3. **IT IS FURTHER ORDERED THAT** Table Rock Asphalt Construction Company, Inc., pay a civil penalty of $155.00.00 in satisfaction of Citation Nos. 7891423 and 7893052.

4. **IT IS FURTHER ORDERED THAT**, pursuant to the parties' agreement, Citation No. 7891486 **IS MODIFIED** to delete the significant and substantial (S&S) designation, and that Table Rock Asphalt Construction Company, Inc., pay a civil penalty of $55.00.00 in satisfaction of Citation No. 7891486.

5. **IT IS FURTHER ORDERED THAT**, consistent with the parties' agreement, Citation Nos. 7891420, 7891424 and 7891409 **ARE VACATED**.

6. **ACCORDINGLY, IT IS FURTHER ORDERED THAT** Table Rock Asphalt Construction Company, Inc., shall pay a total civil penalty of $210.00 within 45 days of the date of this decision. Upon timely receipt of payment, the civil penalty proceedings in Docket Nos. CENT 2000-268-M, CENT 2000-306-M, CENT 2000-387-M and CENT 2001-2-M **ARE DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution:

Jennifer Casey, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Bradley S. Hiles, Esq., R. Lance Witcher, Esq., Blackwell Sanders Peper Martin, LLP, 720 Olive Street, Suite 2400, St. Louis, MO 63101 (Certified Mail)

/hs

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

July 10, 2001

DYNATEC MINING CORPORATION, Contestant	:	EQUAL ACCESS TO JUSTICE PROCEEDING
	:	Docket No. EAJ 2001-3
v.	:	
	:	Formerly WEST 94-645-M
	:	Magma Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	ID. No. 02-00152 WJ6

DECISION

Before: Judge Manning

This case is before me on an Application for Award of Fees and Expenses under the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504 and 29 C.F.R. § 2704.100 *et seq*. Dynatec Mining Corporation ("Dynatec Mining") filed the application against the Department of Labor's Mine Safety and Health Administration ("MSHA") based on my decision in *Dynatec Mining Corporation*, 20 FMSHRC 1058 (Sept. 1998), as modified by the decision of the Commission at 23 FMSHRC 4 (Jan. 2001). MSHA issued one citation and 13 orders of withdrawal under section 104(d)(1) against Dynatec Mining following an accident at the Magma Mine in which four people died. I vacated six of these orders of withdrawal and reduced the total penalty on the remaining eight items from $300,000 to $90,000. On review, the Commission vacated six additional orders of withdrawal with the result that one citation and one order remained and the total penalty is $60,000. Dynatec appealed the Commission's decision upholding the remaining citation and order to the Court of Appeals for District of Columbia Circuit.

Dynatec Mining contends that it prevailed against MSHA because 12 of the 14 citation/orders were vacated and the Secretary's total proposed penalty was reduced from $700,000 to $60,000. The Secretary opposes Dynatec Mining's application in this case and moved to dismiss the application. For the reasons set forth below, I grant the Secretary's motion to dismiss this application on the grounds that Dynatec Mining is not an eligible party.

The EAJA limits recovery, as pertinent here, to "any . . . corporation . . . , the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated." 5 U.S.C. § 504(b)(1)(B). The Commission's regulation implementing this provision is at 29 C.F.R. § 2704.104. The Commission's regulation requires the aggregation of affiliates, as follows:

> The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. Any individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless the administrative law judge determines that such treatment would be unjust and contrary to the purposes of the Act in light of the actual relationship between affiliated entities.

29 C.F.R. § 2704.104(b)(2).

An applicant for an award of fees and expenses has the burden of establishing that it is an eligible party. Dynatec Mining argues it is eligible because it had a net worth of less than seven million dollars and fewer than 500 employees at the time it contested the MSHA citation and orders. It presented credible evidence to support its position. It contends that its net worth and number of employees should not be aggregated with that of its affiliates. The Secretary presented evidence to show that if the Commission's aggregation regulation is applied in this case, Dynatec Mining would not meet the EAJA eligibility requirements. Dynatec Mining did not present conflicting evidence on this issue. Consequently, for purposes of this decision, I find that if Dynatec Mining's corporate affiliates are considered when evaluating eligibility under section 2704.104, Dynatec Mining cannot be awarded fees and expenses under the EAJA because its net worth was greater than seven million dollars or it had more than 500 employees. I also find, based on the evidence presented by Dynatec Mining, that if the net worth and number of employees of its corporate affiliates are not considered, it would be an eligible party under the EAJA. Thus, this case raises issues concerning the application of the Commission's aggregation regulation and appears to be a case of first impression.

Dynatec Mining contends that the Commission's aggregation regulation is *ultra vires* because it conflicts with the plain and unambiguous language of the EAJA. It argues that the EAJA does not require or authorize the aggregation of affiliated corporations. Further, because the Commission's aggregation regulation changes the EAJA eligibility requirements, it is unlawful and cannot be used to determine Dynatec Mining's status as an eligible party in this EAJA case. In making this argument, it relies, in part, on *Tri-State Steel Const. v. Herman*, 164 F.3d 973, 977-80 (6th Cir. 1999). That case arose following an adjudication involving the Department of Labor's Occupational Safety and Health Administration ("OSHA"). The Occupational Safety and Health Review Commission ("OSHRC") aggregated the net worth and number of employees of Tri-State's corporate parent and determined that it was not an eligible party under the EAJA. The Sixth Circuit held that the Tri-State's net worth should not have been aggregated with that of its corporate parent because Tri-State was a separate corporate entity litigating on its own behalf and the interrelationship between Tri-State and its corporate parent did not justify aggregation.

I reject Dynatec Mining's argument for a number of reasons. First and foremost, I do not have the authority to overturn or ignore a regulation duly promulgated by the Commission. The

Commission's aggregation requirement has been in place since the Commission first promulgated regulations implementing the EAJA. When the Commission recently revised these regulations, many comments were received in response to its notice of proposed rulemaking suggesting that the aggregation requirement be eliminated. 63 Fed. Reg. 63172, 63173 (Nov. 12, 1998). The Commission chose not to eliminate or modify this requirement in response to the comments. I cannot overturn the Commission's conclusion that an applicant's net worth should be aggregated with that of its corporate affiliates when determining whether an applicant is an eligible party.

As the Sixth Circuit noted, the EAJA is "silent on the question of whether the net worth and employees of an otherwise eligible corporation should be aggregated with any related or affiliated corporations." 164 F.3d at 978. Although the OSHRC now has an aggregation regulation that is the same as the Commission's regulation, the OSHRC used a case-by-case "real party in interest" test in *Tri-State*. (29 C.F.R. § 2404.105(f); *Nitro Elec.*, 16 BNA OSHC 1596 (1994)). The Sixth Circuit noted that the OSHRC's new regulation was not before the court. 164 F.3d at 978 n. 6. The court held that the OSHRC's application of its real-party-in-interest test to the facts of that case abrogated basic common law principles of corporate law. 164 F.3d at 979. The Commission has not adopted a real-party-in-interest test.

In the alternative, Dynatec Mining argues that aggregation of Dynatec Mining and its affiliates would "be unjust and contrary to the purpose" of the EAJA "in light of the actual relationship between" Dynatec Mining and its affiliates. (D. App. 3-4 *quoting* section 2704.104(b)(2)). First, it argues that aggregation would be unjust because it is contrary to circuit court precedent whereby recovery of fees is only precluded where the eligible party is a "front" or "sham" for an ineligible party or a nonparty that controls, directs, or finances the litigation. I find that Dynatec Mining is not a front or a sham and that MSHA issued the citations to Dynatec Mining not to its corporate parent. Based on these undisputed facts, Dynatec Mining argues that because it contested MSHA's citation, orders, and penalties on its own behalf, "its lawful relationship with its affiliates, which is typical in the mining industry, cannot justly be used to deny it eligibility under the EAJA." (D. App. 5). The court decisions cited by Dynatec Mining discuss the real-party-in-interest doctrine. The Commission has not adopted this doctrine. Moreover, as Dynatec Mining states, the relationship between it and its affiliates is typical for the mining industry. Dynatec Mining has not presented any facts to show that its relationship with its corporate affiliates is different from what is commonplace in the mining industry. Dynatec Mining is a wholly owned subsidiary of a corporation that is too large to be an eligible party under the EAJA. If I were to find that aggregation is unjust in this case based on Dynatec Mining's actual relationship with its affiliates, I would have to do so in virtually all cases. The "actual relationship" exception to the Commission's aggregation regulation would subsume the rule under Dynatec Mining's interpretation. In essence, I would be invalidating the regulation.

Second, Dynatec Mining argues that requiring aggregation in this case would undercut one of the EAJA's primary goals, which is "deterring the unjustified action in the first place." *Tri-State*, at 978. It argues that excluding "otherwise eligible subsidiaries, such as Dynatec Mining Corporation, based on affiliation, means that, for all practical purposes, only a handful of

Section 110(c) claimants and uniquely unaffiliated mining entities will ever be EAJA eligible in Mine Act proceedings." (D. Br. 5). I agree. At the present time, there is a large number of unaffiliated sand, gravel, and aggregate operators, but even their number is becoming smaller as consolidation continues in that industry. Small mine operators in other mining sectors are affiliated with larger entities with increasing frequency. Nevertheless, the Commission was surely aware that the application of its aggregation requirement would disqualify many operators from recovering fees and expenses when it originally promulgated its EAJA regulations and revised them in 1998. I cannot invalidate the Commission's aggregation regulation on the basis that it prevents a large number of mine operators from recovering fees and expenses under the EAJA. Dynatec Mining must address these arguments to the Commission.

Dynatec Mining makes other arguments in its application and in its reply to the Secretary's answer and motion to dismiss. These arguments are made in support of its position that the Commission's aggregation regulation is inconsistent with the language of the EAJA, its legislative history, and the intention of Congress. For the reasons set forth above, I am required to apply the Commission's aggregation regulation in this case.

Dynatec Mining submitted the affidavit of John D. Marrington, General Manager and Vice President of Dynatec Mining, to support its application. In the affidavit, Mr. Marrington testified that Dynatec Mining was a wholly owned subsidiary of another corporation at the time the adjudication was initiated.[1] Marrington states that he controlled and directed the course of the adjudication of the citation and orders issued by MSHA. He states that MSHA's proposed $700,000 penalty against Dynatec Mining had an adverse impact on it because the proposed penalty required it to take a financial charge on its books in 1994, 1995, and 1996. Marrington also states that the civil penalty cases caused Dynatec Mining to incur substantial legal fees and expenses. Dynatec Mining paid all legal expenses and fees in the underlying adjudication and it received no funding from its affiliates specifically allocated for this purpose. He states that Dynatec Mining, not its affiliates, was liable for the proposed civil penalty, which was "nearly equivalent to the entire net worth of Dynatec Mining" and if assessed in full, would have substantially and adversely impacted Dynatec Mining's business. (Marrington Aff. ¶ 11).

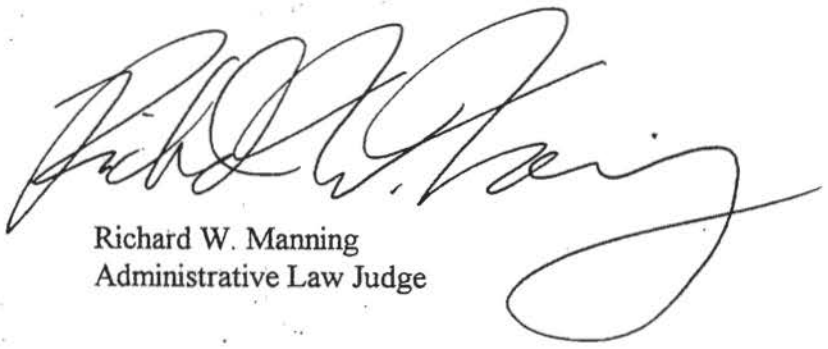
The Commission's regulation provides that "[a]ny individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part." (emphasis added). At the time the underlying adjudication commenced, Dynatec Mining's corporate parent owned all of the voting shares of the company and its net worth is therefore required to be aggregated with that of Dynatec Mining under the regulation. As stated above, there has been no showing that Dynatec Mining's "actual relationship" with its corporate parent is so different or unique that its

---

[1] At the time the underlying cases were initiated, Dynatec Mining was a wholly owned subsidiary of Tonto Drilling Supplies, Inc. (renamed Dynatec Drilling Supplies, Inc.), which was wholly owned by Dynatec International, Ltd. (Marrington Aff. ¶ 5). In 1997, following a merger and reorganization, Dynatec Mining became a wholly owned subsidiary of Dynatec Corporation USA, which is wholly owned by Dynatec Corporation. (Marrington Aff. ¶ 7).

"treatment" under the Commission's regulation is "unjust and contrary to the purposes of the [EAJ] Act" when compared to any other mine operator or independent contractor that is owned by a larger entity. In its application, Dynatec Mining is asking that I directly or indirectly invalidate the Commission's aggregation regulation. Because I am bound by the Commission's aggregation regulation, I must interpret it so as to give it the force and effect of law. I conclude that Dynatec Mining is not an eligible party under 29 C.F.R. § 2704.104(b)(2). Consequently, I do not reach the merits of Dynatec Mining's application under section 29 C.F.R. § 2704.105.

For the reasons set forth above, the Secretary's motion to dismiss this case is **GRANTED** and this proceeding is **DISMISSED**.



Richard W. Manning
Administrative Law Judge

Distribution:

C. Gregory Ruffennach, Esq., 450 East 3rd Avenue, Durango, CO 81301 (Certified Mail)

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA 22203-1954 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3993/FAX 303-844-5268

July 11, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION COMPLAINT
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-203-D
on behalf of **ERNEST J. JENSEN,**	:	DENV CD 99-16
Complainant	:	
	:	Trail Mountain Mine
v.	:	Mine ID 42-01211
	:	
ENERGY WEST MINING COMPANY,	:	
Respondent	:	

DECISION

Appearances: Edward F. Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Thomas C. Means, Esq., CROWELL & MORING, LLP, Washington, DC, for Respondent.

Before: Judge Cetti

This case is before me upon the complaint filed by the Secretary of Labor, pursuant to Section 105(c)(2) of the Federal Mine Safety Health Act of 1997, 30 U.S.C. § 801 et. seq., the "Act." Complainant alleges that Energy West Mining Company (Energy West) violated section 105(c)(1) of the Act, [1] 30 U.S.C. § 815(c), when it discharged Ernest J. Jensen on May 13, 1999, for his alleged chronic and excessive absenteeism under its "Chronic and Excessive Absenteeism Program" which it adopted in 1996.

Jensen was first employed by Energy West in 1975. Since April 1997 he was employed at Energy West's Trail Mountain Mine. In October of 1998 Jensen was placed on step 3 of the final step of Energy West's "Chronic and Excessive Absentee" program. Under step 3 of that program Jensen was subject to discharge if, during the next 12 months, his non-contractual and

[1] Section 105(c)(1) provides in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, [or] representative of miners. . . of any statutory right afforded by this Act.

non-industrial absences under the program exceeded the mine's average non-contractual absent rate for those months. On April 21, 1999, Jensen had an unexcused non-contractual, non-industrial absence that exceeded the mine's average non-contractual absence rate for that month. He was terminated on May 13, 1999, under the program for his chronic and excessive absenteeism.

It is undisputed and specifically conceded by Energy West that Jensen in the past had on occasion engaged in protective activity. Energy West denies that the suspension and termination of Jensen was in any part motivated by any safety-related conduct or complaints by Jensen.

While Jensen's attendance record clearly demonstrates chronic and excessive absenteeism, Jensen contends that this is a "mix-motive case" and that the adverse action (his suspension and discharge) were motivated in some part by his safety-related conduct and complaints.

On or about June 7, 1999, Jensen timely filed a complaint of discrimination with MSHA alleging that he was terminated by Respondent because he had exercised his rights under the Act.

Discrimination

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, 2797-2800 (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 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 2799-2800. 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).

Protected Activity

Energy West acknowledged from the beginning that Jensen had engaged in some protected activity. Jensen himself testified that sometime in 1979 or 1980, in the presence of an MSHA inspector, he contradicted manager Kevin Tuttle's statement to the inspector that a particular violation had existed for only a few days and stated that the violation existed for much longer than that. (Tr. 30-31). Jensen testified that in mid-1997 he argued with someone in mine management about the effectiveness of the roof-bolting in the longwall section; that in mid-1997 he refused to work at the tailgate of the longwall without a dust pump; that he spoke to the

MSHA investigator in late 1997 or early 1998 about an April 1997 accident which, he claims, reinjured his neck.

Although Jensen was outspoken on some safety matters, his own witness acknowledged that there were other miners who were more outspoken than Jensen on safety matters and none of them had been disciplined. T. 487, 138. In that regard, Mr. Snow, who eventually discharged Jensen, testified that protected activities are a miner's "protected right" and he would not allow anyone to be disciplined for engaging in protected activity as long as he was in charge. (Tr. 250). I credit Snow's testimony. Based on the evidence, I am satisfied that the conduct that concerned Energy West management was Jensen's excessive and chronic absenteeism, not his protected activity.

Jensen's Absenteeism

Jensen testified that he first injured his neck in April 1993, when a shuttle car he was operating ran off a lip, causing his head to jam against the cab. He had neck pain. He did not lose any time from work immediately after that but in August 1994 he was placed on unpaid sick leave. On December 13, 1995, Mr. Jensen underwent neck surgery which he states resulted from the April 1993 accident. His neck problem was a disputed job injury. The workmen's compensation carrier sued him for the return of the worker's compensation benefits it provided.

Upon his return to work at the Trail Mountain Mine on April 7, 1997, after a long extended two-year absence, Jensen was given a letter from Respondent, dated April 3, 1997, advising him that he would be subject to discharge if his attendance at the mine did not improve, or if he took additional extended absences from his job.

On April 15, 1997, just eight days after his return to work, Jensen reported an accident similar to the one he reported in 1993. Jensen testified that he reinjured his neck when a vehicle he was driving suddenly dropped over a lip in the mine roadway. Jensen reported this accident to his supervisor Jim Basso during his lunch break but lost no time from work and later requested medical attention for his neck problem. Jensen filed a complaint with MSHA, pursuant to section 103(g) of the Act, complaining about the road condition in the 9th right working section. Pet. Ex. 6. MSHA ultimately issued a citation to Respondent under section 104(a) of the Act, for the road condition. Pet. Ex. 6.

On April 18, 1997, Jensen attended a meeting with his foreman, Jim Basso, and the Manager for Health, Safety and Training, Kevin Tuttle. In this meeting, Jensen was informed that he would be classified as an unsafe worker as a result of his accident several days earlier. Apparently, in response to this information Jensen, on May 8, 1997, filed a discrimination complaint with MSHA. On March 22, 1999, a formal settlement agreement, not involving the Commission, was reached between Respondent and MSHA regarding Jensen's complaint. (Com. Ex. 4).

Between May of 1997 and April of 1999, Jensen had uncontractual absences from work on several occasions. During this period, Respondent placed Jensen on the company's Chronic and Excessive Absentee Program. Because of these excessive unexcused non-contractual absences, Jensen advanced through the progressive steps of the program and at the final step was discharged on May 13, 1999, under that program for his chronic and excessive absenteeism.

Energy West presented persuasive evidence that Jensen was discharged for one reason only and that was Jensen's chronic and excessive absenteeism.

Evidence was presented that excessive absenteeism of employees was a serious problem at Energy West. To correct the problem, Energy West in 1996 adopted a more restrictive absentee program. The reason for the adoption of the program and a concise summary of its pertinent provisions are set forth in Respondent's Ex. C as follows:

> **Chronic and Excessive Absentee Program**
>
> Absenteeism continues to be a serious problem at Energy West Mining Company. The current Chronic and Excessive Absentee Program has become ineffective. In an attempt to correct this continuing problem, the Chronic and Excessive Absentee Program is being changed to take into consideration changes that have occurred since the original Chronic and Excessive Absentee Program was adopted.
>
> Employees who continue to be excessively absent from work cannot expect to continue to remain employed at Energy West Mining Company. Effective immediately, with the implementation of this revised program, if an employee's absence rate for non-contractual absences exceeds the mine's average non-contractual absence rate, that employee will be subject to corrective action up to and including discharge. Non-contractual absences are defined as all absences except paid personal or sick leave, graduated vacation, regular vacation, paid bereavement days, military duty, jury duty, union business and days properly considered as family and medical leave.
>
> **Counseling**
>
> If during any calendar month an employee's non-contractual absentee rate exceeds the mine's average non-contractual rate the employee will be counseled by management. A written record of the counseling will be maintained by management.

Written Warning

If during any month in the next twelve (12) months after an employee has received counseling an employee's non-con tractual absentee rate again exceeds the mine average non-contractual absentee rate the employee will receive a written warning.

Final Warning

If during any month in the next twelve (12) months after an employee has received a written warning the employee's non-contractual absentee rate again exceeds the mine average non-contractual absentee rate the employee will receive a final written warning.

Suspension With Intent to Discharge

If during any month in the next twelve (12) months after an employee has received a final written warning the employee's non-contractual absentee rate again exceeds the mine average non-contractual absentee rate the employee may be suspended with intent to discharge.

Clearing an Employee's Record

If an employee maintains an absentee rate for non-contractual days below the mine average for a period of six consecutive months after receiving corrective action, the employee will go to next lower step in the corrective action program. If an employee maintains an absentee rate for non-contractual days below the mine average for a period of twelve (12) consecutive calendar months after receiving corrective action, the employee's attendance record will be considered as cleared.

Thus the program not only provides for progressive, adverse steps if unexcused absenteeism continued but also provides an opportunity at every step for a miner to correct his excessive absenteeism and progressively clear his attendance record under the program.

Under the wage agreement (union contract) employees such as Jensen are entitled a total of 44 days to be absent from work and receive pay. These paid days off, called contractual days, are as follows:

12 days	Graduated Vacation	
9 days	Personal or Sick Leave	
11 days	Holidays	
12 days	Vacation	
44 days	Total	(Pg 13 Ex. 33)

In addition to all these paid days off, employees who have worked 1250 hours in the prior 12 months are eligible to receive 12 weeks off from work for Family and Medical Leave (FMLA) which is also not subject to corrective action.

Jensen's attendance record for the past few years show Jensen's non-contractual days absence rate, as compared to the mines average non-contractual absenteeism rate may be summarized as follows:

Year	No. Of non-contractual days Ernest Jensen was absent	Ernest Jensen's Non-contractual absenteeism rate	Mine non-contractual absenteeism rate
1990	119	45%	3.25%
1991	22	8%	3.78%
1992	54	20%	4.20%
1993	30	11%	4.30%
1994	96	36%	4.85%
1995	Entire Year	100%	6.28%
1996	Entire Year	100%	5.20%
1997	37	14%	.71%
1998	64	24%	.45%
1999	26	30%	.61%

Jensen's attendance history clearly shows there has not been a year since 1990 where Mr. Jensen's absentee rate had not exceeded the mine average.

A final warning, step 3 of the C&E program, was given to Jensen on December 16, 1998. Jensen had a non-contractual absence on April 21, 1999. The mine non-contractual rate for April 1999 was less than 1% (.55%) and Jensen's non-contractual rate was 8%, which again far exceeded the rate for the mine. Jensen was suspended with intent to discharge. Earl Snow, the mine's general superintendent, discharged Jensen on May 13, 1999, for his chronic and excessive absenteeism.

Aside from the C& E program and its provisions and technicalities, the evidence presented clearly demonstrates that Jensen, in the last few years of his employment had a

chronic and excessive absentee problem. He had ample opportunities to improve his attendance record., but failed to do so.

Following his discharge, in addition to filing a 105(c) discrimination complaint, Jensen also filed an arbitration procedure through his union. Marvin I. Fieldman was the selected arbitrator. A hearing on the discharge of Ernest Jensen was held before the arbitrator in August 1999. In his decision of August 16, 1999, the arbitrator upheld the discharge. He found that there was just cause for Jensen's discharge; that the policy of Energy West was "reasonable" and "evenhandedly applied." (Resp. Ex. T).

I place substantial weight on Arbitrator Fieldman's decision.

Following his discharge, Jensen was not eligible to file for unemployment compensation because he was an employer. (Pg. 7, Ex. U). When questioned at the hearing by Respondent's counsel as to his status as an employer, Jensen testified that he has owned and operated a cement construction business since 1977. He has seven employees and concedes the business is large enough to do several jobs at one time. He has had contracts with local governments to do paving and concrete work. Jensen conceded that sometimes when he was not at work at the Trail Mountain Mine he was at work at his cement construction company. (Tr. 87-88). Asked as to how many hours he put in at the construction company, Jensen stated "a couple, 3 hours a day, some days more, some days four or five hours." (Tr. 89).

General Superintendent Snow who discharged Jensen was asked if he considered giving Jensen a last agreement or another break as he felt he had done in the past. Snow responded as follows:

> No, sir. I'd already felt that there had been many last chances at this point in time. The corrective actions all in themselves are last chances, particularly the step three basically is a last chance, an easy one to get out of. Plus the fact that I'd worked with Ernie on several occasions. In particular he could have been discharged in December, February, March. I had already exceeded my authority, you know. By not giving cor- rective action, and at this point in time I didn't feel that there was any value, that Ernie was not a candidate and it was inappropriate, he'd already had many last chance agreements. (Tr. 246-247).

I note even as early as April 3, 1997, management sent Jensen a memo regarding attendance that many employees would consider a last chance to correct his chronic and excessive absenteeism. The letter to Jensen reads as follows:

SUBJECT: Attendance Requirements

It is my understanding that you will be returning to work on Monday, April 17, 1997. For the past several years your attendance at work has been unacceptable. Your absenteeism rate has been so excessive that you cannot even be termed a part-time employee.

This letter is to notify you that if upon your return to work, your attendance record does not improve to an acceptable level you will be suspended with intent to discharge. In the event you return to work for a short time and then go back off work on an extended leave you will be subject to discharge.

It is management's hope that you will attend work on a regular basis and further action will not be necessary.

cc. David Campbell, President
Local 2176, UMWA

After Jensen's discharge, a question arose as to whether or not at the time of his discharge he still had one personal leave day that at Jensen's request could have been used at management's option to cover Jensen's absence of April 21, 1999. Evidence was presented that even if Jensen had a personal day left on his attendance calendar, it would have been used up by his absences on March 9 and 10. (Tr. 260-274).

I am satisfied from the record at the time of Jensen's discharge that neither Jensen, Snow, nor anyone was aware that Jensen may have had a personal day left on his attendance calendar. Counsel for Energy West maintains that there was no personal day available to cover the absence of April 21 and that everyone concerned knew that. Furthermore, he contends that even if a personal leave day were available, Jensen would have had to ask for it and then it was up to management to decide to grant it or not. Respondent's counsel also contends that even if Jensen is able to show a mistake was made, it would not establish that any part of the motivation for the discharge was something other than Jensen's chronic and excessive absenteeism. I find merit in counsel's contentions. Jensen was discharged for his chronic and excessive absenteeism and was not suspended or discharged in any part for his safety complaints or any other protected activity.

The Secretary's Motion to Reopen the Record and later her supplemental motion to Submit in the record the declaration of Kevin Phillips are untimely and fail to meet her heavy

burden to justify the extraordinary relief of reopening the record to receive new evidence. See *Meek* 15 FMSHRC 606, at 614. See also Commission Rule 10(b) and 10(d). In addition, the proffered evidence would not change the results of the hearing.

On the basis of the evidence and record as a whole, I find that Jensen's suspension and discharge were in no part motivated by activities protected under the Act. The Secretary's complaint on behalf of Jensen is **DISMISSED** and the Order of Temporary Reinstatement is **DISSOLVED** forthwith.

August F. Cetti

August F. Cetti
Administrative Law Judge

Distribution:

Edward F. Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Thomas C. Means, Esq., CROWELL & MORING LLP, 1001 Pennsylvania Avenue, NW, Washington, DC 20004-2595 (Certified Mail)

/sh-ek

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 24, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2000-31-D
ON BEHALF OF WILLIAM JENKINS	:	HOPE CD 99-10
AND MICHAEL MAHON,	:	
Complainants	:	Mine No. 1
v.	:	Mine ID 46-08102
	:	
DURBIN COAL, INC.,	:	
Respondent	:	

DECISION

Appearances: M. Yusuf M. Mohamed, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainants;
David J. Farber, Esq., Patton Boggs, LLP., Washington, D.C. and John Kirk, Esq., Inez, Kentucky, for Respondent

Before: Judge Zielinski

This matter is before me on a complaint of discrimination filed by the Secretary on behalf of William Jenkins and Michael Mahon pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(c)(2). The complaint seeks an order declaring that Respondent, Durbin Coal, Inc., discriminated against Jenkins and Mahon and other relief including back pay and benefits, as well as a civil penalty in the proposed amount of $12,000.00. A hearing was held in Inez, Kentucky on December 5, 2000 and concluded on January 30, 2001, and the parties submitted briefs following receipt of the transcript. For the reasons set forth below, I find that Respondent did not discriminate against Jenkins and Mahon in violation of the Act.

Findings of Fact

Jenkins and Mahon worked the second shift at Durbin's underground coal mine until their employment ended on March 2, 1999. Whether they voluntarily left their jobs or were terminated by Respondent is hotly contested. Jenkins was a shuttle-car operator. He had worked at Durbin's mine twice in the past and over the last ten years had worked at various times for Universal Coal, a contractor that provided labor to a number of mines. Mahon operated a roof

bolting machine, or "pinner." He had worked at Durbin's mine approximately six months and had been employed for over three years before that at another mine that was co-owned by Carl Kirk, who was also a co-owner of Durbin. Jenkins and Mahon were related as "half brothers," born of the same mother, and both men were considered good employees who were capable of operating a variety of mining equipment and performing whatever tasks were needed.

In early 1999, Durbin was experiencing what it viewed as a high number of inspections by the Secretary's Mine Safety and Health Administration (MSHA) prompted by confidential, phoned-in complaints, commonly referred to as "code-a-phone" complaints. Miners were not raising safety issues with management and MSHA inspectors rarely found the conditions complained of. Kirk had visited the MSHA district office to discuss the complaints because their frequency was disrupting operations. He was advised by MSHA officials that the number and lack of merit of the complaints was a concern to them also because it resulted in a lot of "wasted time" on inspections. MSHA officials eventually went to the mine, met with the miners and encouraged them to raise safety issues with management in the first instance and to make code-a-phone complaints if management did not satisfactorily address the problem. This had little impact on the frequency and nature of the complaints.

On February 26, 1999, at about 2:00 p.m., Edward Paynter, an MSHA inspector, responded to Durbin's mine to conduct an inspection regarding a code-a-phone complaint that had been transcribed and forwarded by facsimile to his office the day before. The complaint was about "deep cuts and dust" and bore a date and time notation at the top left corner of "2/25/99 14:51." When he showed the brief complaint to Forest Newsome, Durbin's superintendent, he appeared somewhat angry and inquired if Paynter knew who made the complaint. When he received a negative response, he stated that he knew who it was, apparently basing his determination on the noted time of 14:51, or 2:51 p.m.[1] Paynter told him that the notation indicated when the copy of the complaint form had been transmitted by facsimile to their office, not necessarily the time of the call. Paynter met with the miners on the first and second shifts, and requested additional information in order to properly investigate the complaint. He told the men that if they wanted help from MSHA they would have to be willing to provide more information and that complaints should not be used as pranks or to vent frustrations. None of the miners present volunteered additional information. Paynter issued dust sampling pumps to the underground miners and went underground with them to conduct the inspection and monitor the dust sampling. He did not find evidence of deep cuts and the dust sampling results, returned the next day, were within acceptable limits.

---

[1] The Secretary argues that Newsome's statement indicated that he suspected that Mahon had made the complaint because he was absent because of illness that day. However, it was not established that Mahon was the only second shift miner absent that day. Nor was it explained why a miner on another shift, and/or who may have been absent that day, could not have made the call.

Billy Williams, a second shift miner, testified that Newsome had told him that the complaint initiator was likely one of the "two Billy's" working the second shift because they were the only ones who had raised concerns about dust. However, Newsome denied that the other "Billy," William Jenkins, had complained about dust and Jenkins, himself, also denied making such complaints and stated only that he might have said something about ventilation or getting line curtain installed sometime in the past. Newsome had remarked, in the presence of a few miners, that he would give $1,000 to know who was making the code-a-phone complaints. However, there is no indication that anyone took this "offer" seriously. David Runyon, an electrician and mechanic, heard of the remark and jokingly said they could turn him in and split the $1,000 if they could find anyone to pay it. Jenkins too laughed it off when he heard about it.

On March 1, 1999, Mahon reported to work to find that someone had taped his pliers together and written the word "rat" on his belt. He took it as a joke, consistent with similar pranks that the miners perpetrated on each other, though after learning of the February 26 inspection, it occurred to him that the word "rat" may have been a reference to the person who had called in the complaint. Mahon told Newsome about it, and he also took it as an unremarkable prank. When Mahon later made a joking comment that he was a rat and would report his foreman's efforts to get the shift started a few minutes early, he perceived that Newsome, who was in an adjoining office, "slammed" the door.

At the time, Durbin was experiencing unexplained losses of equipment and supplies, which it was suspected were being stolen from the mine site, possibly by employees. Kirk monitored costs closely and had noticed an unusual increase in expenditures for bits for continuous mining and roof bolting machines, which he thought also might be related to the theft problem. He had instructed his mine superintendent, Newsome, and the person who handled supplies, Richard Mollette, to tighten up controls on supplies, including specifically pinner bits, and generally keep the supply room locked.

On March 2, 1999, Jenkins and Mahon arrived for work at the normal time, about 2:00 p.m.. Mahon rode to work in Jenkins' pickup truck, which had an open bed and a closed but unlocked toolbox immediately behind the cab. Mollette, who was in the supply room of the mine's office trailers, heard a noise like someone tossing something into the bed of a truck and looked out to see Jenkins returning from the area of the truck. He finished working with the supplies and told Newsome about it after the second shift men had gone underground. Newsome decided to investigate. He, Mollette and Jeffrey Farris, a mine foreman, went to Jenkins' truck and looked into the bed and through the windows into the cab. They did not see anything unusual. When Newsome lifted the top of the toolbox, however, he saw boxes containing roof bolter bits which were the same type of bits used by Durbin, some of which were wired together in the same manner that Mollette prepared them for Durbin's roof bolter operators. They counted 135 bits in the boxes. Newsome and Mollette felt that the bits belonged to Durbin.

Growing concerned about whether their search of the truck was legal, Farris called the West Virginia State Police post and was advised that the search was likely illegal and that the

matter should be handled administratively. Newsome called Kirk and told him what he had found. Kirk happened to be en route to the mine site to deliver some supplies to replace items that had been "lost" from the mine. He advised that he would be at the mine site in about fifteen minutes at which time they would discuss what to do. When he arrived, he and Newsome discussed the issues and Kirk advised Newsome to talk to Jenkins and Mahon, advise them what had been found and see what they had to say about it. He cautioned that they should not be accused of anything, just questioned, and told Newsome to have witnesses present for the conversation. Newsome wanted to do it before he left work, rather than wait until the end of the second shift, and Kirk stated that he could call the men out during the shift and talk to them. Kirk then left the mine site.

Newsome called down into the mine and spoke with David Runyon and told him that Jenkins and Mahon were needed on the surface. David Runyon told Frank Runyon, the foreman, that Jenkins and Mahon were needed on the surface and that he would give them a ride out of the mine in a mantrip. Although Newsome did not say anything about an emergency at home, it was unusual for miners to be called out of the mine during a shift and the calling out of these related miners raised the possibility of an emergency at home, possibly involving their mother. Frank Runyon likely included a comment to the effect — "I don't know whether there's an emergency at home, or what" — when he told Jenkins and Mahon to report to the surface. The trip to the surface took approximately 30 minutes, during which Jenkins and Mahon were very concerned about a possible emergency involving their families.

When they got to the surface, Jenkins dropped his gear into his truck and proceeded to change clothes. Mahon went to use the phone in the office to call home. Newsome interrupted him, saying: "There is nothing wrong. I just want to talk to you." He told Mahon that pinner bits were found in the truck and he asked where they came from. Mahon became angry and responded that if there were bits in the truck they belonged to his brother, Kip Mahon. He protested that Durbin had no business searching his brother's truck and that Jenkins would be angry about it. Jenkins came into the room and Mahon told him there was nothing wrong at home and that Newsome had found pinner bits in his truck and wanted to know where they came from. Jenkins became very upset and cursed Newsome for searching his truck. He also stated that if there were bits in the truck that they belonged to their brother Kip Mahon. Both men indicated that their brother, Kip, had asked them to try and sell some pinner bits a week or two before and speculated that Kip may have placed the bits in the truck over the weekend, without their knowledge. They had previously, however, indicated to another miner, Billy Williams, that they believed that Kip had obtained the bits illegally and were aware that the bits were in the truck. I find that Jenkins and Mahon knew, on March 2, 1999, that the bits were in the truck and that they believed that their brother Kip had stolen the bits.

There was a very heated exchange between Jenkins and Mahon and Newsome, including much cursing, primarily by Jenkins and Mahon. Jenkins was more angry than Mahon. Jenkins asked if they were fired, and Newsome responded that he had not fired anybody. Mahon went out to the truck to see if the bits were still there. Upon returning, he encountered Jenkins leaving

the office trailer and was told by him that Kirk didn't need them anymore. Both men got into the truck and left the mine. A few minutes later they returned to get their belongings. Jenkins stated that he believed that the incident was not about bits but was because of safety complaints that Durbin suspected he had made. Newsome denied that the incident had anything to do with safety complaints. Mahon requested that Newsome provide him with a "fired slip," documentation of the termination of their employment, and Newsome indicated that he would have one for them the next day. However, no such documentation was supplied.

The following day, Jewell Mahon, Michael's wife, called Newsome inquiring about final pay checks for the two men, noting that when men are fired they should be paid the next day. Newsome responded that the men were not fired, they had quit. She responded that if they weren't fired, then they could report for their regular shift, to which Newsome responded that he didn't want them back on mine property. When Paynter returned with the negative dust sample analysis on March 3, 1999, Newsome remarked that he thought that he had gotten rid of his problem. Paynter did not know wether that was a reference to the thefts or the complaints. Records maintained by Durbin, which appear to have been filled out and executed on March 2, 1999, by Newsome and Farris, note that both Complainants "got mad and quit" and that they would not be hired back. A personnel record maintained by Mahon Enterprises[2] reflects that Mahon "walked off the job when the person he rode with was asked about some items in the back of his truck" and notes the reasons for the action as "Dissatisfied" and "Personal reasons."[3] Mahon claimed unemployment benefits and a statement he gave on March 9, 1999, was essentially consistent with his allegations. However, at a subsequent "predetermination hearing" he apparently stated that Newsome responded "I don't know" when Mahon asked if he was being fired.[4] Newsome told several people after the fact, that Jenkins and Mahon had quit. Although, he also told Paynter that they had been fired.

In October of 1999, Kirk's then superintendent James Fain, indicated that he wanted to hire Mahon and inquired whether Kirk had any objection. Kirk responded that Fain was in charge and he could hire whoever he wanted to, that he had no objection to hiring Mahon. Kirk also testified that he felt that the incident had gotten out of control, reached an unfortunate result, and that he likely would not have objected to Jenkins being rehired. Mahon voluntarily left employment at Durbin's mine in February of 2000. Aside from Mahon's brief period of re-employment, neither Jenkins nor Mahon has since worked at a mine in which Kirk had an ownership interest.

---

[2] Complainants' actual employer was Mahon Enterprises, a contractor that provided labor for Durbin's mine. Durbin has stipulated that it is an operator subject to the Act and is responsible for any discrimination against Jenkins and Mahon.

[3] These documents were exhibits to Carl Kirk's deposition, which was admitted into evidence as Complainants' Ex. 32.

[4] See, exhibit 3 to the Kirk deposition and Respondent's Ex. 1.

Conclusions of Law - Further Factual Findings

A complainant alleging discrimination under the Act typically establishes a prima facie case by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator my rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n. 20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Complainants here do not allege that they engaged in protected activity.[5] Rather, they contend that they were fired, or constructively discharged, because Respondent believed, or suspected, that they had engaged in protected activity, i.e., making code-a-phone complaints to MSHA. Their allegations state a viable claim of discrimination under the Act. *Sec'y on behalf of Moses v. Whitley Development Corp.*, 4 FMSHRC 1475 (1982), *pet. for rev. den., Whitley Development Corp. v. FMSHRC*, 770 F.2d 168 (6th Cir. 1985) (table). In *Moses*, the Commission held that "discrimination based upon a suspicion or belief that a miner has engaged in protected activity, even though, in fact, he has not, is proscribed by section 105(c)(1)." *Id.* at 1480. Complainants further allege that they were falsely accused of stealing company property as a pretext for Respondent's discriminatory action.

While there is evidence that Durbin may have suspected that Jenkins and/or Mahon had made code-a-phone complaints, I find that they left their employment in a fit of anger after being questioned about the pinner bits found in Jenkins' truck. They suffered no adverse action, i.e., their employment was not terminated, either actually or constructively, by Durbin. The Commission has made clear that adverse action is an essential element of a discrimination claimant's case, and in the absence of adverse action no finding of discrimination can be made. *Dolan v. F & E Erection Co.*, 22 FMSHRC 171, 175 (Feb. 2000). In addition, I find that the incident that led to their departure from Durbin was not precipitated, in any part, by suspicion that they had engaged in protected activity.

---

[5] While Complainant Jenkins had refused to operate a shuttle car on which monitors had been bridged out, his actions had not produced any adverse reaction by his foreman, Frank Runyon, who appears supportive of both men. Complainants have also made clear that their theory of liability is that they were terminated because of an erroneous belief or suspicion that each of them had engaged in the protected activity of making code-a-phone complaints.

Complainants have devoted considerable attention to the "home emergency" issue, arguing that they are entitled to some leeway for impulsive behavior prompted by Durbin's "wrongful provocation," at least implying that Durbin deliberately decided to use a home emergency as a ruse to get them out of the mine. However, there would have been no need for Durbin to resort to a ruse. Complainants were subject to directives by their supervisors and presumably would have responded to an instruction to report to the surface. While unusual, men are occasionally called out of a mine, sometimes for unremarkable reasons, such as a need to move a vehicle. That said, those involved in responding to Newsome's request to bring the men out speculated that there might be something wrong at home. Frank Runyon and David Runyon admitted that the subject crossed their minds. The concern was verbalized, at least to the extent of an innocent comment by Frank Runyon to the effect: "I don't know if it's an emergency at home, or what." It would also have been reasonable for Jenkins and Mahon to conclude that they were likely being called out because of a home emergency. I find that both Jenkins and Mahon believed that the reason they were being called to the surface was some emergency at home, possibly related to their mother's health.[6] However, their belief was not the result of any statements by Durbin that there was, in fact, such an emergency. Nor did any Durbin official intend to, or, take any actions to mislead or provoke Complainants in the manner in which they were called out of the mine.

The real significance of the "home emergency" issue is its impact on the ensuing events. Complainants' feeling that they had been led, or allowed, to believe during the lengthy ride out of the mine that there was an emergency involving their families primed their reaction to being questioned about the pinner bits discovered in the truck. Their outrage at the search of the vehicle and implicit accusation of stealing company property resulted in an extremely hostile reaction to Newsome's inquiries. There was a very heated discussion, in which Complainants loudly cursed Newsome. Newsome, no doubt, reacted emotionally to Complainants' verbal assault. He noted that the Complainants would not be hired back on Durbin's records and gruffly told Mrs. Mahon the following day that he did not want them back on mine property. However, I credit his testimony and that of other witnesses to the discussion that he remained considerably more in control than the Complainants and was surprised by their reaction to his inquiry. I credit Newsome's testimony that he did not fire the Complainants, which would have been inconsistent with Kirk's instructions to him and find that the Complainants quit their jobs in a fit of anger in reaction to the search of the truck and the inquiry about the pinner bits.

The Secretary argues that a March 16, 1999, letter to Mahon relative to continuation of his health benefits and citing a "Qualifying Event Date of 02/28/99" evidences an intent by Durbin to terminate his employment that preceded the March 2, 1999 incident. The Secretary contends, in essence, that Durbin had determined to discharge Complainants on or prior to February 28, 1999, and that the events of March 2, 1999, were carefully scripted to result in the

---

[6] Their mother had been in a serious automobile accident previously. Although it appears that she had largely recovered from her injuries by that time, her health apparently was a concern and was an issue that would have affected both men.

termination of their employment. This is far too great a leap to make from such a precarious platform. There was no evidence establishing where Black Mineral, the entity that wrote the letter, got the information it used to prepare the letter, what that information was, or whether it had any connection to Durbin.

The Secretary also questions the legitimacy of Durbin's concerns about pinner bit expenditures and suspicion that bits were being stolen. While it is correct that per-ton costs of continuous miner bits were, at least in one report, grouped with pinner bit costs and miner bit costs would be significantly higher, there is virtually no dispute that Durbin had been experiencing losses, or thefts, of equipment and supplies, such as pinner bits. Even Mahon was aware that there had been problems with thefts of supplies. I credit that testimony and the testimony of Durbin officials and Mollette that they were concerned about thefts and pinner bit expenditures and had taken steps to more closely control and monitor bit usage.

Constructive Discharge

Complainants alternatively argue that they suffered adverse action in that they were constructively discharged. As explained in *Dolan*, *supra*, 22 FMSHRC at 176-77:

> A constructive discharge is proven when a miner engaged in protected activity shows that an operator created or maintained conditions so intolerable that a reasonable miner would have felt compelled to resign. *See, e.g., Simpson v. FMSHRC*, 842 F.2d 453, 461-63 (D.C.Cir. 1988). * * * It is the operator's failure to reasonably remedy such conditions that converts the resignation into an adverse action. *See Secretary of Labor on behalf of Nantz v. Nally & Hamilton Enters., Inc.*, 16 FMSHRC 2208, 2210-13 (Nov. 1994) (affirming conclusion of constructive discharge in the absence of finding that operator deliberately created intolerable conditions to provoke miner's resignation). The question whether conditions are intolerable is "viewed from the perspective of a reasonable employee alleging such conditions." *Secretary of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265, 276 (Mar. 1999), [*aff'd*, 230 F.3d 1358 (6th Cir. 2000) (table)]. * * * *
>
> In cases involving claims of constructive discharge, the Commission has first examined whether the miner engaged in a protected work refusal, and then whether the conditions faced by the miner constituted intolerable conditions. *See Bowling*, 21 FMSHRC at 272-81; *Nantz*, 16 FMSHRC at 2210-13. * * * * In order to be protected, work refusals must be based upon the miner's "good faith, reasonable belief in a hazardous condition." *Robinette*, 3 FMSHRC at 812; *accord Gilbert v. FMSHRC*, 866 F.2d 1433, 1439 (D.C.Cir. 1989). A good faith belief "simply means honest belief that a hazard exists." *Robinette*, 3 FMSHRC at 810. Consistent with the requirement that the complainant establish a good faith, reasonable belief in a hazard, "a miner refusing work should ordinarily

communicate, or at least attempt to communicate, to some representative of the operator his belief in the safety or health hazard at issue." *Sec'y of Labor on behalf of Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 133 (Feb. 1982).

Once it is determined that a miner has expressed a good faith, reasonable concern about safety, the analysis shifts to an evaluation of whether the operator addressed the miner's concern "in a way that his fears reasonably should have been quelled." *Gilbert*, 866 F.2d at 1441; *see also Secretary of Labor on behalf of Bush v. Union Carbide Co.*, 5 FMSHRC 993, 998-99 (June 1983); *Thurman v. Queen Anne Coal Co.*, 10 FMSHRC 131, 135 (Feb. 1988), *aff'd mem.*, 866 F.2d 431 (6th Cir. 1989). A miner's continuing refusal to work may be deemed unreasonable after an operator has taken reasonable steps to dissipate fears or ensure the safety of the challenged task or condition. *See Bush*, 5 FMSHRC at 998-99.

Complainants' constructive discharge argument does not conform to this analytical framework, either legally or factually. The Secretary does not argue that the Complainants engaged in a protected work refusal, perhaps because none of the incidents prior to March 2, 1999, either individually or collectively, posed any safety or health hazard. The Complainants did not feel that they were subjected to a safety or health hazard and did not even perceive any significant objectionable condition in their employment. Obviously, they did not communicate any such concern to Durbin. The incident that precipitated their departure from Durbin, the questioning about pinner bits, likewise cannot be characterized as a safety or health hazard that would have justified a work refusal.

The Secretary argues that the totality of the conditions amounted to intolerable conditions such that Complainants "could not return to their jobs with any dignity."[7] The totality of conditions includes; as to Mahon, the incident of his pliers being taped, the word "rat" written on his belt and the incident where Newsome supposedly slammed a door after hearing him joke about being a rat; as to Jenkins, the comment that one of the "two Billy's" was making the complaints; and, as to both, the inquiry about the pinner bits. The Secretary contends that all of these conditions were the product of a suspicion that Complainants' had engaged in protected activity.

---

[7] Secretary's Post Hearing Brief, at p. 20.

As noted above, none of the "conditions" that preceded the March 2, 1999 incident were viewed as intolerable, or even objectionable, by Complainants and they would not have been so viewed by a reasonable employee. Nor could the events of March 2, 1999, be viewed as intolerable working conditions by a reasonable employee, either standing alone or in combination with prior events. Durbin was rightly concerned about missing and stolen property and had a reasonable basis to call Complainants out of the mine and question them. Whether they could have remained at their jobs "with dignity" is not the test. They were not unreasonably subjected to a safety or health hazard. Nor were they subjected to conditions so intolerable that a reasonable miner would have felt compelled to resign. Moreover, as with the discharge allegation, I find that the conditions that Complainants allege prompted them to leave their employment were not, in any part, the result of unlawful motivation by Durbin, i.e., they were not the result of any suspicion or knowledge that either Complainant had engaged in protected activity.

Complaints of discrimination under *Moses* alleging constructive discharge do not fit nicely into the analytical framework described in *Dolan*. It is possible that the Commission would sustain a discrimination allegation where an operator, motivated by a suspicion that a miner had engaged in protected activity, created objectively intolerable working conditions that did not involve subjecting him to a safety or health hazard. This is clearly not such a case.

The Bounty or Reward Statement

The Secretary additionally contends that Newsome's statement that he would give $1,000 to know who was making the code-a-phone complaints was, in itself, discrimination in violation of the Act. The Secretary posits two theories for this contention; 1) that the statement amounted to a policy of Durbin's that was "facially discriminatory," relying on *Swift v. Consolidation Coal, Co.*, 16 FMSHRC 201 (Feb. 1994); and, 2) that the statement was discriminatory under the traditional *Pasula-Robinette* test. I find that the *Swift* analysis is inapplicable here in that Newsome's statement was not a policy or program of Durbin's. More significantly, there was no adverse action attributable to the statement.

Under *Swift*, in order to establish that a business policy is discriminatory on its face, "a complainant must show that the explicit terms of the policy, apart from motivation or any particular application, plainly interfere with Mine Act rights or discriminate against a protected class." *Swift*, 16 FMSHRC at 206. If a miner can establish that he suffered adverse action because of a facially discriminatory policy, he will prevail in a discrimination action under the Act, because "an operator may not raise as a defense lack of discriminatory motivation or valid business purpose in instituting the policy." *Id.*

Swift and similar "facially discriminatory" cases[8] deal with formal policies or programs implemented by an operator that did not directly target protected activity. Whether that precedent applies to an isolated verbal statement like that at issue here is questionable. If such a statement was construed as a serious attempt to learn the identity of a miner making confidential complaints of safety or health violations, an operator responsible for it could hardly contest the unlawfulness of the motivation or advance a valid business purpose for it. There would appear to be no need to extend the "facially discriminatory" theory of liability, with its elimination of defenses, to situations that do not involve formal employment policies. The traditional *Pasula-Robinette* analysis, which the Secretary advances here, should provide an adequate remedy for a discrimination claimant who has suffered adverse action in such circumstances.

The Secretary argues that because Newsome was superintendent of the mine, that his statement should be construed as a Durbin policy and since it is facially discriminatory that Newsome's "intention is irrelevant," that "such a statement is inherently designed to chill" the exercise of Mine Act rights and that the "result of making such a statement is predictable and foreseeable."[9] This argument fails for several reasons.

Assuming that Newsome could make policy for Durbin, he had no such intention when he made the "off-the-cuff" remark and there is no direct evidence that anyone who heard the comment, or heard about it, took it seriously or viewed it in the remotest sense as a policy of Durbin's. Newsome's intention is relevant to the analysis. While lack of discriminatory motive is not a defense to an action premised upon a facially discriminatory policy, Newsome's intent in making the statement, as well as the manner and circumstances under which the statement was made, are relevant to determining whether it constituted a facially discriminatory policy and whether it resulted in any adverse action. Newsome testified that, if he did make such a statement, it was not serious and was made as an off-the-cuff remark. No other witness to the statement testified. The Secretary's argument concerning the statement is relegated to assessment of the demeanor of one individual, who also did not testify, who told other witnesses about the statement.[10] As noted above, there is no evidence that the comment was made other than in jest or that it was pursued or even widely circulated. I find that the comment, while

---

[8] See *Sec'y on behalf of Price v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521 (Aug. 1990); *UMWA v. Consolidation Coal Co.*, 1 FMSHRC 338 (May 1979).

[9] Secretary's Post Hearing Brief, at 37-38.

[10] Billy Williams testified that Stephen Ellis told him about the statement and that Ellis, in the opinion of Williams, appeared to take the statement seriously, although it was related in an unemotional, conversational manner. Williams expressed surprise and stated that he didn't believe that Durbin was so desperate to pay money to find out who was making the complaints. Jenkins testified that Ellis told him about a $500 offer and that he appeared to have taken the statement seriously. Jenkins, himself "laughed it off." In a statement given to MSHA, Ellis denied any knowledge of a reward or bounty from the company to find out who called MSHA.

made, was no more than an off-hand remark prompted by frustration with what was perceived as a persistent pattern of groundless complaints resulting in disruptive inspections. It was not an employment policy of Durbin's.

The Secretary's adverse action assertions related to the statement are somewhat confusing. Her facially discriminatory argument does not directly allege adverse action, suggesting that she can prevail even in the absence of adverse action. Her *Pasula-Robinette* argument is based upon adverse action suffered by a protected class of miners, i.e., the presumed chilling effect on their right to make safety and health complaints. Her focus is on the two Complainants here. The First Amended Complaint, as amended by Order dated March 8, 2001, prays for a civil penalty "in the amount of $3,000.00 per occurrence, per victim of discrimination, for a total of $12,000.00," i.e., $3,000.00 for the discrimination suffered by Jenkins and Mahon related to their alleged discharge and $3,000.00 as to Jenkins and Mahon related to the "reward" offer. However, there is no evidence that Jenkins or Mahon, or any other miner, suffered adverse action or felt that his rights under the Act were interfered with because of the statement.[11] Jenkins did not take the statement seriously when he was told about it. Mahon did not testify about the statement and apparently never heard about it. In the absence of adverse action, an essential element of a discrimination claimant's case, Complainants cannot prevail. *Dolan, supra.*

ORDER

Complainants suffered no adverse action. They were not discharged either affirmatively or constructively. They suffered no adverse action as a result of Newsome's off-the-cuff comment. The complaint of discrimination cannot be sustained. Accordingly, the complaint is hereby **DISMISSED**.

Michael E. Zielinski
Administrative Law Judge

---

[11] Such comments are not to be condoned, because they could result in a chilling of miners' rights to make legitimate safety complaints if made in a manner and under circumstances suggesting a serious intent to discover the identity of miners making legitimate confidential complaints. There is also a danger that, even if obviously made in jest, such a comment could be taken seriously by a miner hearing about it second or third hand. Here, Newsome's comment was not intended to, and did not, have a chilling effect on the rights of miners.

Distribution:

M. Yusuf M. Mohamed, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified Mail)

David J. Farber, Esq., Alexandra V. Butler, Esq., Patton Boggs, LLP, 2550 M Street, NW, Washington, D.C. 20037 (Certified Mail)

/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 26, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2000-245-M
Petitioner	:	A.C. No. 01-00851-04087
v.	:	
	:	Oak Grove Mine
U.S. STEEL MINING COMPANY, LLC,	:	
Respondent	:	

DECISION

Appearances: Terry G. Gaither, Conference and Litigation Representative, U. S. Department of Labor, Birmingham, Alabama, on behalf of Petitioner;
S. Andrew Scharfenberg, Esq., Ford & Harrison, LLP, Birmingham, Alabama on behalf of Respondent.

Before: Judge Zielinski

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor against U.S. Steel Mining Co., LLC, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815. The petition alleges a single violation of the Secretary's mandatory health and safety standards and proposes a civil penalty of $242.00. A hearing was held in Hoover, Alabama on June 15, 2001. For the reasons set forth below, I vacate the citation and dismiss the petition.

Findings of Fact

On June 5, 2000, Jacky H. Shubert, an inspector for the Secretary's Mine Safety and Health Administration (MSHA), conducted an inspection of U.S. Steel's Oak Grove Mine. He was accompanied by James Bell, an elected union safety representative. Shubert issued Citation No. 7667878 for what he perceived to be a violation of 30 C.F.R. § 75.220(a)(1), which requires that operators comply with their approved roof control plans. He described the alleged violation as follows:

> The current roof control plan is not being complied with, in that the cribs in the tail gate entry of the long wall were not installed properly [--] none of the cribs were capped tightly against the roof.

Respondent's roof control plan, which had been approved by MSHA, included the following provisions for roof control relative to the longwall mining operation:

> Hydraulic jacks, timbers, or cribs shall be installed on a maximum spacing of 5' centers on the operator side of the head gate entry for a distance of 30' from the face in the direction of the longwall advance. Tail gate support shall consist of a minimum of one row of cribs positioned at maximum intervals of 7' between cribs. "Can-type" cribs may be installed in lieu of conventional cribs with maximum spacing between cribs to be 10 feet. These supports shall be installed the entire length of the tailgate entry, not to extend beyond the recovery area, in the panel presently being mined. These supports are to be maintained even with the working face in the tailgate entry for the subsequent panel.

Tailgate and head gate entries, some 8,000 to 12,000 feet in length, are originally created by a continuous miner machine and conventional roof supports, i.e., roof bolts, are installed as the primary means of roof support. Cribs provide supplemental roof support. While there are several types of cribs, conventional cribs are typically made of rough-cut lumber, 6" by 6" by 30" long. The members are stacked in layers of two, at 90 degree angles, or crosswise, until the stack reaches the roof of the entry. The stack is generally "capped" with a two inch thick board and wedges are driven to fit the crib tightly against the roof. The additional support provided by cribs helps prevent the roof from sagging and deteriorating. It also helps to prevent deterioration and rolling of the ribs, i.e., portions of the wall of the entry breaking off and falling into the entry. As the wood dries, it typically shrinks, which can cause the cribs to loosen. They are tightened again by driving the wedges in further and/or adding more material. Respondent contends that there is no requirement in its roof control plan that cribs, initially properly installed, be subsequently maintained tight against the roof. However, any logical construction of the plan would require that the cribs be properly installed and maintained tight against the roof. In the words of the inspector, if the cribs are not tight against the roof, they are not providing roof support and are little more than stacks of lumber interfering with ventilation and travel through the entry.

The supplemental roof support provided by the cribs is especially important in the first 100 feet "outby," i.e., in the direction of the advancing longwall. As the longwall mining machine advances, the unsupported roof left behind in the gob area is allowed to fall. MSHA's field office supervisor, Kenneth Ely, explained that the forces generated by the falling roof are often transferred forward to the area in front of the long wall machine, especially in the first 30-100 feet. Beyond 100 feet in front of the advancing long wall, the tailgate entry is like any other entry and the primary roof support, roof bolts, provide adequate support. The requirement for tailgate entry cribs in the roof control plan is, then, that there be a single row of cribs installed at minimum spacing of 7' from where the long wall operation began through 100 feet in front of the advancing long wall. Although the plan states that cribs are required for the entire length of the tailgate entry, the absence of cribs further than 100 feet in front of the advancing long wall would not be considered a violation of the plan.

Inspector Shubert testified that as he walked the approximate 7,000 foot length of the tailgate entry, from the longwall to the main entry, he observed that the majority of the cribs were not capped tight against the roof. Respondent actually installs two rows of cribs on 5-7 foot spacings -- at least twice as many as required by its roof control plan. Shubert passed by and had an opportunity to observe each of the approximately 2,000 cribs in the tailgate entry that he inspected. Some had cap boards and wedges, some didn't. There were gaps as much as 3 to 6 inches between the cribs and the roof. He observed deterioration in the roof and sloughing of material from the ribs. He stated that he would see where a rib had rolled for about 20 feet, would proceed another 50 feet and see another rib roll that had knocked over a couple of cribs. He recalled that the objectionable condition of the roof was more severe in the first 150 feet of the entry, the rest was not as bad. He did not note the specific location of the ineffective cribs or the places were the rib had rolled and knocked over the cribs, which he estimated would have taken six to eight pages to describe. Consequently, he just cited the whole area. He talked to Bell about the cribs and advised him that he was going to issue a citation. His field notes refer to cribs not being tightly capped against the roof, deterioration of the roof and rib rolls, but do not specify the number or location of the objectionable conditions.

Bell testified that he checked the cribs within the first 100-150 feet of the tailgate entry and they were properly installed, were tightly capped against the roof and there was no roof deterioration. He had inspected the tailgate entry less than a month before, noticed some loose cribs, and they had been tightened. He acknowledged that there were some loose cribs, which surprised him because of the recent tightening, but that they were not within 100-150 feet of the longwall. He also acknowledged that there were some cribs knocked down at the #19 crosscut due to a rib roll, but that was some 2,000 feet away from the longwall, and the area had been "dangered off", i.e., marked to forbid miners from entering the area. Shubert discussed the cribs with him but not until they had reached the main entry

Conclusions of Law - Further Factual Findings

In an enforcement proceeding under the Act, the Secretary has the burden of proving an alleged violation by a preponderance of the evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), *aff'd., Secretary of Labor v. Keystone Coal Mining Corp.,* 151 F.3d 1096 (D.C.Cir. 1998); *ASARCO Mining* Co., 15 FMSHRC 1303, 1307 (July 1993); *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989); *Jim Walter Resources Inc.*, 9 FMSHRC 903, 907 (May 1987).

In order to establish the alleged violation, the Secretary must prove that there was not at least one properly installed crib every 7 feet in the first 100 feet of the tailgate entry. Improperly installed or missing cribs in the remainder of the entry, at that time 7,000 feet in length, would not violate the roof control plan. Because Respondent installed two rows of cribs, twice as many as required by the roof control plan, the Secretary cannot establish a violation by simply proving that some cribs within the critical first 100 feet of the entry were not tightly capped against the roof. With two rows of cribs on 7 foot centers, some 28 cribs would have been installed in the

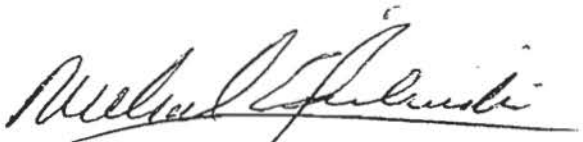
first 100 feet of the entry. The roof control plan requires only one row of cribs, at most 14.[1] Consequently, up to 14 of the 28 cribs could be improperly installed or knocked over without violating the roof control plan. It was incumbent upon the Secretary, therefore, to prove that either there were no properly installed cribs in that area or that the cribs that were properly installed did not satisfy the requirement of the plan. The Secretary did not introduce any evidence as to the specific locations of improperly installed cribs in the first 100 feet of the entry. Consequently, in order to prevail, the Secretary must prove that there were no properly installed cribs in that area. This she failed to do.

Although Inspector Shubert noted in the citation that all of the cribs in the tailgate entry were loose, his testimony was more equivocal. He testified that some cribs had been properly installed and at least tacitly admitted that some were tight to the roof. He also testified that the rib roll and loose cribs were in the 100-150 feet of the tailgate entry closest to the longwall. However, his field notes are silent as to the location of those deficiencies. According to Bell, he and Shubert did not discuss their observations until they had exited the entry and there is no indication as to when Shubert recorded his observations, but he likely did so after leaving the entry. Accepting Bell's testimony, in part, which is largely consistent with Shubert's, I find that there were loose cribs throughout the tailgate entry, including the critical 100 feet closest to the advancing longwall. However, there were also properly installed and maintained cribs in the entry, including the critical 100 foot zone. The rib rolls and knocked over cribs were not in that area, but were in the area of the 19th crosscut.

While the Secretary presented evidence sufficient to support a finding that there were some loose, improperly installed, cribs in the first 100 feet of the tailgate entry, she failed to prove that all of the cribs in that area were deficient. She did not present evidence of the specific locations of improperly installed cribs and, consequently, failed to establish that the cribs that were properly installed did not satisfy the requirements of Respondent's roof control plan.

ORDER

Based upon the foregoing, Citation Number 7667878 is **VACATED**, and the petition is **DISMISSED**.



Michael E. Zielinski
Administrative Law Judge

---

[1] The plan specifies that there be no more than "7' between cribs." If measured from the edges of the cribs, there would be one crib required every 9.5 feet, or approximately 10 cribs per 100 feet.

Distribution:

Terry G. Gaither, Conference and Litigation Representative, U.S. Department of Labor, Mine Safety and Health Administration, 135 Gemini Circle, Suite 213, Birmingham, AL 35209 (Certified Mail)

Anthony F. Jeselnik, Esq., U.S. Steel, Law Dept., USX Tower, Fifteenth Floor, 600 Grant St., Pittsburgh, PA 15219-2749 (Certified Mail)

S. Andrew Scharfenberg, Esq., Ford & Harrison, LLP., 505 N. 20th Street, Suite 1201, Birmingham, AL 35203 (Certified Mail)

/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

July 26, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2000-474-M A.C. No. 26-01977-05528
v.	:	
ROYAL CEMENT COMPANY, INC., Respondent	:	Royal Cement

DECISION

Appearances: Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Patricia D. Ceron, Esq., Logandale, Nevada, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Royal Cement Company, Inc., ("Royal"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). A hearing was held in Las Vegas, Nevada.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Royal operates a quarry and cement plant (the "plant") in Clark County, Nevada. An accident occurred at the plant on July 1, 1999, that killed Robert Dotts, an electrician. The plant was not operating at the time and had been shut down for about 17 months. The plant was being rebuilt and modernized at the time of the accident. Mr. Dotts was in the process of replacing a transformer when he was electrocuted.

At the conclusion of MSHA's investigation of the accident, MSHA Inspector John Widows issued Citation No. 4394965 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14100(b). The condition or practice section of the citation states:

> A fatal accident occurred at this mill on July 1, 1999, when a contractor electrician was electrocuted when he contacted an energized 4160 volt cable inside the crusher and finish grinding transformer. The flicker switches (knife blades) in the interrupter

> switches for the transformer were defective in that they did not open when the switch was tripped due to an accumulation of dust and dirt. With the switches stuck in the closed position, power was inadvertently supplied to the 4160 volt transformer.

In the citation, Inspector Widows determined that the violation was of a significant and substantial nature ("S&S"), was serious, and that Royal's negligence was moderate. The Secretary proposes a penalty of $25,000 for this violation under her special assessment regulation at 30 C.F.R. § 100.5. The safety standard provides, as follows:

> Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

Royal was started by Aldo DiNardo in the late 1980s. Mr. DiNardo bought a used cement plant, had it transported to Nevada, and set it up in the Logandale area, which is about 60 miles from Las Vegas. Mr. Dotts was associated with Royal for a considerable length of time. He was first hired in 1990 to work under another electrician. When that electrician was terminated, Dotts became the electrical supervisor at the plant. Because Mr. DiNardo had little knowledge of electrical systems, he relied on Mr. Dotts to perform all electrical services and to keep him informed of any electrical problems. (Tr. 64-65, 81-82, 88). Although Mr. Dotts performed some of the electrical work himself, he also supervised other Royal employees who performed electrical work under his direction.

At some point in time, Dotts asked DiNardo if his status could be changed from a Royal employee to an independent contractor. Dotts apparently made this request because of tax problems and because he wanted to be able to do electrical work for others. (Tr. 62-63). DiNardo testified that Dotts basically put this request in the form of an ultimatum that he would quit if he could not become an independent contractor for Royal. DiNardo granted Dotts' request in spite of the fact that it cost Royal more money because he believed that Dotts was a good electrician who was familiar with the plant. As an independent contractor, Mr. Dotts worked under the name Dotts Electric. He lived in Las Vegas where DiNardo believes he did electrical work for others. The parties dispute when Mr. Dotts became an independent contractor. DiNardo testified that Dotts was an independent contractor by the mid 1990's, while the Secretary contends that this change occurred 12 to 18 months prior to the accident.

In March 1998, DiNardo shut down the plant because it was losing money and he owed about $700,000 to creditors. (Tr. 69-70). He testified that Royal was too undercapitalized to be successful. DiNardo traveled to California to raise capital and also found three additional principals to invest in the plant. By the spring of 1999, DiNardo decided that he could reopen the plant with the objective of starting production in September 1999. Mr. Dotts was contacted to upgrade the electrical system at the plant. Other independent contractors provided services at the plant to get it back into production.

On July 1, 1999, Dotts was at the plant to install a new transformer for the crusher finish grinding circuits. He was working alone at the time of the accident but there were other people working at the plant. Based on the investigation conducted by MSHA, with the cooperation of Royal, it appears that the following events occurred, as set forth in MSHA's accident report. (Ex. P-3). Several weeks before the accident, Dotts opened (shut off) the circuit breaker for the transformer circuit and also opened the load interrupter switch for that same circuit. Dotts locked out the load interrupter switch with his own lock, but did not lock out the circuit breaker. He then disconnected the leads from the old transformer. As a result of a power outage at the plant some days later, all of the circuit breakers tripped open. Dotts flipped them back to the closed (on) position once power was restored to the plant, including the circuit breaker for the transformer at issue in this case.

Dotts was at the plant on July 1 to install the new transformer, which had arrived the day before. The transformer was rated at 4.16 KV - 480 V, 1000 KVA . Because the circuit breaker was closed, power was being supplied to the load interrupter switch for the transformer. This load interrupter switch, manufactured by Square D Electrical Company, is operated by pulling a large lever on the front of cabinet. When the lever is up, power is being supplied to the circuit. When the lever is down, power should be cut off. At the time of the accident, the lever was down and locked so that it could not be pulled up. This lever controls both the main electrical contacts and the arcing contacts inside the cabinet. Both the main and arcing contacts must be disengaged in order to shut off the power and both are controlled by the same lever. The arcing contacts are operated by a spring so that when the lever is pulled down a spring pulls the knife blades away from the contacts thereby disengaging the circuit. They are often called "flicker blades" because they flick out of the contacts when the lever is pulled. This feature is incorporated into the interrupter switch to prevent potentially hazardous arcing when opening and closing the circuit. One can look into the cabinet through a window on the front to see if these flicker blades have disengaged when the lever is pulled down. (Tr. 18-19, 26; Ex. P-15).

When representatives from Royal and MSHA looked into the window on the cabinet of the load interrupter switch during MSHA's investigation, they discovered that the flicker blades were still engaged. Royal relied upon John Zeller, an engineer with the firm of Grove Madsen Industries, to provide technical assistance during the investigation. (Ex. P-17). The cabinet was opened and Mr. Zeller cleaned the flicker blades and contacts with an aerosol cleaner. (Tr. 48). After the blades were cleaned, the spring-operated flicker blade mechanism functioned properly. Because the plant had been shut down for about 17 months, dirt and grime had accumulated around the flicker blades which prevented them from working properly. In his report, Mr. Zeller stated that "[l]ack of maintenance and accumulations of dust and dirt will cause this type of anomaly in load switches of this type." (Ex. P-17). He recommended regular preventive maintenance and inspection of the switch. It appears that when Mr. Dotts pulled down and locked out the lever to shut off the power, he did not look through the window to make sure that the blades had "flicked out" and he had not cleaned the blades prior to removing the old transformer. When he removed the old transformer, power had also been shut off at the circuit breaker so Dotts was not endangered. Because Dotts had flipped on all of the circuit breakers

following the power outage, power was being supplied to the load interrupter switch on July 1. As the flicker blades were stuck in the closed position, power was being supplied to the bare electrical leads Dotts was going to connect to the new transformer. He was found lying motionless on the ground in front of the open transformer box at 6:55 am. It is the Secretary's position that it was the responsibility of Royal to make sure that the flicker blades were in proper working condition. (Tr. 12, 26).

At the conclusion of the investigation, Inspector Widows issued the contested citation to Royal. He also issued a section 104(d)(1) citation to Dotts Electric charging a violation of section 56.12107 for Dotts' failure to lock out and tag out the circuit breaker.

Royal makes a number of arguments in its trial brief. First, it maintains that it fully complied with the provisions of section 56.14100(b) by selecting the most qualified licensed electrician to perform the specialized electrical tasks necessary to safely reopen the plant. Although Mr. Dotts had been a Royal employee in the past, Dotts Electric was an independent contractor at the time of the accident. Royal maintains that it acted reasonably in relying on Dotts' expertise. Dotts was in complete control over all the electrical work necessary to restart the plant in September 1999. Royal believes that it would have been foolhardy for Mr. DiNardo or any other representative of Royal to "go behind" Mr. Dotts and supervise his work because Dotts knew more about it than DiNardo or other Royal employees.

Royal states that MSHA violated its own enforcement guidelines for issuance of citations involving independent contractors. III MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 45. The MSHA guideline provides that enforcement action "against a production-operator for a violation involving an independent contractor is normally appropriate in any of the following situations: (1) when the production-operator has contributed by either an act or by an omission to the occurrence of a violation in the course of an independent contractor's work; (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor; (3) when the production-operator's miners are exposed to the hazard; or (4) when the production-operator has control over the condition that needs abatement." *Id.* Royal contends that it does not fit into any of these categories because Dotts Electric was in control of the condition; Royal did not contribute to the violation; and Royal's employees were not exposed to the hazard. Royal maintains that Dotts Electric had the responsibility to inspect the flicker blades to ensure they were operating properly prior to doing electrical work on the circuit. As a consequence, it argues that Dotts Electric was solely responsible for the violation.

MSHA's guidelines relied upon by Royal are not binding on the Secretary. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536-538 (D.C. Cir. 1986). Production operators are strictly liable for the violations of their independent contractors. *See Cyprus Indus. v. FMSHRC*, 664 F.2d 1116, 1119-20 (9th Cir. 1981). Consequently, Royal's argument that it is not liable for the violation of section 56.14100(b) is rejected.

I find that the Secretary established a violation of section 56.14100(b). A defect in the flicker blades was not corrected in a timely manner to prevent creation of a hazard to persons. The defect was that dust and dirt had been allowed to accumulate on the blades. This accumulation affected safety because it prevented the flicker blade switch from functioning properly. The flicker blades must disengage in order to shut off the power. Under the Mine Act, a production operator such as Royal is strictly liable for violations that occur at its facility. "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195, 1197 (10th Cir. 1989). Although Mr. Dotts should have inspected and cleaned the flicker blades before commencing work, Royal bears some responsibility as the production operator.

In the alternative, Royal argues that the Secretary should not have applied MSHA's special assessment regulations at 30 C.F.R. 100.5 when proposing a penalty in this case. It contends that, in doing so, the Secretary failed to properly consider the civil penalty criteria. The Secretary's penalty regulations are not binding on the Commission. Commission administrative law judges must assess an appropriate penalty *de novo* based on the six statutory criteria specified in section 110(i) of the Mine Act. 30 U.S.C. § 820(i). *Sellersburg Stone Co.*, 5 FMSHRC 287, 291-92 (March 1983), *aff'd* 376 F.2d 1147, 1150-51 (7th Cir. 1984). I base the penalty in this case on the evidence presented at the evidentiary hearing not on the Secretary's Part 100 regulations.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The Secretary submitted information concerning the history of violations at the plant but it included four citations issued more than 24 months prior to the fatal accident. I find that 16 citations were issued at the plant during the 24 months prior to the date of the accident. The Secretary presented information that the plant worked over 66,000 man-hours during 1999. That figure includes work performed during the months following the accident when the plant was in operation. I find that Royal was a small- to medium-sized operator. The violation was rapidly abated in good faith. The penalty assessed in this decision will not have an adverse effect on Royal's ability to continue in business.

I find that the violation was serious and I affirm Inspector Widow's significant and substantial determination. I find that Royal's negligence was very low. I considered the evidence and arguments presented by Royal with respect to its relationship with Mr. Dotts. Royal hired Dotts Electric based on its past experience with his work as a licensed electrician. It was reasonable for Royal to rely on Mr. Dotts's electrical expertise. It was also reasonable for Royal to believe that he would follow safe procedures, especially since he was the one who was personally exposed to the hazards presented by his work. I reject the Secretary's argument that Dotts was an independent contractor in name only. The fact that Dotts was once an employee and supervised Royal employees in performing electrical work prior to the March 1998 shutdown does not change the fact that on July 1, 1999, he was working as an independent contractor. The

Secretary does not dispute his independent contractor status. (Tr. 21-22; Ex. P-3). MSHA's reliance on Royal's safety rules on lockout procedures is not well taken because the contested citation does allege such a violation. (Tr. 26-27; Ex. P-16 p. 16). As an electrician, Mr. Dotts was in a position to know more about the operation of the flicker blades than Royal's employees. (*See* Tr. 17). Based on the penalty criteria, I find that a penalty of $5,000 is appropriate. The reduction in the penalty is based primarily on my finding that Royal's negligence was quite low.

III. ORDER

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

Citation No.	30 C.F.R. §	Penalty
4394965	56.14100(b)	$5,000.00

Accordingly, Citation No. 4394965 is **AFFIRMED**, except that the degree of negligence is lowered from moderate to very low, and Royal Cement Company, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $5,000.00 within 30 days of the date of this decision. Upon payment of the penalty, this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Suite 1110, San Francisco, CA 94105-2999 (Certified Mail)

Patricia D. Ceron, Esq., Royal Cement Co., P.O. Box 380, Logandale, NV 89021 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 30, 2001

KINDER MORGAN OPERATING LTD, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. KENT 2001-264-R
	:	Citation No. 7641370/01; 2/26/2001
v.	:	
	:	Docket No. KENT 2001-265-R
	:	Citation No. 7641371/01;2/26/2001
	:	
	:	Docket No. KENT 2001-266-R
SECRETARY OF LABOR,	:	Citation No. 7641372/01/02;2/26/2001
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. KENT 2001-267-R
Respondent	:	Citation No. 7641373/01;2/26/2001
	:	
	:	Docket No. KENT 2001-268-R
	:	Citation No. 7641374/01/02;2/26/2001
	:	
	:	Docket No. KENT 2001-269-R
	:	Citation No. 7641375/01;2/26/2001
	:	
	:	Docket No. KENT 2001-270-R
	:	Citation No. 9898588;2/8/2001
	:	
	:	Grand Rivers Terminal
	:	Mine ID 15-18234

DISMISSAL ORDER

These cases are before me on Notices of Contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary has moved to dismiss them has having been untimely filed. The Respondent opposes the motion. For the reasons set forth below, the motion is granted.

Section 105(d) requires that a notice contesting the issuance of a citation must be filed within 30 days of receipt of the citation. In accordance with the Act, Commission Rule 20(b), 29 C.F.R. § 2700.20(b), requires the same thing. The most recent of the seven citations in these cases was issued on February 26, 2001. Therefore, the notice of contest should have been filed by March 27, 2001. However, all of the notices of contest were filed on May 4, 2001.

While acknowledging that the notices of contest were not filed within the prescribed 30 days, Kinder Morgan states that its on-site manager "inadvertently failed to forward to Contestant's management staff or its counsel copies" of the citations and that the manager "subsequently" believed that the citations were included in a stay of other citations (not involved in these proceedings). (Resp. at 2-3.) Therefore, it requests that the late filing be excused.

Unfortunately, as former Chief Judge Merlin has noted: "A long line of decisions going back to the Interior Board of Mine Operations Appeals holds that cases contesting the issuance of a citation must be brought within the statutor[il]y prescribed 30 days or be dismissed." *M.A. Walker Co., Inc.*, 19 FMSHRC 897, 898 (May 1997) (citations omitted). Further, late filing has been permitted only when the delay was caused by MSHA's conduct. *Id.*

Since there is no allegation that the delay was caused by MSHA, I am constrained to grant the Secretary's motion. Accordingly, it is **ORDERED** that the captioned cases are **DISMISSED**.[1]

T. Todd Hodgdon
Administrative Law Judge

[1] This dismissal will not prevent the Respondent from raising its jurisdictional challenge to these citations, since the issue can still be raised by contesting the civil penalties proposed for the citations. 29 C.F.R. § 2700.21. Indeed, the citation at issue in Docket No. KENT 2001-270-R is already before me in Docket No. KENT 2001-281.

Distribution:

Charles E. Allen, III, Esq., Frost Brown Todd, LLC, 400 West Market Street, 32nd Floor, Louisville, KY 40202-3363

Anne T. Knauff, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Rd., Suite B-201, Nashville, TN 37215

nt

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 11, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2001-88
Petitioner	:	A. C. No. 15-14324-03511
v.	:	
	:	Preparation Plant
EXCEL MINING LLC,	:	
Respondent	:	

ORDER DENYING MOTION FOR PARTIAL SUMMARY DECISION

This case is before me on a Petition for Assessment of Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Respondent has filed a motion seeking summary decision on two of the three citations at issue in the case. The Secretary opposes the motion. For the reasons set forth below, the motion is denied.

Commission Rule 67(b), 29 C.F.R. § 2700.67(b), provides that: "A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." The Commission has long held that:

> Summary decision is an extraordinary procedure. If used improperly it denies litigants their right to be heard. Under our rules, a party must move for summary decision and it may be entered only when there is no genuine issue as to any material fact and when the party in whose favor it is entered is entitled to it as a matter of law.

Missouri Gravel Co., 3 FMSHRC 2470, 2471 (November 1981) (footnote omitted). It "is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact.'" *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) [quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)]. Here, the company has failed to show that there is no genuine issue as to any material fact.

Excel asserts that summary decision should be granted for Citation Nos. 7367802 and 7367805. Citation No. 7367802 alleges a violation of section 77.210 of the Secretary's regulations, 30 C.F.R. § 77.210, because:

> Taglines or other devices were not used to guide a suspended load that required guidance during a material hoisting operation. While reaching out to guide a suspended chemical barrel from the open hoistway [*sic*] onto the third floor of the preparation plant, an employee fell approximately 55 feet to the ground, sustaining fatal injuries.

Section 77.210 provides, in pertinent part, that: "(c) Taglines shall be attached to hoisted materials that require steadying or guidance."

Citation No. 7367805 alleges a violation of section 77.1713(a), 30 C.F.R. § 77.1713(a), in that:

> Inadequate daily inspections were conducted on the third floor of the preparation plant. The metal supports and other structural members of the railing surrounding the open material hoistway [*sic*] had corroded to the point that the railing was ineffective. Although daily on-shift inspections were conducted, the condition was not reported or corrected.

Section 77.1713(a) requires that:

> At least once during each working shift, or more often if necessary for safety, each active working area and each active working surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

With respect to Citation No. 7367802, the company argues that no violation can be proved because the regulation only requires taglines "when hoisted materials require guidance or steadying and . . . there is no evidence that the load in question required guidance or steadying." (Motion at 8.) On the other hand, the Secretary asserts that the facts available to her, as attested to in the declaration of Robert Bates, "establish that a tagline was necessary to steady or guide the barrel in question so that the employee would not put himself in a position of peril as happened in this accident." (Response at 4.) I find from the evidence apparently available to the Secretary that there clearly is a material question of fact as to whether a tagline was necessary in this case.

Turning to Citation No. 7367802, Excel agrees that "if an examination is required, it must be accomplished in a manner that would reveal hazards that would be discernable to a reasonably prudent miner who is looking out for the safety of his fellow works and himself." (Motion at 11-12.) However, it maintains that "it was not reasonable to expect an on-shift examiner to see the corrosion that MSHA concluded was the cause of the accident." (Motion at 12.) I find that whether it was reasonable to expect the on-shift examiner to see the corrosion and whether the examination was carried out in a reasonably prudent manner are material questions of fact which must be decided in this case.

Accordingly, the Motion for Partial Summary Decision is **DENIED**. Counsel for the Secretary shall initiate a telephone conference call with the Respondent's counsel and the judge, at any time convenient to the parties, but not later than **July 19, 2001**, for the purpose of setting a hearing date.

T. Todd Hodgdon
Administrative Law Judge
(703) 756-6213

Distribution: (Certified Mail)

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215

Timothy M. Biddle, Esq., Crowell & Moring, LLP, 1001 Pennsylvania Avenue, N.W., Washington, DC 20004-2595

/nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 11, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-306-M
Petitioner	:	A. C. No. 45-03212-05518
v.	:	
	:	Docket No. WEST 2000-307-M
HARD ROCK MINING COMPANY,	:	A.C. No. 45-03212-05519
OF OLYMPIA, INC.,	:	
Respondent	:	Docket No. WEST 2000-308-M
	:	A.C. No. 45-03212-05520
	:	
	:	Docket No. WEST 2000-458-M
	:	A.C. No. 45-03212-05521
	:	
	:	Docket No. WEST 2000-500-M
	:	A.C. No. 45-03212-05522
	:	
	:	Docket No. WEST 2000-577-M
	:	A.C. No. 45-03212-05523
	:	
	:	Hard Rock Pit

ORDER TO SHOW CAUSE

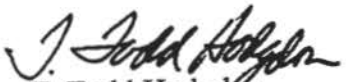
These cases are before me on Petitions for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Proceedings in the cases are currently stayed.[1] The Secretary has now filed a motion requesting that the stays be lifted and the cases set for hearing. In his motion, however, counsel for the Secretary notes that he has not been able to contact the Respondent by telephone and that the last letter he sent to the Respondent by certified mail was returned "unclaimed." Attempts by this office to set up a telephone conference call for the purpose of setting a hearing date have met with the same results.

[1] Docket Nos. WEST 2000-306-M, WEST 2000-307-M and WEST 2000-308-M have been on stay since August 23, 2000. Docket No. WEST 2000-458-M has been on stay since August 24, 2000. Docket No. WEST 2000-500-M has been on stay since October 20, 2000, and Docket No. WEST 2000-577-M has been stayed since March 27, 2001.

Permission was granted for Respondent's counsel to withdraw from the case on October 20, 2000. A copy of the order granting permission was sent to David F. Lapp, President, Hard Rock Mining Co., at the company's address of record and a green, "return receipt" card signed by what appears to be a "Karla Davis" was received back. Since that time, however, no return receipt cards have been received back from mail sent to the Hard Rock address of record. On the other hand, the March 27, 2001, order canceling the hearing and staying the proceedings in Docket No. WEST 2000-577-M was sent to Rosemary M. Short, Bookkeeper, Hard Rock Mining Co., in Tumwater, Washington, and the return receipt card, signed by "D. Lapp," was received back.[2]

At a minimum, Hard Rock has not complied with Commission Rule 5(c), 29 C.F.R. § 2700.5(c), which requires, among other things, that: "Written notice of any change in address or telephone number shall be given promptly to the Commission or the Judge and all other parties." In addition, counsel for the Secretary stated in a December 28, 2000, pleading that he had been advised by Hard Rock's former counsel that both Lapp and the company had filed for bankruptcy.

Since Hard Rock has not kept either the Commission or the Secretary apprized of its status, it is not clear what the company's position is with regard to these proceedings, or even if the company still exists.[3] Accordingly, Hard Rock Mining Company of Olympia, Inc., is **ORDERED TO SHOW CAUSE,** within **21 days** of the date of this order, why it should not be held in default in these proceedings and ordered to pay penalties in the amount of $35,314.00 for failure to prosecute its cases. Hard Rock may respond to this order by providing both the Secretary and the Commission with an address and a telephone number at which it can be contacted. **Failure to respond to this order will result in the company being held in default and ordered to pay the $35,314.00 in proposed penalties in these cases.**



T. Todd Hodgdon
Administrative Law Judge
(703) 756-6213

---

[2] This address was not provided by the company.

[3] Telephone inquiries by this office seeking a telephone number for the company in both Olympia and Tumwater were met with the statement that there was no listing for the company.

Distribution: (Certified Mail) (regular mail)

Matthew L. Vandal, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212

David F. Lapp, President, Hard Rock Mining Company, 10145 Littlerock Road SW, Olympia, WA 98512

Rosemary M. Short, Bookkeeper, Hard Rock Mining Company, 2827 29th Avenue SW, Tumwater, WA 98512

nt

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

July 25, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-123-M
Petitioner	:	A.C. No. 02-00150-05594
	:	
v.	:	Docket No. WEST 2001-237-M
	:	A.C. No. 02-00150-05595
ASARCO INCORPORATED,	:	
Respondent	:	Asarco Ray Complex

ORDER DENYING ASARCO'S MOTION TO DISMISS

Asarco Incorporated filed a motion to dismiss these cases "for lack of subject matter jurisdiction, or in the alternative, . . . for failure to state a claim upon which relief may be granted. . . ." It states that the cases involve two citation/orders issued pursuant to sections 104(a) and 107(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* ("Mine Act"). Each 104(a) citation includes a 107(a) imminent danger order in the same document. Asarco bases its motion on the fact that "the Proposed Assessment of Penalty and the Petition for Assessment of Penalty for each citation/order only requests an assessment of penalty for the 107(a) component of each citation/order." (A. Motion 1). Asarco argues that under the Mine Act, the Secretary does not have the authority to assess penalties for imminent danger orders issued under section 107(a). It concludes that the Commission is without jurisdiction to hear these cases. In the alternative, Asarco argues that the Secretary's Petition for Assessment of Penalty fails to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6). The Secretary opposes Asarco's motion.

Asarco bases its motion on the forms sent to it by the Secretary. The Secretary's proposed penalty assessment, served under 29 C.F.R. § 2700.25, consists of a computer printout listing the citations and orders included within each of her assessment control numbers. This form includes a number of columns including ones entitled "Citation or Order Number," "Type of Action," "Health or Safety Standard Violated: CFR Title 30," and "Proposed Penalty." In the case of WEST 2001-123-M, for example, the citation/order number is "7934757," the type of action is "107A O," the standard allegedly violated is "56.3131," and the proposed penalty is $486.00." Accordingly, Asarco argues that the Secretary is improperly attempting to assess a penalty for a section 107(a) imminent danger order.

In addition, the Secretary's petition for assessment of penalty, served under 29 C.F.R § 2700.28, contains a similar computer printout labeled "Exhibit A" which includes the same

information as the proposed penalty assessment. Under the column "Type of Action" the Secretary inserted "107A O." In WEST 2001-237-M, the proposed penalty was specially assessed by the Secretary under 30 C.F.R. § 100.5. In a document entitled "Narrative Findings for a Special Assessment" that was included with the petition for assessment of penalty, the Secretary included the following paragraph:

> On August 15, 2000, MSHA issued a section 107(a) order 7934772 at Asarco Ray Complex Mine. Asarco, Incorporated, was cited for a violation of 30 CFR 56.1313.

This document does not state that a citation issued under section 104(a). Asarco states that "there is no section of the Mine Act which provides for the assessment of a penalty for a violation of section 107(a). . . ." (A. Motion 5). Asarco maintains that the Mine Act clearly provides that penalties may only be assessed for citations and orders issued under section 104. It contends that this requirement is "more than window dressing" and must be adhered to by the Secretary. (A. Motion 3).

The Secretary does not deny that penalties cannot be assessed under section 107(a) of the Mine Act. She argues that it is quite clear that she was assessing the penalties for the section 104(a) citation component of the citation/orders, despite the fact that the documents referred to by Asarco refer only to the section 107(a) imminent danger order. The Secretary attached a declaration of Stephen Webber, MSHA's Director of the Office of Assessments, to explain the Secretary's practice. Mr. Webber states that the Office of Assessments does not assess penalties for section 107(a) orders. He states that MSHA's Metal/Nonmetal division frequently issues a combined section 104(a) citation and section 107(a) order in a single document. (Decl. ¶ 4). He further states:

> In such cases it has been the longstanding practice of the Office of Assessments in Metal/Nonmetal cases to show [under] the "Type of Action" on page two of the Proposed Assessment form as "107(a) O." No operator has previously expressed any confusion as the basis for assessment in such cases.

Id. Mr. Webber further explains that the designation "107(a) O" is used as an administrative convenience so that it is understood that a combined citation/order is involved. (Decl. ¶ 5). He states that MSHA follows this procedure is to "implement the policy of the Office of Assessments to not apply the 30% reduction for good faith in such cases." (Decl. ¶ 6).

The Secretary also points out that the documents relied upon by Asarco refer to violations of 30 C.F.R. § 56.3131. She states that since section 107(a) imminent danger orders do not allege violations of the Secretary's safety and health standards, it is clear that the violations arose out of the section 104(a) citations.

I find that Asarco's motion is not well taken for a number of reasons. It is black letter law under the Mine Act that the Secretary does not have the authority to assess penalties for section 107(a) orders. If the Secretary believes that the condition that created an imminent danger also violated one of her safety standards, she issues a citation under section 104(a) citation alleging the violation. Section 107(a) specifically provides that a section 104(a) citation may be issued in conjunction with such an order. The Secretary then proposes a civil penalty for the alleged violation of the safety standard. In these cases, the Secretary used the same document for both the section 104(a) citation and section 107(a) order. In each case the combined document clearly states in item 12 that the type of action is a 107(a) order and 104(a) citation. A civil penalty can only be proposed for the 104(a) citation portion of the document that alleges a violation of a safety standard. As noted by Asarco in its motion, the relationship between sections 104(a), 107(a), and the Secretary's authority to propose penalties was thoroughly analyzed by the Commission in *Eastern Associated Coal Corp.*, 13 FMSHRC 902 (June 1991).

Asarco and the law firm of Patton Boggs LLP have frequently appeared in cases before this Commission and they have a sophisticated level of knowledge of the Mine Act. They are well aware that the Secretary does not have the authority to propose civil penalties for alleged violations of 107(a). This concept is so well established that they should also know that the Secretary fully understands that she cannot propose penalties for imminent danger orders. In addition, Asarco and Patton Boggs should be aware that the section 104(a) portion of each citation/order alleges a violation of section 56.3131 not the 107(a) portion. In each document relied upon by Asarco in its motion, the Secretary alleges a violation of that safety standard. The allegation of a violation can only relate to the section 104(a) citation notwithstanding the references to section 107(a) in these documents. An individual with only a passing familiarity of the Mine Act and MSHA's assessment process would be able to understand that the penalties in these cases were proposed for the alleged violations of section 56.3131, which relate back to the section 104(a) citations by operation of law.

While it would perhaps be a little clearer if the computer generated forms listed both 107(a) and 104(b) under "Type of Action," Asarco and Patton Boggs should not have been confused by this omission. The explanation provided by Mr. Webber is reasonable. The Office of Assessments places the 107(a) order designation on the forms so that anyone reading them will know that the alleged violation arose out of circumstances that the Secretary believes created an imminent danger. The fact that a section 104(a) citation was also issued and forms the basis for the proposed penalty is implied. The motion filed by Patton Boggs on behalf of Asarco makes clear that they understand the interrelationship between sections 104(a), 107(a), and the Secretary's authority to propose civil penalties.

For the reasons set forth above, Asarco's motion to dismiss these cases is **DENIED**. The hearing in these cases will be held on August 14, 2001, in Tucson, Arizona, as previously scheduled.

Richard W. Manning
Administrative Law Judge

Distribution:

Alan M. Raznick, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Suite 1110, San Francisco, CA 94105-2999 (Fax and First Class Mail)

Cole A. Wist, Esq., Patton Boggs, 1660 Lincoln Street, Suite 1900, Denver, CO 80264 (Fax and First Class Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

July 27, 2001

CDK CONTRACTING COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 2001-154-RM
v.	:	Citation No. 7941750; 12/05/2000
	:	
	:	Portland Plant & Quarry
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Mine Id 05-00037 L35
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 2001-298-M
	:	A.C. No. 05-00037-05504 L35
v.	:	Portland Plant & Quarry
CDK CONTRACTING COMPANY, Respondent	:	

ORDER GRANTING SECRETARY'S MOTION TO AMEND CITATION TO ALLEGE VIOLATIONS OF TWO ALTERNATIVE SAFETY STANDARDS

The Secretary filed a motion to amend Citation No. 7941750 and the penalty petition for WEST 2001-298-M to allege, in the alternative, that CDK Contracting Company ("CDK") violated 30 C.F.R. § 56.14105 in addition to the allegation in the citation that CDK violated section 56.12106. The Secretary is not seeking to substitute the one allegation for the other but is seeking to have the citation and penalty petition amended to allege violations of both safety standards, in the alternative. In support of her motion, the Secretary states that under Fed. R. Civ. P. 8(e)(2) "a party may set forth two or more statements of a claim . . . alternately . . . either in one count . . . or in separate counts . . . ." The Secretary also relies upon the decision of former Commission Administrative Law Judge Lasher in *Mid-Continent Resources, Inc.*, 10 FMSHRC 191, 202-03 (Feb. 1988).

CDK opposes the motion. CDK states that under section 104(a) of the Federal Mine Safety and Health Act, 30 U.S.C. § 801, *et seq.* ("Mine Act"), the Secretary is required to "includ[e] a reference to *the provision* of the Act, standard, rule, regulation, or order alleged to

have been violated." (emphasis added). CDK maintains that the Secretary is without authority to allege violations of alternative safety standards in a citation or order. In addition, it argues that it will be materially prejudiced by granting the Secretary's motion because it will have to conduct additional discovery, undertake additional legal research, and prepare to defend against alternative legal theories at the hearing. In addition, because CDK will be ending its operations in Fremont County, Colorado, by the end of September 2001, many of its potential witnesses will no longer be available if the hearing is postponed from its currently scheduled date.

Although I appreciate CDK's concerns, I conclude that the Secretary is authorized to amend her pleadings in this case to allege violations of two alternative safety standards. It is well settled that administrative pleadings are liberally construed and easily amended, as long as adequate notice is provided and there is no prejudice to the opposing party. The only issue is whether CDK is prejudiced by the amendment. The case cited by the Secretary does not discuss the issue raised by the Secretary's motion and I was unable to find any other Mine Act cases on point. The Secretary, under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, ("OSH Act"), frequently alleges violations of two alternative standards. For example, she often alleges a violation of a specific safety standard and the OSH Act's general duty clause. She has also sought to amend a citation to include two alternative safety standards. "When an amendment puts no different facts in issue than the original citation, reference to an additional legal standard is not prejudicial." *Donovan v. Royal Logging Co.*, 645 F.2d 822, 827 (9th Cir. 1981) *citing So. Colo Prestress v. Occup. Safety & H. R. Comm.* , 586 F.2d 1342, 1346-47 (10th Cir. 1978).

The contested citation alleges that an employee was injured by a descending elevator when he was helping to install a handrail in an area adjacent to the path of the elevator. The citation contains a rather detailed description of the accident. The MSHA inspector cited section 56.12016, which provides, in part, that electrically powered equipment shall be de-energized before mechanical work is performed on such equipment. The Secretary seeks to add, in the alternative, a violation of section 56.14105, which provides, in part, that repairs or maintenance of machinery or equipment shall be performed only after the power is off. The requirements of these two safety standards are similar. The proposed amendment does not place "different facts in issue than the original citation." I find that there is no inherent prejudice in the proposed amendment.

The hearing on the contested citation is scheduled for October 10, 2001. Consequently, CDK has sufficient time to serve additional discovery and prepare alternative defenses. Because CDK is closing its operations at its Colorado site by the end of September, time constrains are present in these cases that are untypical. Consequently, it is hereby **ORDERED** that, if CDK serves additional discovery on the Secretary, the Secretary shall put forth its best efforts to respond to CDK's discovery as quickly as possible. The Secretary's answers and responses to interrogatories, requests for admissions, and requests for production of documents, under 29 C.F.R. § 2700.58, **SHALL** be provided to CDK within **18 days** of service.

For the reasons set forth above, the Secretary's motion to amend Citation No. 7941750 and her pleading in WEST 2001-298-M is **GRANTED**, subject to the provisions of this order.

Richard W. Manning
Administrative Law Judge

Distribution:

Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550

Danielle M. Bonett, Esq., Jackson & Kelly, 1099 18th Street, Suite 2150, Denver, CO 80202

RWM

 ☆ U.S. GOVERNMENT PRINTING OFFICE: 2001 472-304/52451